UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In Re: **DISPOSABLE CONTACT LENS ANTITRUST LITIGATION**		**Case No. 3:15-md-2626-J-20JRK** **Judge Harvey E. Schlesinger**
THIS DOCUMENT RELATES TO: **ALL ACTIONS**		

ORDER

THIS CAUSE is before the Court on the following motions:[1]

ABB and B&L's Summary Judgment Motion Regarding Vertical Conspiracy (Doc. 912), ABB and J&J's Summary Judgment Motion Regarding Vertical Conspiracy (Doc. 906), ABB and Alcon's Summary Judgment Motion Regarding Vertical Conspiracy (Doc. 907) as well as the Joint Defendants' Summary Judgment Motion Regarding Horizontal Conspiracy (Doc. 908).

Attached to the motions were thousands of pages of exhibits. As a threshold matter, the Court notes that it has thoroughly discussed the background of this case in both its Motion to Dismiss Order (Doc. 243) and Class Certification Order (Doc. 940). Further, many of the relevant facts supporting certain allegations are undisputed; the Court need not repeat the entire

[1] The Court will use the following abbreviations in this Order: Eye Care Practitioner - ECP; Unilateral Pricing Policy- UPP; Alcon Laboratories, Inc. - Alcon; Johnson & Johnson Vision Care, Inc. - J&J; Bausch & Lomb, Inc. - B&L and CooperVision, Inc. - CV (collectively, Manufacturer Defendants). ABB Concise Optical Group, LLC will be referred to as ABB. To streamline this Order, the Court will often refer to Defendants collectively rather than apportioning specific arguments to individual defendants.

factual history now. Similarly, the majority of the Parties' arguments, cited cases and expert report citations have not substantially changed at the summary judgment stage and were analyzed in either the Motion to Dismiss or Class Certification Orders. Thus, this Order will focus on the summary judgment record, especially the documents, testimony and cases the Parties highlighted during oral argument, which was held on August 21 and 22, 2019.

Because the vertical case is inextricably intertwined with the horizontal and hub and spoke allegations, the Court will not separate the arguments and evidence into these conspiracy categories.

Standard[2]

Summary Judgment

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Where the nonmoving party bears the burden of proof at trial, the moving party may discharge this initial responsibility by showing that there is an absence of evidence to support the nonmoving party's case or by showing that the nonmoving party will be unable to prove its case at trial." Hickson Corp. v. Northern Crossarm Co., Inc., 357 F.3d 1256, 1260 (11th Cir. 2004). If the moving party does so, the nonmoving party "must come forward with evidence sufficient to withstand a directed verdict motion." Id.

Summary judgment is appropriate "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

[2] Most caselaw internal citations and quotation marks will be omitted in this Order.

Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In making this determination, a court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Hinson v. Clinch Cty., Georgia Bd. of Educ., 231 F.3d 821, 826-27 (11th Cir. 2000). "[T]he court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." Id. at 827. "In other words, [the court] must consider the entire record, but disregard all evidence favorable to the moving party that the jury is not required to believe." Id.

However, the nonmoving party "may not rest upon the mere allegations or denials in its pleadings. Rather, its responses . . . must set forth specific facts showing that there is a genuine issue for trial. A mere scintilla of evidence supporting the opposing party's position will not suffice . . . ." Walker v. Darby, 911 F.2d 1573, 1576-77 (11th Cir. 1990).

Antitrust

United States v. Colgate & Co., 250 U.S. 300 (1919) provides a "safe harbor" for manufacturers. "Under Colgate, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984).

The Eleventh Circuit explicitly adopted a two-part test derived from Monsanto and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) for use in summary judgment cases. Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530, 1534 (11th Cir.1987). First, the plaintiff must show that the conspiracy alleged is an economically reasonable one. Then, the plaintiff must present evidence which "tends to exclude the possibility

that the manufacturer was operating independently in making [its] determination to terminate the distributor" such as "direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." Id. at 1534-5.

In Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007), the Supreme Court examined the pros and cons of vertical price maintenance agreements, and held that "the rule of reason, not a per se rule of unlawfulness, would be the appropriate standard to judge vertical price restraints." Id. at 899. To establish a Section One claim analyzed under the Rule of Reason, a plaintiff must "prove (1) the anticompetitive effect of the defendant's conduct on the relevant market, and (2) that the defendant's conduct has no pro-competitive benefit or justification." Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'n, Inc., 376 F.3d 1065, 1071 (11th Cir. 2004).

Under a rule of reason analysis, the plaintiff may show either actual or potential harm to competition. Levine v. Central Florida Medical Affiliates, Inc., 72 F.3d 1538, 1551 (11th Cir. 1996). To establish potential harm, a plaintiff must "define the relevant market and establish that the defendants possessed power in that market," id. and make "specific allegations linking market power to harm to competition in that market." Spanish Broad. Sys., 376 F.3d at 1073.

When a plaintiff relies on circumstantial evidence of price-fixing, a three-part test is applied:

> First, the court must determine whether the plaintiff has established a pattern of parallel behavior. Second, it must decide whether the plaintiff has demonstrated the existence of one or more plus factors that tends to exclude the possibility that the alleged conspirators acted independently. The existence of such a plus factor generates an inference of illegal price fixing. Third, if the first two steps are satisfied, the defendants may rebut the inference of collusion by presenting evidence establishing that no reasonable factfinder could conclude that they entered

> into a price fixing conspiracy. In undertaking this analysis, the district court is obligated to give the price fixing plaintiff(s) the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean of scrutiny of each. However, as indicated by this discussion, it unquestionably is the duty of the district court to evaluate the evidence proffered by the plaintiffs not to ascertain its credibility, but instead to determine whether that evidence, if credited, tends to establish a conspiracy more than it indicates conscious parallelism.

Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1301 (11th Cir. 2003).

The sides disagree whether the Court must apply a special summary judgment standard in the antitrust realm. Defendants assert that in Sherman Act cases, the permissible inferences that can be drawn from ambiguous evidence are limited; "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Matsushita, 475 U.S. 588. Plaintiffs cite Williamson to support their view that Matsushita placed no special burden on plaintiffs seeking to avoid summary judgment in an antitrust case. 346 F.3d at 1301-02.

Without deciding which side properly interprets the relevant case law on this point, the Court will assume that Defendants' position is correct and apply that standard accordingly.

Analysis

To keep this Order succinct, absent relevant and compelling summary judgment evidence, the Court will not comprehensively examine the issues that were essentially disposed of either in its Motion to Dismiss or Class Certification Orders. Stated differently, the Court will not extensively re-analyze issues when the Court's preliminary holding remains unaltered. The Court will briefly discuss a few examples.

Market power aggregation

Defendant Manufacturers have again argued that they lack market power individually, contesting Plaintiffs' aggregation of the manufacturers' market shares. The market power showing is necessary to demonstrate the requisite anticompetitive effects under Leegin's Rule of Reason analysis. 551 U.S. 877, 879-98.

During oral argument, Alcon asserted that a company with market share "below 30 percent is presumptively incapable of exercising market power" and noted its proportion was "23.6 percent, [and further] only 18 percent of Alcon's total sales were from its UPP covered lenses...[Thus, Alcon's] UPP products accounted for only 4 percent of the marketplace."(Doc. 1026, pps. 34-35).

Alcon cited Maris Distributing Co. v. Anheuser-Busch, Inc., 302 F.3d 1207 (11th Cir. 2002) to support its argument that when attempting to demonstrate market power, aggregation is impermissible. However, Maris is distinguishable; it involved a non-price vertical restriction imposed by a single manufacturer.

Specifically, the Maris Court addressed the claims of a plaintiff beer distributor that contracted with defendant Anheuser–Busch, Inc., to forego its right to be publicly owned. Maris sued to overturn the provision, arguing it was an unreasonable vertical restraint. The Maris Court indicated that while aggregation is not always appropriate, "the reason for looking at market power is to determine whether the combination or conspiracy, not each individual conspirator, has the power to hurt competition in the relevant market . . ." Id. at 1218. The Maris decision does not support Defendants' aggregation position.

Further, not only did the Court previously discuss aggregation in the Motion to Dismiss Order, it recognized conspiracies must be judged as a whole, the Manufacturer Defendants

control two-thirds of the lens market and they "may not de-construct the larger alleged conspiracy to avoid liability for vertical conspiracies by arguing that each individual impacts less than a large percentage of market share." The Court further held that Plaintiffs had established the relevant product market is disposable lenses which constitute ninety percent of lenses sold. Manufacturer Defendants control ninety-seven percent of that market. There is no need to further discuss market power aggregation.

Explicit agreement evidence not required

Also in the Motion to Dismiss Order, the Court indicated Plaintiffs are not required to proffer explicit agreement evidence and cited case law pointing out that conspiracies are rarely established with direct evidence. (Doc. 243, p. 26-29; 47); DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1515 (11th Cir. 1989). Instead, Plaintiffs must present evidence that reveals "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).

After issuing the DeLong Equipment decision, the Eleventh Circuit has continued to explicitly indicate most conspiracies are demonstrated through circumstantial evidence: "It is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators, and from other circumstantial evidence (economic and otherwise), such as barriers to entry and other market conditions." Williamson, 346 F.3d at 1299-1300.

However, Defendants in their summary judgment pleadings continue to discuss the dearth of written agreement evidence.

Increased prices due to anticompetitive conduct

Defendants once more contend that Plaintiffs have failed to establish they paid higher prices due to the UPPs' anticompetitive effect. According to the Defendants, UPPs promote inter-brand competition and, "Plaintiffs have conceded we could set the UPP wherever we wanted, at any price point, relative to where our competitors were setting their price point....We could apply it to whatever lenses we wanted, or not apply it to whatever lenses we wanted." (Doc. 1027, p. 168).

Additionally, Defendants assert some ECPs were unaware of the UPPs (Doc. 1023-2, p. 21) and during the last six months of 2016, the average price customers paid for an Alcon Dailies lens type was slightly lower than the UPP price. Id. at p. 20.[3]

In any case, Plaintiffs have submitted a significant amount of discovery that ties inflated lens prices to the alleged anti-competitive behavior. The evidence includes J&J's own November 2015 prediction in its "Go-to-Market Strategy Post-UPP" which compared estimated prices with and without a UPP; the forecast reveals a stark price difference between ECP and "big retail" pricing. One example shows a notable discount at Costco with independent ECPs selling the relevant product for $114.50 vs. $81.81 at Costco. (Doc. 865-Ex. PX-18).

In the Class Certification Order, the Court observed Dr. Williams' opinion confirming an anticompetitive effect due to UPPs. (Doc. 404, pps. 29-30). The Court finds that Plaintiffs have submitted adequate evidence of an anticompetitive effect due to the UPPs.

[3] The UPP price was $89 dollars for a 90 pack and the average price was $84.50.

Standing

Although the Court has previously analyzed Defendants' standing arguments, it will briefly discuss the matter again because Defendants have continued to emphasize standing in their summary judgment pleadings and also filed supplemental authority addressing the direct purchaser doctrine after the summary judgment briefing deadline passed.

At oral argument, Defendants maintained, *inter alia*: (1) recent case law supports their position that the Illinois Brick case instituted a bright line direct purchaser rule; the Supreme Court specifically disallows exceptions or inquiry into rationale and (2) Plaintiffs must demonstrate they purchased lenses from a conspiracy participant; establishing the seller was compelled to abide by a UPP is insufficient.

Regarding whether the Plaintiffs must demonstrate they purchased directly from a conspirator, in the Class Certification Order, the Court decided "testimony that ECPs did not 'participate' in the alleged conspiracy may be countered by circumstantial evidence that they too were subject to and required to charge at least the UPP minimum price for the covered contact lens products, or risk losing access to them." (Doc. 940, p.105).

There is ample evidence that the UPPs functioned as mandatory price floors for all lens sellers; the fact that Defendants have produced evidence of outlier sales or ECPs that lacked knowledge of the UPPs does not negate the overwhelming amount of evidence that the relevant retail pricing was, with few exceptions, compulsory. Alternatively, Plaintiffs have asserted three class representatives purchased directly from sellers that actively conspired with at least one Defendant; one seller testified she agreed to accept UPPs, a second was a member of the UPP Violations Facebook group and the third was coerced into UPP pricing.

Defendants' last revived standing argument addresses whether the direct purchaser rule applies in this case; this issue was previously discussed in the Class Certification Order. (Id. at p. 106, *et seq.*). The direct purchaser doctrine is based on a 1977 Supreme Court case, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), and it was recently revisited in the Supreme Court's Apple v. Pepper, 139 S. Ct. 1514 (2019), decision. Taken out of context, both cases seem pertinent to standing here and the Defendants assert the cases support their position that the Plaintiffs lack standing because the direct purchaser of a price-fixed product is the only person or entity that can recover antitrust overcharges.

However, as discussed in the Class Certification Order, the Supreme Court's Illinois Brick holding was more limited than Defendants maintain. "The Court held that an indirect purchaser of a product cannot sue a *distant manufacturer* for alleged antitrust violations under a 'pass-on' theory - meaning a theory that the intermediary passed on the unlawful overcharges *through the distribution channel* to them." (emphasis added)(Doc. 940, p. 106).

In the instant case, the Court has explicitly recognized the direct purchaser rule is not relevant in all antitrust cases and that the Eleventh Circuit in Lowell v. American Cyanamid Co., 177 F.3d 1228 (11th Cir. 1999), clarified that the indirect purchaser bar does not apply to cases that don't involve an overcharge "pass-on" through a middleman. Id. (concluding that Illinois Brick has no application in a vertical conspiracy absent allegations of pass-on).

Here, Plaintiffs essentially assert they are direct purchasers because the UPPs affected the price they paid, not the wholesale price; there is no "pass-on" of a higher price through the distribution chain. As the Court noted in the Class Certification Order, "[u]nder these facts, Plaintiffs have purchased contact lenses 'directly' from a 'conspiring party,' satisfying the exception set forth in Lowell." (Doc. 940, pps.109-110). The Court found the Lowell exception

also applies to the horizontal allegations; the hub and spoke resulted in the customers paying higher prices via the vertical relationships. Id. at pps.110-111.

Despite the Court's prior ruling, Defendants have filed Apple v. Pepper as supplemental authority to support their assertion regarding the direct purchaser test. While Defendants are correct that Apple reaffirmed the Illinois Brick holding, the Court agrees with Plaintiffs that Apple is inapposite. There, iPhone users that purchased developers' apps through Apple's store sued Apple because it instituted a charge on the app developers. Although iPhone apps could only be purchased through Apple's store, Apple maintained that it was merely a broker; the direct sellers were the app developers, making the end users indirect purchasers. (139 S. Ct. 1514).

Of course, in the instant case, the lens manufacturers did not increase the wholesale price it charged distributors; they only controlled the end price. Because Plaintiffs were the only group paying a higher price due to the alleged conspiracy, they are the logical antitrust plaintiffs. Moreover, while it is true that Apple declined to overrule Illinois Brick, it also did not discuss exceptions to the indirect purchaser rule and did not overrule any of the cases the Court cited in its Class Certification Order. The Court rejected Defendants' almost identical arguments at that stage of this litigation. For all these reasons, the Court finds that Plaintiffs have standing to sue.

Of course, an overarching summary judgment consideration is whether the Plaintiffs have adequately demonstrated Defendants entered into an illicit agreement to fix prices. The Court has previously discussed the relevant case law as it applies to concerted action and need not repeat that entire discussion now.

Initially, the Court recognizes that although Defendants have proffered evidence that disclaims participation in any illicit agreement, including specific UPP text,[4] the entire evidentiary picture is mixed. Plaintiffs have submitted direct evidence of both horizontal and vertical pacts. First, they have proffered various deposition excerpts and documents wherein the speaker used the actual word "agreement," or "contract" when discussing cooperation between certain Defendants. For example, Plaintiffs cite testimony from Trupti Marshall, ABB's Vice President of Supplier Management, who expressed an opinion that ABB had a contract with the manufacturers to enforce the relevant pricing policies by adhering to manufacturers' "do not sell" lists. (Doc. 922-100, pps. 67-8).

Next, J&J's Price Monitoring and Policy Enforcement document, dated April 16, 2014, included a "UPP Process Map-What needs to be done." Under the Policy Creation heading it lists "Voice of Customer Input" with the bullet points "internal" and "external." (Doc. 920-74, p. 5). Alcon's Sales Playbook directed its staff to "gain commitment" with retailers on pricing. (Doc. 921-34).

Regardless, Plaintiffs do not have to prove an explicit agreement. As the Court has noted, an illicit agreement may be entirely unspoken. The Court will assume, without deciding, that Plaintiffs have failed to proffer sufficient direct evidence of a proscribed agreement between Defendants and will therefore examine circumstantial evidence, namely parallel conduct as well as plus factors. Plus factors may include, *inter alia*, a "common motive to conspire [and] evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators . . . ." Anderson News, L.L.C. v. Am. Media, Inc., 899 F.3d

[4] Alcon's April 1, 2014 UPP document stated in caps, "Alcon is not making and will not make an agreement with any of its customers regarding [price] . . . ." (Doc. 908-11).

87, 105 (2d Cir. 2018).[5] [6] Defendants may rebut the inference of collusion by presenting evidence establishing that no reasonable factfinder could conclude that they entered into a price fixing conspiracy.

At oral argument, the Defendants asserted that upon examination of the manufacturer's UPPs, they do not constitute parallel conduct but rather were a generic tool used in the course of their respective businesses; the UPPs diverged in many aspects including timing, scope and pricing and therefore Plaintiffs fail to exclude the possibility that the manufacturers acted independently. Stressing UPP variations, Defendant Manufacturers assert, *inter alia*, the lenses with a UPP were not equivalent and their marketing strategies varied. To illustrate, J&J's UPPs affected eighty-eight percent of its shipped sales but Alcon only applied a UPP to its new products. (Doc. 1026, p. 27).

Defendant Manufacturers additionally argue that Plaintiffs have failed to produce adequate evidence that indicates their UPP decisions were not unilateral and therefore the policies qualify for Colgate's safe harbor.

Defendant Manufacturers insist that they were surprised by each other's UPPs, citing evidence that includes email communications. (Doc. 908-59; "I just learned today that B&L has adopted a Unilateral Pricing Policy . . ." and Doc. 908-60; "We just got wind of Vistakon's big announcement . . ."). The manufacturers also submit there is no allegation that each enacted its pricing policy conditionally based upon a representation that the others would also adopt a UPP.

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[5] In Plaintiffs' opposition pleading, they assert that in some situations parallel conduct alone may support a conspiracy inference.

[6] Of course, the Court has previously discussed market power aggregation.

Additionally, Defendant Manufacturers argue it simply didn't make sense to recruit other manufacturers or collude. For instance, Alcon pointed to evidence that its UPP initially increased its market share; its self-interest was to be the only manufacturer to have a UPP. Further, Sauflon adopted a UPP before it was acquired by CV. Defendants contend that because Plaintiffs lack evidence that Sauflon acted conspiratorially, the UPP was obviously in its self-interest.

The manufacturers argue that each company had adopted its UPPs for distinct reasons:

> For Alcon, they had a new, innovative, expensive technology that they had invested quite a bit of money in developing over a number of years. And they wanted to put that as a premium product with a premium price, the same thing that Apple does on its iPhones...Johnson & Johnson, a year later...had a very different objective. [J&J set its] UPPs at a lower price than the average iECPs were selling [the lenses]. [J&J was] losing market share to Alcon. They were giving a better profit margin to iECPs, and to retailers across the board. And [J&J] wanted to reset that to try to better compete against them...each of us had independent pro-competitive reasons.

(Doc. 1026, pps. 116-17).

However, Plaintiffs have produced evidence that negates many of these points. Regarding lens interchangeability, Plaintiffs proffer a J&J document, Project Mayflower Strategic Opportunity Areas, opining that lens technology was "good enough." (Cykiert Report; Doc. 919-3, p. 12 n. 10). The document's overview included a heading which stated, "a lens is a lens . . . ." Id. Additionally, Plaintiffs cite a 2010 publication co-sponsored by Ciba Vision/Alcon and endorsed by the American Optometric Association, Best Practices of Contact Lens Management, which states, "[regarding contact lenses] what a doctor chooses to prescribe creates the sales mix, not what the patients request or prefer." (Doc. 919-3, pps. 9-10). The Court finds the manufacturers' product distinctions unavailing.

As the Court discussed in its Class Certification Order, the UPPs were adopted in a short time frame and represented as a significant industrywide change that removed pricing competition. (Doc. 940). For instance, the Third Quarter 2014 issue of ABB's publication "The Profit Advisor, Business Strategies for ABB Optical Group Customers," reports that "UPP Brings a Fundamental Shift to the Industry," that "can level the playing field." (Doc. S-410-20, pps. 3-4).

Plaintiffs also submitted evidence the UPPs were against each manufacturers' independent economic self-interest. For instance, at a 2014 Analyst Meeting, CV listed UPPs' pros and cons. The pros included protecting "ECP's retail price point from discounters" and cons included not just backlash from the public and legislatures but also the opinion that UPPs may "alienate larger customers . . ." (Doc. 920-5, p. 20). This topic was discussed at length in the Court's Motion to Dismiss Order and the Court now finds that Plaintiffs have adequately demonstrated both parallel conduct and that the UPPs were against the manufacturers' self-interest.

At oral argument one of the cases that Defendants emphasized was Acquaire v. Canada Dry Bottling Co. of New York, Inc., 24 F.3d 401 (2d Cir.1994). Alcon cited a passage from Acquaire to support its position that Plaintiffs failed to show circumstantial evidence of an illegal agreement, contending that "[e]vidence of pricing suggestions, persuasion, conversations, arguments, exposition, or pressure" is not an antitrust violation. Id. at 410. In context, the Acquaire Court noted: "[A] Section 1 [violation] must be demonstrated by proof of: (1) an express or implied agreement, or (2) the securing of actual adherence to prices by means beyond mere refusal to deal." Id.

The Acquaire Court also specified, *inter alia*, that suppliers cannot "use coercion on its retail outlets to achieve resale price maintenance . . . . [c]oercion that achieves actual price-fixing is illegal . . . [e]vidence *of threats of termination or other explicitly coercive conduct that secure adherence to fixed prices is what supports a finding of an illegal combination.*" Id. (emphasis added).

Holding for the defendant manufacturer, the Acquaire Court cited evidence that the manufacturer didn't require distributors to participate in its promotions and that "non-participating distributors may sell . . . at, above, or below [suggested wholesale prices] . . . Plaintiffs assert that, as a practical matter, [distributors] must participate in the promotions in order to survive. There is nothing in the record, however, forcing this conclusion." Id. The Acquaire case is not on point.

There is abundant written evidence of ECP involvement in UPP implementation. Laura Angelini, J&J's former President, in a June 24, 2014 letter to ECPs discussed J&J's strategy changes including UPPs, which it instituted "[t]hanks to [ECPs'] open and candid responses" to a prior communication she sent "To further demonstrate our commitment to prescribers…[you will hear from your J&J representative] about our new pricing strategy…" (Doc. 919-6). A J&J document titled, "UPP Process Map-What needs to be done" contains a Policy Creation heading that contains the category "legal ramifications" and under "Voice of Customer Input" lists internal and external in bullet points. (Doc. 920-74, p. 5).

Plaintiffs cite an email sent to ECPs by B&L's "medical strategy director," Benjamin Chudner, after an industry conference asking how B&L could help the profession. (Doc. 919-49,

p. 2). In response, one of the ECP recipients, Jeff Cooper, stated it needed to support [the ECPs] regarding minimum pricing which B&L did indeed institute shortly thereafter. Id.

Plaintiffs have produced additional evidence that exhibits the role of certain "influential" ECPs in UPP implementation and the manufacturers' motivation for UPP enactment. Dr. Eiden was a manufacturer consultant and one of the most involved ECPs in the alleged conspiracy; many documents demonstrate his activism.

For example, in September of 2012, Dr. Eiden tells an industry group, SECS (Society of Eye Care Specialists), that he is "waiting on [Alcon's UPP] decision." (Doc. 919-20, p. 3).

In December of 2012, after Alcon decided to implement a UPP, Eiden wrote to his business partners confirming that ECPs were involved in the decision: "Based on feedback to Alcon in the past from the advisory group, and I must say a point that I have been proposing to not only Alcon/Ciba but to numerous other companies over the past years – Alcon has decided to set a 'minimum retail price' for DT-1. . . I believe that this will revolutionize the industry if they can make it work. Other companies as they come out with new technologies will be forced to follow otherwise doctors won't fit their lenses." (Doc. 919-21).[7]

In June of 2014, Dr. Eiden discussed a UPP blog post writing, "[CV] probably is spinning with confusion [regarding UPP]- do they align with the ECP or do they go rogue as a consumer responsive company?" (Doc. 919-81). At oral argument, Plaintiffs plausibly asserted

[7] Plaintiffs have established that other ECPs engaged in UPP advocacy and to illustrate proffer an email chain between ECP Rick Peterson and CV's Bob Ferrigno. Peterson wrote to Ferrigno, "Doctors . . . have mentioned that they are forming 'closer ties' to the companies embracing UPP, and two even used the word 'boycott' of companies that are not actively *moving* in that direction."(emphasis in original) (Doc. 919-86).

the phrase "consumer responsive company" refers to a manufacturer which had not implemented a UPP. (Doc. 1026).

Also in June of 2014, Dr. Eiden discussed his concerns with J&J about its planned UPP; Eiden noted he was "involved with consulting and development of similar [UPP] strategies for both Alcon and [B&L] in the past." (Doc. 919-71, p. 3).

On December 28, 2016, after learning Alcon terminated its UPP in light of Utah's Contact Lens Consumer Protection Act, Dr. Eiden emailed Dwight Akerman at Alcon: "Is it true? If so, so very sad – all others now will follow." (Doc. 920-68). Plaintiffs have produced satisfactory evidence that certain ECPs acted as a conspiracy hub.

Further, Plaintiffs' position is that ABB not only served as the ECPs' agent, it was also instrumental in UPP enactment. The Court discussed some of Plaintiffs' evidence that demonstrates ABB's role as a hub in its Class Certification Order.

Angel Alvarez is ABB's CEO and Plaintiffs maintain he made a multitude of statements that confirmed his and ABB's role in the market-wide adoption of UPPs. Plaintiffs illustrate:

> ABB's CEO, Alvarez, eliminated any doubt about ABB's role in the conspiracies by repeatedly bragging about his and ABB's role in the market-wide adoption of UPPs. See Opp. Ex. 180 ("I'm a huge fan and been lobbying for years for UPP!!"); Opp. Ex. 181 (confirming the following quote: "ABB has been working closely with manufacturers to develop Unilateral Pricing Policies, which we believe enables a better overall patient experience, by supporting competitiveness of prescribing practitioners . . . ."); Opp. Ex. 182 (published quote in Optometry News); Opp. Ex. 183 ("We have worked hard with the manufacturers to develop Universal Product Pricing, UPP, that will not allow any group, including managed care, to under sell the prescribing practitioner."); Opp. Ex. 184 ("I have asked Shaun to pursue a press release for next Monday based on the UPP dynamics and our need to let some pressure out of the UPP issue for CVI."). As Moody, an ECP and friend of ABB's Alvarez wrote: "No more rebates etc. and 1-800 etc goes away if they all follow B&L Alcon, and now J&J. Cooper next??" Opp. Ex. 186.

(Doc. 919, p. 60).

Defendants discount several of Alvarez's written statements; when deposed, he essentially disclaimed the substance of many of his past comments. For example, regarding Alvarez's remark that he had been "lobbying for years" in favor of UPPs, when deposed he stated, "[I] probably got carried away with the verbiage [I] used there . . . I absolutely did not lobby for UPP. Had nothing to do with UPP until the manufacturers presented them to us . . ." (Doc. 922-99, pps. 155-7). Clearly, some of Alvarez's deposition statements contradict his prior assertions; credibility determinations are the jury's province.

At oral argument, ABB cited Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11 (1st Cir. 2004) to support its argument that distributors may legally comply with a manufacturer's pricing policy. In that case, the Court affirmed the grant of summary judgment to a manufacturer and non-discounting retailer accused of entering into an unlawful resale price maintenance agreement. The full price retailer threatened to stop purchasing products from the manufacturer if it continued supplying the plaintiff, a discount retailer. The First Circuit concluded that summary judgment was appropriate because a distributor's "attempt to pressure a manufacturer into terminating a distribution relationship with a price-cutting competitor is not enough either to show concerted action or to defeat summary judgment." Id. at 19. The Euromodas Court decided, "[t]he most natural inference from the evidence—that the manufacturer took sides as between two dealers and chose the more lucrative of them—makes manifest a legitimate, independent reason for terminating the less desirable distribution relationship." Id. Euromodas is not on point authority.

Defendants insist that Plaintiff's evidence addressing UPP implementation consisting of statements and documents generated after the UPPs commenced is mostly immaterial. For

example, ABB discounts Alvarez's declarations about working with manufacturers to develop UPPs and "lobbying for years" because he made the statements after the UPPs were implemented. As the Court discussed in the Class Certification order, post-UPP implementation evidence can be "relevant to Plaintiffs' allegations of conspiracy and Defendants' motivations, notwithstanding that the [the evidence] was created after UPP launch." (Doc. 940, p. 46).

The Court will not simply disregard post-implementation evidence. Plaintiffs have demonstrated there is a genuine issue of material fact the manufacturers enacted UPP policies pursuant to ECP concerns and that ABB served as an ECP advocate. A reasonable factfinder could conclude that the Defendants entered into a price fixing conspiracy.

Enforcement

There is also copious evidence that demonstrates coordinated UPP enforcement and instances of cooperative policing efforts. To illustrate, Plaintiffs submit an email that B&L's Senior Territory Manager, Henry Hackney, Jr. sent to J&J's Head of Professional Affairs, Millicent Knight, about Costco inappropriately pricing UPP lenses, expressing that even though J&J and B&L were competitors, he wanted to help [J&J police its UPPs]. (Docs. 920-20 and 21). Defendants maintain that an individual employee monitoring or reporting UPP violations does not show an agreement to enforce.

Plaintiffs also produce evidence detailing J&J's negotiations with Costco seeking to generate a pricing agreement after Costco failed to approve of its UPP policy. Plaintiffs have submitted a September 10, 2014 email written by J&J's Ashley McEvoy addressing the efforts:

> [W]e've been working with all key stakeholders at Costco for vision care to develop a win win solution for both of us. We had alignment thru optical and now all being

> challenged again . . . . Really coming from CEO Craig who fundamentally not aligned with UPP. We have two solves which we have a high degree of confidence can create value for Costco members and are custom Costco solves.

(Doc. 922-60, pps. 2-3).

Plaintiffs maintain that despite the fact the effort was ultimately unsuccessful, there was an initial bargain and meeting of the minds between J&J and Costco.

In September of 2014, J&J discovered through the UPP Violations Facebook group that Costco was pricing below its UPP. (Doc. 922-61). In response, J&J eventually deemed Costco "ineligible to order any and all brands" which included non-UPP lenses. J&J cancelled all pending Costco orders including those partially shipped, totaling $150 million dollars' worth of lenses. (Doc. 922-63).

Plaintiffs assert that Alcon had a "criminal agreement" with ECP Dr. Uzick. Evidently, Alcon asked Uzick to validate fictitious prescriptions so it could confirm certain retailers were pricing below UPP. (Doc. 923-5, pps. 184-190). Dr. Uzick referred to his conduct as participation in test market research. Id. at 186. Plaintiffs assert Uzick's conduct was illegal per the Texas Optometry Act (Section 351.408) and violated the FTC's Contact Lens Rule.

Plaintiffs have also submitted evidence of ECP violation reports including a February 2015 email from Dr. Liang with the subject line "UPP pricing infarction (sic)" that states "[w]e were under the impression that every account that carries Total 1 signed the UPP agreement . . . ." (Doc. 921-63, p. 2).

Regarding ABB, it asserts that its policy was to leave UPP enforcement up to each manufacturer and cites selected text from emails to further this point. These denials

aside, there is evidence that ABB was actively involved in not only UPP implementation but also enforcement. For example, ABB received a "do not sell list" from J&J and Plaintiffs persuasively argue it was against ABB's self-interest as a distributor to put retailers on that list. (Doc. 921-13). As reviewed in the Class Certification Order:

> Dr. Solow states that "[t]here is also evidence that [JJVC] and ABB acted cooperatively to enforce UPPs, citing to JJVC's use of ABB's publication Retail Price Monitor, and ABB reports about retailers selling below the UPP price as a "violation of detection tool[s]..." He notes that JJVC "shared 'Do Not Sell' customer lists with ABB for such violations..." JJVC adjusted and modified its UPPs several times during the summer of 2014 in response to concerns from customers and retailers.

(Doc. 940, p. 33)(internal citations omitted).

UPP Violations was a Facebook group founded by Dr. Glazier, who also administers another Facebook group, ODs on Facebook. The violations group was secret; participants must be invited and the administrator must accept the member. A screenshot of the Facebook page shows participants were directed to hashtag violations with the manufacturer's name. (Doc. 861-37). Plaintiffs indicate the group contained not only ECP members but also Defendants' employees. For example, Plaintiffs submit there were nineteen J&J employees, ten Alcon employees and four ABB employees. The J&J representatives included four of the company's executives. (Doc. 861-1).

Defendants counter that customers are legally permitted to report pricing policy violations and that manufacturers are free to monitor the violations and act accordingly. Assuming this contention is true as applied to the UPP Violations Group, as the Court pointed out during oral argument, a Defendant can engage in lawful activity that is part of an illegal conspiracy.

Conclusion

This Court's job is to determine triable issues and it must examine the record as a whole. The Court finds Plaintiffs have produced satisfactory evidence supporting their position that Defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective. There is evidence that the UPPs were instituted pursuant to coordinated pressure exerted by certain ECPs and ABB, the manufacturers sought agreement regarding the UPPs and the Defendants jointly policed the pricing policies. Plaintiffs have also proffered ample evidence of potential or actual anticompetitive market effects, demonstrated the alleged conspiracy was economically reasonable and substantiated their allegation that the UPPs imposed an unreasonable restraint on competition with no pro-competitive benefit.

The Court has considered Defendants' arguments and evidence and agrees there is some evidence pointing to independent action regarding the manufacturers' UPP implementation and enforcement efforts. The Court also considers Defendants' alternative characterizations of certain evidence that Plaintiffs have proffered and finds that in many cases the two competing interpretations are not irreconcilable. However, the Court cannot blindly accept blanket denials of wrongdoing when there is significant evidence to the contrary; its job is to decide whether a genuine issue of material fact exists.

Finally, the Court finds that Plaintiffs have done more than show conduct that is as consistent with lawful competition as it is with an illicit conspiracy; weighing the competing inferences, it is reasonable for a jury to find Defendants were engaged in an illicit price fixing. Accordingly, the decision is left to the trier of fact.

State claims

Defendants Alcon, J&J and ABB have recently filed a motion to remand the remaining state law claims and Alcon has filed a motion to dismiss the Maryland state law claims. The Parties agree that the upcoming trial should proceed only on the federal claims. The Court will address the motion in a separate order.

Upon due consideration, it is hereby **ORDERED**:

1. Alcon, J&J and ABB's Motion for Remand of State Claims and Alcon's Motion to Dismiss Maryland State Law Claims (Doc. 1052) will be addressed in a separate order.
2. ABB and B&L's Summary Judgment Motion Regarding Vertical Conspiracy (Docs. 872 and 912), ABB and J&J's Summary Judgment Motion Regarding Vertical Conspiracy (Docs. 873 and 906), ABB and Alcon's Summary Judgment Motion Regarding Vertical Conspiracy (Docs. 874 and 907) as well as the Joint Defendants' Summary Judgment Motion Regarding Horizontal Conspiracy (Docs. 877 and 908) are **DENIED as to the federal claims**.

DONE AND ORDERED in Jacksonville, Florida, this 27th day of November, 2019.

HARVEY E. SCHLESINGER
United States District Judge

Copies to: Counsel of Record