**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

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| **In Re:**<br><br>**DISPOSABLE CONTACT LENS ANTITRUST LITIGATION** | **Case No. 3:15-md-2626-J-HES-JRK**<br><br>**Judge Harvey E. Schlesinger**<br>**Judge James R. Klindt** |
| **THIS DOCUMENT RELATES TO:**<br><br>**All Actions** | |

# PLAINTIFFS' AND CLASS COUNSEL'S MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND FOR CERTIFICATION OF SETTLEMENT CLASS, AND INCORPORATED MEMORANDUM OF LAW

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Plaintiffs and Class Counsel respectfully move for Preliminary Approval of the Settlement Agreement attached as Exhibit A ("Settlement" or "Agreement"), which will resolve all claims against CooperVision, Inc. ("CVI") in the Action.[1] The Court should grant Preliminary Approval because this "ice-breaker" Settlement provides substantial and meaningful relief for the Settlement Class, and because the terms of the Settlement are well within the range of reasonableness and consistent with applicable case law. Indeed, the Settlement, under which CVI will pay $3,000,000 in cash to create a Settlement Fund, is a great result for the Settlement Class. *See* Declaration of Thomas K. Boardman ("Boardman Decl."), ¶¶8, 13, attached hereto as Exhibit B. The Settlement satisfies all Eleventh Circuit criteria for Preliminary Approval.

Accordingly, Plaintiffs and Class Counsel respectfully request that the Court take the following initial steps in the settlement approval process: (1) grant Preliminary Approval to the Settlement; (2) certify for settlement purposes the proposed Settlement Class, pursuant to Rule 23(b)(3) and (e) of the Federal Rules of Civil Procedure; (3) approve and order the proposed opt-out and objection procedures; (4) appoint the Named Plaintiffs as Class Representatives; (5) appoint as Class Counsel and Settlement Class Counsel Scott+Scott, Attorneys at Law, LLP, Hausfeld LLP, and Robins Kaplan LLP, respectively; (6) stay the Action against CVI pending Final Approval of the Settlement; and (7) enter the [Proposed] Order Preliminarily Approving Class Settlement and Certifying Settlement Class attached hereto as Exhibit C.

## INTRODUCTION

Beginning in early 2015, Plaintiffs filed suits against the major manufacturers of disposable contact lenses, CVI, Johnson & Johnson Vision Care ("JJVC"), Alcon Laboratories, Inc. ("Alcon"), Bausch & Lomb ("B&L"), and their primary distributor, ABB Concise Optical

[1] All capitalized defined terms used herein have the same meanings ascribed in the Agreement.

Group ("ABB"), collectively, "Defendants", alleging that their "Unilateral Pricing Policies" ("UPPs") were illegal restraints on competition under §1 of the Sherman Act and various state unfair competition laws. Eventually, on June 10, 2015, all of the cases were consolidated before this Court by the United States Judicial Panel on Multidistrict Litigation. (ECF No. 1).

The Action involved sharply opposed positions on several fundamental legal questions, including whether CVI entered into a conspiracy to restrict competitive pricing practices in violation of federal and state competition laws. Boardman Decl., ¶4. CVI consistently argued that its UPP was entered into without collusion with other market participants and done within the bounds of established law. *Id.*, ¶5.

Plaintiffs and Class Counsel actively litigated the Action for the past two and half years. The parties engaged in significant motion practice and extensive formal discovery, including 68 depositions of Plaintiffs, Defendants' employees, and third parties, and the production of more than 4,160,459 pages of documents and voluminous electronically stored information by Defendants and third parties. *Id.*, ¶6.

Beginning in mid-July 2017, the parties began bilateral settlement discussions. *Id.*, ¶7. Ultimately, after nearly a month of negotiations, which included both in-person, written, and telephonic communications, the parties reached an agreement in principle on August 11, 2017 to resolve the Action based on CVI's payment of $3,000,000. *Id.*, ¶8. On August 30, 2017, the parties executed the full Settlement Agreement which memorialized the material terms of the Settlement. *Id.*, ¶9.

Reflecting the reasonableness and fairness of the Settlement is the magnitude of the Settlement Fund. Settlement Class Counsel negotiated a $3,000,000 cash payment, which

represents approximately 38% of the maximum recovery Settlement Class Members could have achieved at trial. Boardman Decl., ¶17.

Plaintiffs and Class Counsel now seek Preliminary Approval so they can notify Settlement Class Members of the terms of the Settlement, and provide them with an opportunity to opt out of or object to the Settlement. For the reasons set forth herein, Plaintiffs and Class Counsel respectfully request that the Court grant Preliminary Approval.

## STATEMENT OF FACTS

### I. PROCEDURAL HISTORY

Plaintiffs sought monetary damages and injunctive relief from the Defendants, on behalf of themselves and all others similarly situated who purchased disposable contact lenses subject to UPPs. Plaintiffs alleged that Defendants instituted UPPs as a means of jointly raising the price of disposable contact lenses. Plaintiffs further alleged that Defendants' actions violated Section 1 of the Sherman Act and several state competition laws. Boardman Decl., ¶3.

CVI and other Defendants denied all of Plaintiffs' allegations of wrongdoing. CVI consistently defended its conduct by, *inter alia*, arguing that its UPP complied with the law, that it never entered into an agreement with other Defendants to institute the UPP, and that entities were forced to accept the UPP, meaning that there was no agreement on its terms between the parties. CVI advanced additional defenses. Boardman Decl., ¶5.

#### A. Class Counsel's Investigation

Class Counsel devoted substantial time to investigating the potential claims against Defendants. Class Counsel interviewed customers and potential plaintiffs to gather information about Defendants' conduct and the impact on customers. This information was essential to Class Counsel's ability to understand the nature of CVI's conduct, the nature of the UPPs, and

potential remedies. Class Counsel also consulted with experts to develop and refine their legal and damages theories. Boardman Decl., ¶10.

**B. The Course of Proceedings**

On March 3, 2015, Plaintiffs John Machikawa, Bernadette Goodfellow, and Georgina Lepe filed the first consumer complaint against Defendants in the United States District Court for the Northern District of California ("*Machikawa*"), alleging that Defendants had entered into UPPs in violation of the Sherman Act and various state consumer protection laws and seeking, *inter alia,* monetary damages, interest, attorneys' fees, restitution, and equitable relief. Boardman Decl., ¶3.

On June 10, 2015, the Judicial Panel on Multidistrict Litigation ("JPML") consolidated and centralized *Machikawa* along with all other pending class action lawsuits regarding the above-described conduct to the United States District Court for the Middle District of Florida. The cases were re-captioned *In Re: Disposable Contact Lens Antitrust Litigation*, Case No. 3:15-md-2626-J-HES-JRK.

On October 7, 2015, the Court granted Class Counsel's motion appointing Hausfeld LLP, Scott+Scott, Attorneys at Law, LLP, and Robins Kaplan LLP as interim lead counsel. (ECF No. 116). On November 23, 2015, Class Counsel, on behalf of Plaintiffs, filed the Consolidated Class Action Complaint ("Consolidated Complaint"), asserting six causes of action: (1) Violation of 15 U.S.C. §§1 and 3 (*Per Se* Violation of the Sherman Act); (2) Violation of 15 U.S.C. §§1 and 3 (Rule of Reason Violations of the Sherman Act); (3) Violation of the California Cartwright Act; (4) Violation of the Maryland Antitrust Act; (5) Violation of the California Unfair Competition Law; and (6) Violation of the Maryland Consumer Protection Act. (ECF No. 133).

On December 23, 2015, Defendants filed their Motion to Dismiss the Consolidated Complaint. (ECF No. 146). Following briefing and oral argument, the Court denied

Defendants' motion. (ECF Nos. 185, 190). On July 27, 2016, Defendants filed their Answers and Affirmative Defenses. (ECF Nos. 266-70).

Over the course of the litigation, Plaintiffs and Defendants have participated in monthly status calls with Magistrate Judge, James R. Klindt. Boardman Decl., ¶11. These calls have been the primary means through which discovery disputes have been litigated, including motion practice with CVI. *Id.*.

On July 15, 2015, the Court entered a Case Management Order Pertaining to the MDL, the first in a series of scheduling orders to be applicable to this case. (ECF No. 61).

Discovery commenced on April 1, 2016. (ECF No. 204). During the course of discovery, Class Counsel also served written discovery requests on Defendants. In response, Defendants produced approximately 4,160,459 pages of documents, as well as voluminous electronic data files and spreadsheets in native format. Class Counsel and their experts reviewed and analyzed substantially all of the documents and electronic data files produced by Defendants. Boardman Decl., ¶6.

Discovery specific to CVI was similarly hard-fought and vigorous. Declaration of Peggy Wedgworth, ¶4 ("Wedgworth Decl."), attached as Exhibit D. Plaintiffs propounded their first Requests for Production of Documents and First Set of Interrogatories to CVI on March 7, 2016; and their Second Request for Production of Documents on April 3, 2017. *Id*., ¶5.

CVI initially limited its production of documents to the documents produced in the previous government investigation which were made to the New York Attorney General's office. However, as a result of negotiations, CVI proposed to produce documents for three additional records custodians, totaling 12 custodians, which Plaintiffs rejected. *Id*., ¶6. The parties negotiated extensively over the course of several weeks regarding the parameters for CVI's new

searches for and collection of relevant documents, including extensive teleconferencing and correspondence. *Id*., ¶7. In August of 2016, Class Plaintiffs moved to compel CVI to search the documents of additional custodians (ECF No. 276). The parties fully briefed the motion, and following oral argument before Magistrate Klindt on September 21, 2016, CVI was required to search for the documents of an additional six custodians (ECF. No. 349), bringing CVI's total number of records custodians to 18. CVI then produced thousands of documents for these additional custodians on a rolling basis beginning in November 2016. *Id*., ¶8.

CVI and Plaintiffs' counsel engaged in negotiation on the adequacy of CVI's six privilege logs (including an NYAG log, an initial MDL log, and individual logs for successive productions, which were subject to four separate revisions). Objecting to the content and format of CVI's categorical privilege logs, Plaintiffs' counsel conducted frequent teleconferences and engaged in correspondence with CVI's counsel. As a result of these negotiations, CVI produced a substantial quantity of documents it initially deemed privileged. In addition, CVI revised its privilege logs several times, disclosing greater detail with each revision. Due to extensive negotiation, CVI eventually agreed in each instance to produce more detailed privilege logs. *Id*., ¶9.

In May of 2017, Class Plaintiffs moved to compel CVI to produce records of the interactions between its sales representatives and eye care practitioners during which the UPPs were referred to as "call notes" (ECF No. 460). After a full briefing on the issues surrounding this motion, the parties proceeded to oral argument on the motion to compel on July 7, 2017, resulting in an agreement between the parties on the parameters for the collection of Salesforce call notes and the production of thousands (>6,800) of these records in August of 2017. (ECF No. 565). *Id*., ¶10.

Throughout discovery, CVI produced and Plaintiffs' counsel reviewed 14 separate groups of documents totaling over 280,000 pages, or over 49,000 documents. In addition, Plaintiffs' counsel took three depositions of CVI employees and noticed an additional three depositions of upper-level CVI executives which were about to occur when the parties reached a settlement in principle. *Id*., ¶11.

One March 1, 2017, Plaintiffs filed the operative complaint in this matter. (ECF No. 395). On March 3, 2017, Plaintiffs filed a Motion for Class Certification and Supporting Memorandum of Law, and accompanying expert reports. (ECF Nos. 396-98). On June 15, 2017, Defendants filed their Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification, accompanying expert reports, and other declarations. (ECF Nos. 505-10). Plaintiffs filed their Reply and supporting declarations to the Class Certification Opposition on September 8, 2017. (ECF. Nos. 611-14). On October 20, 2017, Defendants filed their Sur-Reply Memorandum of Law in Further Opposition to Plaintiffs' Motion for Class Certification. (ECF Nos. 674-78). The Class Certification Motion is currently being considered by the Court. On August 15, 2017, the Court granted a motion for an evidentiary hearing regarding the motion to certify class, with the date to be set at a later time. (ECF No. 577).

**C. Summary of the Settlement Terms**

The Settlement's terms are detailed in the Agreement. The following is a summary of the material terms of the Settlement.

The Settlement Class is an opt-out class under Rule 23(b)(3) of the Federal Rule of Civil Procedure. The Settlement Class is defined as:

> [A]ll persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon Laboratories, Inc., Johnson & Johnson Vision Care, Inc., Bausch & Lomb, Inc., or CVI (or distributed by ABB Concise Optical Group) during the Settlement Class Period for their own use and not for resale, which were sold at any time subject to a Unilateral Pricing Policy.

> Excluded from the Settlement Class are Defendants, their parent companies, subsidiaries and affiliates, any coconspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

Agreement, ¶1.37.

**1. Monetary Relief for the Benefit of the Class**

The Settlement requires CVI to deposit $3,000,000 into an Escrow Account within 14 days following Preliminary Approval. Agreement, ¶3.1. That deposit will create the Settlement Fund.

The Net Settlement Fund – which will be distributed at a later date on a *pro rata* basis among eligible Settlement Class Members who do not opt-out of the Settlement – is equal to the Settlement Fund plus any accrued interest and less: (a) the amount of the Court-awarded attorneys' fees, costs and expenses to Class Counsel; (b) the amount of the Court-awarded Service Award to the Plaintiffs; (c) a reservation of a reasonable amount for prospective costs of Settlement administration; and (d) all other costs and/or expenses incurred in connection with the Settlement that are expressly provided for in the Agreement or are approved by Settlement Class Counsel. Agreement, ¶9.3.

Any uncashed or returned checks will remain in the Settlement Fund after a reasonable period of time after the date the first Settlement Fund Payments are mailed by the Settlement Administrator, during which time the Settlement Administrator will make reasonable efforts to effectuate delivery of the Settlement Class Member Payments. Agreement, ¶8.9. Any residual funds still remaining after that period will be distributed in accord with the detailed provisions set forth in the Agreement.

**2. Class Release**

In exchange for the benefits conferred by the Settlement, all Settlement Class Members who do not timely opt out will release CVI from claims relating to the subject matter of the Action. The detailed release language is found in §7 of the Agreement.

**3. Settlement Termination**

Either party may terminate the Settlement if the Settlement is rejected or materially modified by the Court or by an appellate court. Agreement, ¶10.2.

**4. Class Representatives' Service Award**

At a later date, Class Counsel will seek, and CVI will not oppose, a reasonable Service Award for Class Representatives. Agreement, ¶9.2. If the Court approves it, the Service Award will be paid from the Settlement Fund, in addition to the relief the Class Representatives will be entitled to under the terms of the Settlement. *Id.* This Service Award will compensate the Class Representatives for their time and effort in the Action, including preparing for and appearing at a deposition, and for the risks assumed in prosecuting the Action against CVI.

**5. Attorneys' Fees and Costs**

At a later date, Class Counsel will apply for, and CVI will not oppose, attorneys' fees that represent a reasonable percentage of the Settlement Fund, plus reimbursement of litigation costs and expenses. Agreement, ¶9.1.

**6. The Notice Program**

Rule 23(e) requires that prior to final approval, notice of a proposed settlement be given in a reasonable manner to all class members who would be bound by such a settlement. For a class proposed under Rule 23(b)(3), whether litigated or by virtue of a settlement, Rule 23(c)(2)(B) enumerates specific requirements. At an appropriate time prior to moving for final approval of this proposed Settlement, Plaintiffs intend to propose to the Court a plan of notice

which, pursuant to Rule 23(c)(2)(B), will provide due process and reasonable notice to all customers of Defendants – Settling and Non-Settling Defendants alike – who can be identified through the published notice, customer lists that will be requested of the Defendants, and other Court-approved means. However, for the reasons identified below, Plaintiffs request that the Court agree to defer formal notice to the Class for the time being.

There is a large cost to the Class, likely to run to six figures, each time notice is provided to a class of this size. Boardman Decl., ¶12. Therefore, Plaintiffs request that the Court agree to defer formal notice to the Class of this settlement for efficiency and cost effectiveness. In large antitrust cases, courts have deferred notice until enough settlements have been reached to make it cost effective. *In re Aftermarket Filters Antitrust Litig.*, No. 1:08-cv-04883, Preliminary Approval Order (ECF No. 885) at 5 (N.D. Ill. Feb. 16, 2012) (granting preliminary approval of settlement agreements, certifying settlement class, and ordering that class notice be deferred until a later time); *In re New Jersey Tax Sales Antitrust Litig.*, No. 3:12-cv-01893, Order (ECF No. 276), ¶7 (granting preliminary approval of settlement and finding that cost of class notice warranted deferral). If more settlements are reached, then the costs of notice can be spread across those settlements. In addition, multiple notices can be potentially confusing for class members. This Court has the discretion to decide the timing of the notice. *Id.* In the experience of Class Counsel, it is better for notice of more than one proposed settlement to be combined into one notice, with the attendant and obvious efficiencies and cost savings to the Class. No later than 10 calendar days after this Agreement is filed with the Court, CVI shall mail or cause to be mailed the items specified in 28 U.S.C. §1715(b) to each State and Federal official specified in 28 U.S.C. §1715(a).

In addition to the cost savings to the Class of deferring notice, Plaintiffs will need time to obtain customer lists from Defendants and third parties and conduct other research and efforts to determine direct ways to contact disposable lens consumers. Use of Defendants' and third parties' customer lists for individual notice is commonplace in antitrust cases. *See, e.g.*, *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-5238, 2002 WL 31528478, at *2-3 (E.D.N.Y. June 21, 2002) ("For purposes of providing notice, the best way to identify individual merchant class members is . . . through merchant contact information."). The proposed deferral of class notice will permit time to obtain Defendants' and third parties' customer contact information, including through motion practice if necessary.[2]

## II. ARGUMENT

### A. The Legal Standard for Preliminary Approval

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval for the compromise of claims brought on a class basis. "Although class action settlements require court approval, such approval is committed to the sound discretion of the district court." *In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992). In exercising that discretion, courts are mindful of the "strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). The policy favoring settlement is especially relevant in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See*, *e.g.*, *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) ("There is an overriding public interest in favor of settlement, particularly in class actions that have the well-

[2] Plaintiffs are also open to mailing notice of the CVI Settlement along with notice of the certification of the class should the Court grant Plaintiffs' pending Motion for Class Certification.

deserved reputation as being most complex.") (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); *see also* 4 NEWBERG ON CLASS ACTIONS §11.41 (4th ed. 2002) (citing cases).

The purpose of preliminary evaluation of proposed class action settlements is to determine whether the settlement is within the "range of reasonableness." 4 NEWBERG ON CLASS ACTIONS §11.26. "Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Smith v. Wm. Wrigley Jr. Co.*, No. 09-cv-60646, 2010 WL 2401149, at *2 (S.D. Fla. June 15, 2010). Settlement negotiations that involve arm's-length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness. *See* MANUAL FOR COMPLEX LITIGATION, *Third*, §30.42 (West 1995) ("[A' presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.").

When determining whether a settlement is ultimately fair, adequate, and reasonable, courts in this circuit have looked to six factors: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved." *Bennett*, 737 F.2d at 986. Courts have, at times, engaged in a "preliminary evaluation" of these factors to determine whether the settlement falls within the range of reason at the preliminary approval stage. *See*, *e.g.*, *Smith*, 2010 WL 2401149, at *2.[3]

[3] Class Counsel do not address the fifth factor related to objections to the Settlement because, at the preliminary approval stage, notice has not yet been distributed.

Neither formal notice nor a hearing is required at the preliminary approval stage; the Court may grant such relief upon an informal application by the settling parties, and may conduct any necessary hearing in court or in chambers, at the Court's discretion. *See* MANUAL FOR COMPL. LIT.. §13.14.

**B. This Settlement Satisfies the Criteria for Preliminary Approval**

Each of the relevant factors weighs heavily in favor of Preliminary Approval of this Settlement. First, the Settlement was reached in the absence of collusion and is the product of good-faith, informed, and arm's-length negotiations by competent counsel. Furthermore, a preliminary review of the factors related to the fairness, adequacy, and reasonableness of the Settlement demonstrates that it fits well within the range of reasonableness, such that Preliminary Approval is appropriate.

Any settlement requires the parties to balance the merits of the claims and defenses asserted against the attendant risks of continued litigation and delay. Plaintiffs and Class Counsel believe that the claims asserted are meritorious and that Plaintiffs would prevail if this matter proceeded to trial. CVI argues that Plaintiffs' claims are unfounded, denies any liability, and has shown a willingness to litigate vigorously.

The parties concluded that the benefits of the Settlement outweigh the risks and uncertainties attendant to continued litigation that include, but are not limited to, the risks, time, and expenses associated with completing trial and final appellate review, particularly in the context of a large and complex multi-district litigation. Boardman Decl., ¶13.

**1. This Settlement Is the Product of Good Faith, Informed, and Arm's-Length Negotiations**

A class action settlement should be approved so long as a district court finds that "the settlement is fair, adequate and reasonable and is not the product of collusion between the

parties." *Cotton*, 559 F.2d 1326 at 1330; *see also Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298, 318-19 (S.D. Fla. 2005) (approving class settlement where the "benefits conferred upon the Class are substantial, and are the result of informed, arms-length negotiations by experienced Class Counsel"). The policy favoring settlement is especially relevant in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Turner v. General Electric Co.*, No. 2:05-CV-186-FTM-99DNF8, 2006 WL 2620275, at *2 (M.D. Fla. Sept. 13, 2006) ("Settlement 'has special importance in class actions with their notable uncertainty, difficulties of proof, and length. Settlements of complex cases contribute greatly to the efficient utilization of scarce judicial resources, and achieve the speedy resolution of justice. . . .' *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 538 (S.D. Fla. 1988) *aff'd*, 899 F.2d 21 (11th Cir. 1990) (citations omitted)."); *see also* 4 NEWBERG ON CLASS ACTIONS §11.41 (4th ed. 2002).

The Settlement here is the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues of this Action. All negotiations were arm's-length and extensive. Boardman Decl., ¶13.

Furthermore, Class Counsel are particularly experienced in the litigation, certification, trial, and settlement of nationwide class action cases. *Id*., ¶14. Class Counsel zealously represented their clients throughout the litigation including, *inter alia*, prevailing at the motion to dismiss stage, motion practice throughout the discovery process, which included review of over 4,160,459 pages of documents and electronic data as well as taking and defending approximately 68 depositions of party and non-party witnesses. *Id*., ¶6.

In negotiating this Settlement, Class Counsel had the benefit of years of experience, a familiarity with the facts of the Action, as well as with other cases involving similar claims. As

detailed above, Class Counsel conducted a thorough investigation and analysis of Plaintiffs' claims and engaged in extensive discovery with CVI. Class Counsel's review of that discovery enabled them to gain an understanding of the evidence related to central questions in the Action, and prepared them for well-informed settlement negotiations. *Francisco v. Numismatic Guaranty Corp. of America*, No. 06-61677, 2008 WL 649124, at *11 (S.D. Fla. Jan. 31, 2008) (stating that "Class Counsel had sufficient information to adequately evaluate the merits of the case and weigh the benefits against further litigation" where counsel conducted two 30(b)(6) depositions and obtained "thousands" of pages of documentary discovery).

**2. The Facts Support a Preliminary Determination that the Settlement is Fair, Adequate, and Reasonable**

As noted, this Court may conduct a preliminary review of the *Bennett* factors to determine whether the Settlement falls within the "range of reason" such that notice and a final hearing as to the fairness, adequacy, and reasonableness of the Settlement are warranted.

**a. Likelihood of Success at Trial**

Plaintiffs and Class Counsel are confident in the strength of their case, but are also pragmatic in their awareness of the defenses available to CVI, and the risks inherent in trial and post-judgment appeal. As noted above, Plaintiffs defeated Defendants' dismissal motions. The success of Plaintiffs' claims, however, turned on questions that could arise at both summary judgment, again at trial, and during any post-judgment appeal. Under the circumstances, Class Counsel appropriately determined that the Settlement outweighs the risks of continued litigation. Boardman Decl., ¶13.

Even if Plaintiffs prevailed at trial, any recovery could be delayed for years by an appeal. *Lipuma*, 406 F. Supp. 2d at 1322 (likelihood that appellate proceedings could delay class

recovery "strongly favor[s]" approval of a settlement). This Settlement provides substantial relief to Settlement Class Members, without needless delays.

**b. Range of Possible Recovery and the Point on or Below the Range of Recovery at Which a Settlement Is Fair**

When evaluating "the terms of the compromise in relation to the likely benefits of a successful trial . . . the trial court is entitled to rely upon the judgment of experienced counsel for the parties." *Cotton*, 559 F.2d at 1330. "Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Id.*

Courts have determined that settlements may be reasonable even where plaintiffs recover only part of their actual losses. *See Behrens*, 118 F.R.D. at 542 ("[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate."). "[T]he existence of strong defenses to the claims presented makes the possibility of a low recovery quite reasonable." *Lipuma*, 406 F. Supp. 2d at 1323.

The $3,000,000 cash recovery as an "ice-breaker" settlement in this case is outstanding, given the complexity of the litigation and the significant risks and barriers that loomed in the absence of Settlement including, but not limited to, summary judgment motions and trial, as well as appellate review. Based on CVI's transactional data, the $3,000,000 Settlement Fund represents approximately 38% of Plaintiffs' and Settlement Class Members' estimated damages recovery at the time of Settlement ***if*** Plaintiffs had their class certified and the class were successful in all respects through trial and on plenary appeal. Boardman Decl., ¶17.

This Settlement is a fair and reasonable recovery for the Settlement Class in light of the Defendants' defenses, and the challenging and unpredictable path of litigation Plaintiffs and all Settlement Class Members would face absent a settlement.

**c. Complexity, Expense and Duration of Litigation**

The traditional means for handling claims like those at issue here would tax the court system and require a massive expenditure of public and private resources. Thus, the Settlement is the best vehicle for Settlement Class Members to receive the relief to which they are entitled in a prompt and efficient manner. These considerations, and the other considerations noted above, militate heavily in favor of the Settlement. *See Behrens*, 118 F.R.D. at 542 (noting likely "battle of experts" at trial regarding damages, which would pose "great difficulty" for plaintiffs); *Ressler v. Jacobson*, 822 F. Supp. 1551, 1553-54 (M.D. Fla. 1992) (noting that battle of the experts in securities fraud class action militated in favor of approving class settlement).

**d. Stage of the Proceedings**

Courts consider the stage of proceedings at which settlement is achieved "to ensure that Plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." *Lipuma*, 406 F. Supp. 2d at 1324.

The Settlement was reached after extensive pretrial discovery (including significant motion practice), the production and review of more than 280,000 pages of documents produced by CVI, following approximately three lengthy depositions, after expert discovery, and following the filing of the parties' briefs on class certification. Boardman Decl., ¶16. As a result, Class Counsel were extremely well-positioned to confidently evaluate the strengths and weaknesses of Plaintiffs' claims and prospects for success at trial and on appeal. *Id*. Class Counsel are also highly familiar with the challenged practices and defenses at issue in the Action through their experience litigating similar cases in MDL No. 1030 and elsewhere. Boardman Decl., ¶15.

**C. Certification of the Settlement Class Is Appropriate**

For settlement purposes, Plaintiffs and Class Counsel respectfully request that the Court certify the Settlement Class defined in ¶1.37 of the Agreement. "Confronted with a request for

settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *see also Holman v. Student Loan Xpress, Inc.*, No. 8:08-cv-305-T-23MAP, 2009 WL 4015573, at *2 (M.D. Fla. Nov. 19, 2009) ('"A class may be certified 'solely for purposes of settlement [if] a settlement is reached before a litigated determination of the class certification issue.'") (quoting *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 671 (S.D. Fla. 2006)).

Plaintiffs are not seeking to have notice sent out at this time. However, for purposes of preliminary approval and the reasons set forth below, certification is appropriate under Rule 23(a) and (b)(3).

Plaintiffs believe that Certification is appropriate here. Certification under Rule 23(a) of the Federal Rules of Civil Procedure requires that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Under Rule 23(b)(3), certification is appropriate if the questions of law or fact common to the members of the class predominate over individual issues of law or fact and if a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

**1. Numerosity**

The numerosity requirement of Rule 23(a)(1) is easily satisfied here. There are hundreds of thousands of domestic disposable contact lens consumers that purchased lenses subject to UPPs. *Kilgo v. Bowman Trans., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (numerosity satisfied where plaintiffs identified at least 31 class members "from a wide geographical area").

**2. Commonality**

"Commonality requires 'that there be at least one issue whose resolution will affect all or a significant number of the putative class members.'" *Williams v. Mohawk Industries, Inc*., 568 F.3d 1350, 1355 (11th Cir. 2009).[4] Here, the commonality requirement is satisfied because there are many questions of law and fact common to the Settlement Class that center on Defendants' implementation and enforcement of their UPP policies. *See* Fed. R. Civ. P. 23(a)(2). The key with commonality is that the issues be susceptible to class-wide proof, with the claims of the individual class members having a sufficient nexus to those of the plaintiffs, which is the case here. *See Castillo v. N&R Services of Cent. Fla., Inc.*, No. 8:07-cv-1804-T-26EAJ, 2008 WL 1959691, at *3 (M.D. Fla. May 1, 2008). In *Spinelli v. Capital One Bank*, No. 8:08-cv-132-T-33EAJ, 2009 WL 700705, at *7 (M.D. Fla. Mar. 14, 2009) (approving and adopting Report and Recommendation to certify class action).

**3. Typicality**

For similar reasons, Plaintiffs' claims are reasonably coextensive with those of the absent class members, such that the Federal Rule of Civil Procedure 23(a)(3) typicality requirement is satisfied. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (typicality satisfied where claims "arise from the same event or pattern or practice and are based on the same legal theory"); *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (named plaintiffs are typical of the class where they "possess the same interest and suffer the same injury as the class members"); *Spinelli*, 2009 WL 700705, at *8 (typicality satisfied when class representative's claims have sufficient nexus with those of the class at large, and where the representative possesses the same interest and suffers the same injury as the class members).

[4] Unless otherwise noted, citations are omitted.

Plaintiffs are typical of absent Settlement Class Members because they were subjected to the same anticompetitive pricing practices under the UPPs, claim to have suffered from the same alleged injuries, and will equally benefit from the relief provided by the Settlement.

**4. Adequacy of Representation**

Plaintiffs also satisfy the adequacy of representation requirement. Adequacy under Federal Rule of Civil Procedure 23(a)(4) relates to: (1) whether the proposed class representatives have interests antagonistic to the class;[5] and (2) whether the proposed class counsel has the competence to undertake this litigation.[6] *Veal v. Crown Auto Dealerships, Inc.*, 236 F.R.D. 572, 579 (M.D. Fla. 2006). The determinative factor is "'the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class.'" *Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000). Plaintiffs' interests are coextensive with, not antagonistic to, the interests of the members of the Settlement Class, because Plaintiffs and absent Settlement Class Members each have an interest in the relief offered by the Settlement, and absent Settlement Class Members have no diverging interests. Further, Plaintiffs are represented by qualified and competent counsel who have extensive experience and expertise prosecuting complex antitrust class actions, including consumer class actions similar to the instant case. *See* Boardman Decl. ¶14.

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[5] "'The adequacy of representation requirement encompasses two separate inquires: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action.' *Busby v. JRHBW, Realty, Inc.*, 513 F.3d 1314, 1323 (11th Cir. 2008)." *Spinelli v. Capital One Bank*, 265 F.R.D. 598, 601 (M.D. Fla. 2009).

[6] "The adequacy requirement of Rule 23(a) 'involves questions of . . . whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation.' *Pop's Pancakes, Inc. v. NuCo2*, 251 F.R.D. 677, 683 (S.D. Fla. 2008) (citing *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985))." *Id*. at 602.

**5. Predominance**

The predominance requirement of Rule 23(b)(3) requires that "[c]ommon issues of fact and law . . . 'ha[ve] a ***direct impact*** on every class member's effort to establish liability ***that is more substantial than the impact of individualized issues*** in resolving the claim or claims of each class member.'" *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010) (emphasis in original). Plaintiffs satisfy the predominance requirement because liability questions common to all Settlement Class Members substantially outweigh any possible issues that are individual to each Settlement Class Member. In antitrust conspiracy cases such as this one, courts consistently find that common issues of the existence and scope of the conspiracy predominate over individual issues. *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 408 (S.D. Ohio 2007); *see also In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1039 (N.D. Miss. 1993) ("As a rule of thumb, a price fixing antitrust conspiracy model is generally regarded as well suited for class treatment."). This follows from the central nature of a conspiracy in such cases. *Hughes v. Baird & Warner, Inc.*, No. 76 C 3929, 1980 WL 1894, at *3 (N.D. Ill. Aug. 20, 1980) ("Clearly, the existence of a conspiracy is the common issue in this case. That issue predominates over issues affecting only individual sellers."); *see also Amchem*, 521 U.S. at 625 ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."). The same is true in cases that include vertical conspiracies. *See, e.g.*, *In re Pool Prod. Distribution Mkt. Antitrust Litig.*, MDL No. 232, 2014 WL 7338958, at *11 (E.D. La. Dec. 22, 2014) (finding predominance and certifying a class in a case with three vertical conspiracies "[b]ecause class members share issues of fact and law related to establishing defendants' alleged violations of the antitrust laws, and because [Plaintiffs] have put forward a plausible method for proving impact using class-wide

proof and methodology and a plausible method for proving individual damages using class-wide methodology").

**6. Superiority**

Furthermore, resolution of hundreds of thousands of claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3); *Spinelli*, 265 F.R.D. at 602 (noting superiority met where plaintiff shows the benefit of a class action instead of clogging the federal courts with innumerable individual suits litigating the same issues repeatedly). As in *Spinelli*, the Court should conclude "'a reasonable cost/benefit analysis would not justify'" individual actions for each member of the Settlement Class. *Id.* at 604. For these reasons, the Court should preliminarily certify the Settlement Class.

**D. After Plaintiffs File Their Notice and Plan of Distribution, the Court Should Schedule a Final Approval Hearing**

Because Plaintiffs are deferring notice and plan of distribution until more settlements are reached or the Class Certification Motion is granted, there is no need to set a Final Approval Hearing date at this time. Plaintiffs and Class Counsel will request that the Court schedule the Final Approval Hearing approximately 120 days following entry of an order approving the to-be-submitted notice and distribution plan. Plaintiffs and Class Counsel will file their motion for Final Approval and Fee Application and request for Service Award no later than 30 days prior to the Final Approval Hearing.

**CONCLUSION**

Based on the foregoing, Plaintiffs and Class Counsel respectfully request that the Court: (1) grant Preliminary Approval to the Settlement; (2) certify for settlement purposes the proposed Settlement Class, pursuant to Rule 23(b)(3) and (e) of the Federal Rules of Civil Procedure; (3) approve and order the opt-out and objection procedures set forth in the

Agreement; (4) appoint Named Plaintiffs as Class Representatives; (5) appoint as Class Counsel and Settlement Class Counsel Scott+Scott, Attorneys at Law, LLP, Hausfeld LLP, and Robins Kaplan LLP, respectively; (6) stay the Action against CVI pending Final Approval of the Settlement; and (7) enter the [Proposed] Order Preliminarily Approving Class Settlement and Certifying Settlement Class attached as Exhibit C.

DATED: February 21, 2018

Respectfully submitted,

s/ Joseph P. Guglielmo

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**CERTIFICATE OF SERVICE**

I hereby certify that on Feburary 21, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

DATED: February 21, 2018

s/ Joseph P. Guglielmo
Joseph P. Guglielmo