

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

In Re: DISPOSABLE CONTACT LENS ANTITRUST LITIGATION	Case No. 3:15-md-02626-HES-JRK Judge Harvey E. Schlesinger Magistrate Judge James R. Klindt
THIS DOCUMENT RELATES TO: All Class Actions	

**LEAD COUNSEL'S MOTION FOR PAYMENT OF: (1) COMMON EXPENSES;
AND (2) CLASS REPRESENTATIVES' SERVICE AWARD FROM THE BAUSCH &
LOMB, INC. AND COOPERVISION, INC. SETTLEMENT FUNDS; AND
MEMORANDUM OF LAW IN SUPPORT THEREOF**

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For the reasons explained herein, Lead Counsel respectfully move this Court for the payment of common expenses and class representatives' Service Award from Plaintiffs' Settlements with Bausch & Lomb, Inc. ("B&L") (the "B&L Settlement") and CooperVision, Inc. ("CVI") (the "CVI Settlement") (collectively, "Settlements").¹

After nearly five years of hard-fought litigation, Lead Counsel now seek final approval of the B&L Settlement, which provided for the payment of \$10,000,000 in cash, plus limited cooperation, and the CVI Settlement, which provided for the payment of \$3,000,000 in cash, plus limited cooperation. The \$13,000,000 cash funds created from the Settlements are an excellent result for the Settlement Classes: the B&L Settlement represents approximately 72% to 81% of Plaintiffs' estimated class-wide damages attributable to B&L's conduct; and the CVI Settlement represents about 38% of the estimated class-wide damages attributable to CVI. *See* ECF Nos. 1037 at 17, 1037-2 ¶ 30; *see also* ECF Nos. 781 at 16, 781-2 ¶ 17.

In connection with Plaintiffs' Motion for Final Approval of the Settlement Agreements with Defendants B&L and CVI, Lead Counsel seek an award of \$4,329,000 in litigation expenses, to be taken evenly from each of the Settlements, that are reasonable and necessary to litigate this Action for the benefit of the Settlement Class.² Specifically, as set forth in the Joint Declaration of Christopher Lebsack, Eamon O'Kelly, and Joseph Guglielmo ("Joint Declaration" or "Jt. Decl.") filed concurrently herewith, Lead Counsel seek reimbursement of

¹ Unless otherwise defined, all capitalized terms used herein shall have the same meanings as those set forth in the Settlement Agreements (ECF Nos. 781-1, 1037-1).

² This total request accounts for 33.3% of the total \$13,000,000 in Settlements, and Lead Counsel is proposing that they be awarded this percentage from each Settlement. This comes out to \$999,000 from the CVI Settlement and \$3,330,000 from the B&L Settlement.

reasonable, shared litigation expenses that have been invoiced to Lead Counsel's litigation fund, as well as a portion of the future costs Lead Counsel reasonably believe they will incur in order to prosecute this Action through the June 22, 2020, trial.³ Those costs do not include Lead Counsel's own out-of-pocket expenses they have incurred in litigating this Action, such as costs associated with photocopying, printing, lodging, or transportation. Rather, Lead Counsel seek only reimbursement for common costs related to experts and consultants, deposition and court transcripts, and other trial related expenses, as set forth in the Joint Declaration.

The requested expenses represent 33.3% of the combined B&L and CVI Settlement Funds and are compensable under Eleventh Circuit authority, being reasonable and necessary to this Action on behalf of the Settlement Classes and in furtherance of the claims asserted. Thus, as set forth below, Lead Counsel's award of expenses should be approved.

Lead Counsel also seek a Service Award of \$2,500 from the Settlements for each of the current and former Class Representatives: Rachel Berg, Miriam Pardoll, Jennifer Sineni, Elyse Ulino, Susan Gordon, Cora Beth Smith, Brett Watson, Tamara O'Brien, Sheryl Marean, Catherine Dingle, Amanda Cunha, Alexis Ito, Kathleen Schiff, John Machikawa, Joseph Felson, and Pamela Mazzearella.⁴ These Service Awards are permitted by the Settlements and appropriate and necessary to compensate Plaintiffs for their time and efforts on behalf of the

³ Lead Counsel reserve their rights to seek an award of attorneys' fees and their unreimbursed costs.

⁴ Ms. Mazzearella is no longer a Class Representative in this Action, but was up through submission of the CVI Settlement, searched for and produced documents, and sat for a full deposition.

Settlement Class, including producing documents, sitting for their depositions, and participating in discussions with Lead Counsel relating to this Action, all of which were done to advance this Action. ECF Nos. 781-1, ¶¶ 9.1-9.2, 1037-1, ¶¶ 9.1-9.2. Thus, Class Representatives' Service Award should be approved.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs incorporate by reference the factual background and procedural history set forth in Plaintiffs' Memorandum of Law in Support of their Motion for Final Approval of the Settlements.

II. ARGUMENT

A. Lead Counsel Should Be Compensated for Costs Necessary to Litigate This Action Through Trial

Lead Counsel respectfully request payment of common expenses already invoiced to their litigation fund and payment of future common expenses that they reasonably anticipate in litigating this Action through trial against the remaining Defendants. As explained in greater detail below and in the Joint Declaration, these expenses are – or will be – reasonably necessary to litigate this Action through trial.

1. Reasonable Litigation Expenses Are Routinely Paid from Common Funds

“There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of . . . reasonable litigation expenses from that fund.” *Ontiveros v. Zamora*, 303 F.R.D. 356, 375 (E.D. Cal. 2014);⁵ *see also Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 549 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990)

⁵ Unless otherwise indicated, all internal quotations and citations are omitted.

(“[P]laintiff’s counsel is entitled to be reimbursed from the class fund for the reasonable expenses incurred in this action.”); *see also In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1296, 1314 (E.D.N.Y. 1985), *modified on other grounds*, 818 F.2d 226 (2d Cir. 1987) (“Upon submission of adequate documentation, plaintiffs’ attorneys are entitled to reimbursement of those reasonable and necessary out-of-pocket expenses incurred in the course of activities that benefitted the class.”). Courts in this Circuit have thus routinely approved payment of expenses from the common fund where they were reasonable and necessary for the litigation. *See Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 1:04-cv-3066, 2008 WL 11234103, at *6 (N.D. Ga. Mar. 4, 2008) (approving \$2.4 million for reimbursement of litigation expenses); *Swift v. BancorpSouth Bank*, No. 1:10-cv-00090, 2016 WL 11529613, at *20 (N.D. Fla. July 15, 2016) (approving application for reimbursement of costs that “were necessarily incurred in furtherance of the litigation of the Action and the Settlement”); *Ressler v. Jacobson*, 149 F.R.D. 651, 657 (M.D. Fla. 1992) (approving requested expenses as reasonable and necessary); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970); *In re Ikon Office Sols., Inc. Secs. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000) (emphasis omitted).

2. Future Litigation Expenses Are Also Routinely Paid from Common Funds

It is also a well-accepted practice, especially in antitrust cases such as this one, for a portion of the total settlement fund to be set aside for future expenses. *See, e.g., Newby v. Enron Corp.*, 394 F.3d 296, 302-03 (5th Cir. 2004); *In re: Auto. Parts Antitrust Litig.*, No. 12-md-02311, 2016 WL 4435703, at *1 (E.D. Mich. June 20, 2016); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827, Order Granting Direct Purchaser Class Plaintiffs’ Motion for the

Advancement of Litigation Expenses From Settlement Funds (N.D. Cal. Feb. 17, 2011) (ECF No. 2474) (granting \$3 million in future litigation expenses); *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2011 WL 717519, at *13-14 (E.D. Mich. Feb. 22, 2011); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008) (“The Court approves the award of \$500,000 to be paid from the Settlement Fund to Lead Counsel to use in paying outstanding and future litigation costs.”); *In Re Brand Name Prescription Drugs Litig.*, No. 1:94-cv-00897, MDL No. 997 (N.D. Ill. Feb. 18, 1998) (ECF No. 3162) (granting \$6 million disbursement “for advancement of trial preparation expenses of Class Counsel”); *see also* Alba Conte, 1 ATTORNEY FEE AWARDS §2:20 (3d ed. 2004) (“courts have . . . permitted class plaintiffs who have settled with fewer than all defendants to expend class-settlement monies, or a portion thereof, for litigation expenses to prosecute the action against remaining, nonsettling defendants”) (collecting cases).

3. Lead Counsel’s Current and Future Common Expenses

Although the Settlements permit Lead Counsel to apply for attorneys’ fees and expenses that represent a reasonable percentage of the Settlement Funds,⁶ and members of the Settlement Classes were notified that Lead Counsel may “ask the Court for attorneys’ fees of up to one-third (33.3%) of the . . . Settlement[s] and/or reimbursement for costs and expenses for their work in the Litigation” and that any “fees and expenses awarded by the Court would be paid out of the . . . Settlement Funds” (ECF No. 1011), Lead Counsel have determined to

⁶ The Settlements provide that Lead Counsel may seek an award of “reasonable attorneys’ fees” and/or “reimbursement of litigation expenses and costs incurred in connection with the prosecution of the Action.” ECF Nos. 781-1 ¶ 9.1, 1037-1 ¶ 9.1.

not apply for an award of fees from these Settlements.⁷ Rather, Lead Counsel seek only reimbursement of common costs that have been or will be invoiced to the litigation fund that they established for the prosecution of this Action.

As set forth in the Joint Declaration, the common expenses that have been invoiced to Lead Counsel's litigation fund are as follows:⁸

#	Expense Category	Amount
1	Experts & Consultants	\$2,837,535.69
2	Mediation Services	\$18,400.00
3	Document Review Related Charges	\$473,675.88
4	Court Reporting & Transcripts	\$167,242.19
5	Service of Process & Couriers	\$573.25
6	Printing	\$14,419.23
7	Reimbursement of Class Representative Expenses	\$1,636.55
8	Trial-Related Expenses	\$16,574.32
Total:		\$3,530,057.11

In addition, and also as set forth in the Joint Declaration, Lead Counsel anticipates that they will incur at least an additional \$977,100 in common expenses to prosecute this Action through trial., as show in the following table:⁹

#	Expense Category	Amount
1	Experts & Consultants	\$523,400
2	Document Review Related Charges	\$67,500
3	Other Trial-Related Expenses	\$386,200
Total:		\$977,100

⁷ Lead Counsel reserve their right to seek an award of attorneys' fees and unreimbursed costs at an appropriate point in the future.

⁸ Lead Counsel will provide these invoices to the Court, *in camera*, upon request.

⁹ If requested, Lead Counsel would agree to making *in camera* applications to the Court for these future payments from the Settlements when those expenses are actually invoiced.

Thus, in total, Lead Counsel have or will incur at least \$4,507,157.11 in common expenses to litigate this Action through trial. Through this motion, Lead Counsel are only seeking payment of \$4,329,000 from the Settlements, or \$178,157.11 less than the common expenses they have or will reasonably incur to prosecute this Action through trial.

4. These Common Expenses Are or Will Be Reasonable and Necessary

As set forth in the Joint Declaration, the expenses that Lead Counsel seek from the Settlement Funds are reasonable and necessary to the prosecution of this Action and to the Settlements that were obtained on behalf of the Class. *See* Jt. Decl. ¶¶ 60-65. Further, because Lead Counsel advanced the majority of the expenses over the past four and a half years without assurance of reimbursement, they had every incentive not to spend unnecessarily. Thus, this request thus should be approved. *See Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1298 (11th Cir. 1999); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 770 (11th Cir.1991); *Newby*, 394 F.3d at 302-03; 1 ATTORNEY FEE AWARDS §2:20.

B. The Requested Service Award Should Be Approved

The Settlements further provide that Lead Counsel may seek reasonable Service Awards for the Class Representatives. ECF Nos. 781-1 ¶9.2, 1037-1 ¶9.2. Here, Lead Counsel seek a \$2,500 Service Award for each of the Class Representatives, or a total of \$40,000 (to be paid evenly from each Settlement), for their time and effort in prosecuting this Action over the past four and a half years. Jt. Decl. ¶¶ 66-70.

The Eleventh Circuit has held as follows:

[I]ncentive awards may be given to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, to recognize their willingness to act as a private attorney general, and to induce an individual to become a named

plaintiff. Although these considerations will certainly weigh differently in different cases, together they help illuminate the fact that class representatives have typically done something the absent class members have not—stepped forward and worked on behalf of the class. All of these justifications are legitimate, and district courts may exercise their discretion to determine whether they favor an incentive award in any given case.

Muransky v. Godiva Chocolatier, Inc., 922 F.3d 1175, 1197 (11th Cir. 2019) (internal quotation and alterations omitted). Service awards “compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.” *Tomes v. Bank of Am. (In re Checking Account Overdraft Litig.)*, 830 F. Supp. 2d 1330, 1357 (S.D. Fla. 2011) (quoting *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006)).

“[T]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action.” *Id.* Specifically, over the past four and a half years, Class Representatives spent time and effort in pursuit of this Action and provided valuable assistance. *See* Jt. Decl. ¶¶ 66-70.

The proposed Service Award is also reasonably proportionate to the amount of the Settlement Funds, and well within the range of service awards granted by courts in this Circuit and District. Notably, the total Service Award requested here (\$2,500) for each of the 16 Plaintiffs is less than 0.03% of the Settlements (\$13,000,000) and thus is not disproportionate. *See, e.g., Baez v. LTD Fin. Servs., L.P.*, No. 6:15-cv-1043-ORL-40TBS, 2019 WL 2210687, at *7 (M.D. Fla. May 3, 2019) (approving \$2,500 incentive award for class representative); *Gibbs v. Centerplate, Inc.*, No. 8:17-cv-02187-EAK-JSS, 2018 WL 6983498, at *9 (M.D. Fla. Dec. 28, 2018) (approving \$5,000 incentive award for class representatives who were deposed and \$2,500 for those who were not deposed); *Speer v. Whole Foods Mkt. Grp., Inc.*, No. 8:14-

CV-3035-RAL-TBM, 2016 WL 7187183, at *3 (M.D. Fla. Jan. 15, 2016) (approval of class representative incentive award of \$2,500); *Sherman v. Corizon Health, Inc.*, No. 2:12-cv-00635-JES-DNF, 2014 WL 5690024, at *3 (M.D. Fla. Oct. 29, 2014) (same).

III. CONCLUSION

Based on the foregoing, Lead Counsel respectfully request that the Court grant Lead Counsel's application for: (1) an award of \$4,329,000 for reimbursement of current and future common litigation expenses; and (2) a Service Award of \$2,500 for each of the Class Representatives, for a total amount of \$40,000. This amounts to a total of \$4,369,000 from the Settlement Funds. If the Court grants Lead Counsel's request in full, \$1,008,200 will be paid from the CVI Settlement Fund and \$3,360,800 will be paid from the B&L Settlement Fund.

Dated: January 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2020, 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.

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