

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

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| 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 | |

**JOINT DECLARATION OF CHRISTOPHER LEBSOCK, EAMON O’KELLY,
AND JOSEPH GUGLIELMO IN SUPPORT OF 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 PLAINTIFFS’ MOTION FOR FINAL
APPROVAL OF SETTLEMENT AGREEMENTS WITH DEFENDANTS
BAUSCH & LOMB, INC. AND COOPERVISION, INC.**

Pursuant to 28 U.S.C. §1746, Christopher Lebsock, Eamon O’Kelly, and Joseph Guglielmo, declare as follows:

1. We submit this declaration in support of the Lead Counsel’s Motion for Payment of: (1) Common Expenses; and (2) Class Representatives’ Service Award in conjunction with the settlements between Plaintiffs¹ and CooperVision, Inc. (“CVI”), dated August 30, 2017 (the “CVI Settlement”), and between Plaintiffs and Bausch & Lomb Incorporated (“B&L”), dated August 19, 2019 (the “B&L Settlement”) (collectively, the “Settlements”).

2. Christopher Lebsock is a partner with the law firm of Hausfeld LLP (“Hausfeld”) and a member in good standing of the State Bar of California. Eamon O’Kelly is of counsel with the law firm of Robins Kaplan LLP (“Robins Kaplan”) and a member in good standing of the State Bar of New York. Joseph Guglielmo is a partner with the law firm of Scott+Scott Attorneys at Law LLP (“Scott+Scott”) and a member in good standing of the State Bar of New York. Hausfeld, Robins Kaplan, and Scott+Scott are co-lead counsel (“Lead Counsel”) for Plaintiffs and the certified classes in the U.S. District Court for the Middle District of Florida, No. 3:15-md-02626. *See* ECF No. 940.

3. Lead Counsel each declare that he has personal knowledge of the matters set forth herein and, if called to testify as a witness, could testify competently thereto.

¹ “Plaintiffs” include Rachel Berg, Amanda Cunha, Catherine Dingle, Joe Felson, Susan G. Gordon, Alexis Ito, John Machikawa, Sheryl Marean, Tamara O’Brien, Miriam Pardoll, Kathleen Schrif, Jennifer Sineni, Cora Beth Smith, Elyse Ulino, and Brett Watson. Further, 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.

4. Lead Counsel have significant experience with antitrust litigation and class actions, including settlements thereof. Copies of Hausfeld's, Robins Kaplan's, and Scott+Scott's firm résumés are respectively attached hereto as Exhibits A-C.

5. The attorneys working on this Action for the Plaintiffs are experienced lawyers who have substantial experience prosecuting large-scale class actions and antitrust litigation.

I. LEAD COUNSEL'S EFFORTS

6. Lead Counsel have been litigating this Action for nearly five years in what has been hard-fought litigation against Defendants that are represented by some of the most prestigious law firms in the country.

7. Since the beginning of this Action, Lead Counsel have made significant efforts to prepare the case for trial, as detailed below.

A. Complaints and Motions to Dismiss Briefing

8. The first class action lawsuit challenging the Defendants' "Unilateral Pricing Policies" ("UPPs") was filed by Plaintiff Machikawa on March 3, 2015. *See* Case No. 3:15-cv-01001 (N.D. Cal.). In the months that followed, more than 120 plaintiffs filed more than 50 additional class action lawsuits challenging these UPPs.

9. The U.S. Judicial Panel on Multidistrict Litigation ("JPML") transferred all of these cases to this District for centralized pre-trial proceedings. *See, e.g.*, ECF No. 186 in MDL No. 2626 (June 8, 2015). The cases were re-captioned *In Re: Disposable Contact Lens Antitrust Litigation*, No. 3:15-md-02626-HES-JRK.

10. On July 15, 2015, the Court entered a case management order (ECF No. 61), the first in a series of scheduling orders to be applicable to this Action.

11. On October 7, 2015, the Court granted Lead Counsel's motion to appoint Hausfeld, Robins Kaplan, and Scott+Scott as interim lead counsel. ECF No. 116.

12. On November 23, 2015, Lead 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.

13. 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), and on July 27, 2016, Defendants filed their Answers and Affirmative Defenses. ECF Nos. 266-70.

14. On March 1, 2017, Plaintiffs filed the operative complaint in this matter. ECF No. 395.

B. Case Investigation and Discovery

15. Even before discovery commenced, Lead Counsel's investigation included, but was not limited to, review and analysis of publicly available documents from and related to the contact lens market, the pricing of contact lenses, and Congress's investigation into the so-called UPPs.

16. Specifically, in preparation of the complaints, Lead Counsel undertook an extensive investigation regarding contact lenses, including the pricing of contact lenses before

and after the UPPs, and potential claims that could be alleged against the contact lens manufacturers and others in the marketplace, including the dominant contact lens distributor, Defendant ABB. Lead Counsel's investigation also included interviews of customers and potential plaintiffs to gather information about Defendants' conduct and the impact on customers. This information was essential to Lead Counsel's understanding of Defendants' conduct, the nature of the UPPs, and potential remedies. Lead Counsel also consulted with experts to develop and refine their legal and damages theories.

17. Discovery commenced on April 1, 2016. ECF No. 204.

18. During the course of discovery, Lead Counsel served written discovery seeking documents and depositions on Defendants and on certain non-parties. In addition, Defendants sought document and deposition discovery from Plaintiffs and certain non-parties.

19. In total, the parties and non-parties in this Action have produced roughly 4.3 million pages of documents, as well as voluminous electronic data files and spreadsheets in native format (*i.e.*, transactional data), in response to discovery served by Plaintiffs and Defendants in this Action. A breakdown of the number of documents and pages produced in this litigation that Plaintiffs uploaded to their document review platform are set forth in the below chart.

| Producing Party | # of Documents | # of Pages |
|------------------------|-----------------------|-------------------|
| Defendants | 1,001,296 | 3,933,097 |
| Plaintiffs | 855 | 5,226 |
| Non-Parties | 102,530 | 365,973 |
| <i>Totals:</i> | 1,104,681 | 4,304,296 |

20. Lead Counsel and their experts have reviewed and analyzed substantially all of the documents and electronic data files produced in this Action.

21. In addition, Plaintiffs and Defendants have collectively taken a total of 78 depositions in this matter. These depositions are categorized below:

- Defendants' current and former employees: 22 depositions
- Plaintiffs: 16 depositions
- Non-Parties: 23 depositions
- Defendants' experts: 10 depositions
- Plaintiffs' experts: 7 depositions

22. Much of this discovery has been highly contested. In total, Plaintiffs and Defendants have filed at least 17 motions to compel with this Court. *See* ECF Nos. 248, 276, 318, 354, 420, 460, 512, 587, 590-92, 609, 655, 728, 737, 759. Many of these motions were fact-intensive and included declarations attaching significant numbers of documents in support of the parties' respective positions.

23. Apart from the discovery disputes that resulted in motion practice, Lead Counsel separately negotiated resolutions to numerous other discovery disputes with Defendants and non-parties through extensive written correspondence and meet-and-confers.

C. Class Certification

24. On March 3, 2017, Plaintiffs filed their class certification motion, which was supported by two expert reports and 170 exhibits. *See* ECF Nos. 396-99.

25. On June 15, 2017, Defendants filed their motions to strike certain portions of Plaintiffs' expert reports and memorandum of law in opposition to plaintiffs' motion for class certification, accompanying expert reports, and numerous exhibits. *See* ECF Nos. 500-10.

26. On July 10, 2017, Plaintiffs responded to Defendants' motions to strike (ECF Nos. 548-51), and on September 8, 2017, Plaintiffs filed their class certification reply, which included two supporting expert reports and 191 exhibits. *See* ECF Nos. 611-14.

27. On October 20, 2017, Defendants filed their sur-reply in further opposition to Plaintiffs' class certification motion, which included two additional expert reports and numerous exhibits. *See* ECF Nos. 674-78.

28. On August 1 and 2, 2018, the Court held an evidentiary hearing on Plaintiffs' class certification motion, which involved examination and cross examination of Plaintiffs' and Defendants' experts, presentation of more than 50 exhibits, and more than 10 hours of argument relating to Plaintiffs' motion for class certification and Defendants' motions to strike portions of Plaintiffs' expert reports. *See* ECF Nos. 865-1, 865-2, 866.

29. On December 4, 2018, the Court granted Plaintiffs' class certification motion and certified horizontal and vertical litigation classes. *See* ECF No. 940. The Court also appointed Lead Counsel as counsel for the litigation classes and named Plaintiffs 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 Schirf, John Machikawa, and Joseph Felson as class representatives.

30. On December 18, 2018, Defendants filed petitions to appeal the Court's class certification order pursuant to Rule 23(f) of the Federal Rules of Civil Procedure ("F.R.C.P."). The parties briefed Defendants' petitions.

31. On April 5, 2019, the Eleventh Circuit denied Defendants ABB's and JJVC's petition to appeal the Court's class certification order, and on June 20, 2019, the Eleventh

Circuit denied Defendant Alcon's and B&L's and petition to appeal the Court's class certification order.

D. Summary Judgement

32. After the class certification hearing, but before the Court had resolved Plaintiffs' class certification motion, the parties began briefing summary judgment.

33. On August 20, 2018, Defendants filed four summary judgment motions, attaching declarations and more than 200 exhibits in support thereof. *See* ECF Nos. 872-77.

34. Plaintiffs' responded to these motions in a single, omnibus summary judgment brief on October 22, 2018. ECF No. 917. In support of their opposition, Plaintiffs attached a total of 429 exhibits, including the merits reports of three experts. *See* ECF Nos. 918-23.

35. On November 19, 2018, Defendants filed four additional reply briefs in support of their summary judgment motions, which attached additional declarations and more than 200 exhibits. *See* ECF Nos. 930-35.

36. Plaintiffs filed a single sur-reply brief in opposition to Defendants' summary judgment motions on December 17, 2018. ECF No. 942.

37. On May 20, 2019, Defendants filed a notice of supplemental authority in further support of their summary judgment motions (ECF No. 967), which Plaintiffs responded to on May 23 and, with the Court's permission, August 22. *See* ECF Nos. 969, 1014.

38. The Court held a hearing on the summary judgment motions on August 21 and 22, 2019. ECF Nos. 1015-16.

39. On November 27, 2019, the Court denied Defendants' motions for summary judgment. ECF No. 1091.

E. Pre-Trial Preparation & Motions

40. Plaintiffs began preparing for trial in earnest in the Fall of 2019. These efforts have included, among other things, negotiating a final pre-trial schedule and final pre-trial memorandum with Defendants (ECF No. 1099); exchanging preliminary exhibit lists and objections thereto; exchanging deposition designations and objections and counters thereto; exchanging witness lists; filing and opposing motions *in limine* (ECF Nos. 1058-60, 1089, 1103, 1106); opposing motions to strike Plaintiffs' experts (ECF No. 1114); moving to amend the case management order and opposing Defendants' motion to enforce the scheduling order (ECF Nos. 1063, 1065); and opposing a motion for leave to seek interlocutory appeal of the Court's summary judgment order. ECF No. 1123.

41. The Court held a pre-trial conference on December 11, 2019 (ECF No. 1109), and Plaintiffs filed a notice to address the Court's comments at that hearing on January 5, 2020. ECF No. 1125.

42. The Court held a further pre-trial conference on January 8, 2020. ECF No. 1126. At this hearing, the parties argued a number of the pending pre-trial motions and agreed to new dates for the final pre-trial conference and the start of trial.

II. THE SETTLEMENTS

43. A true and correct copy of the CVI Settlement was previously filed with the Court (ECF No. 781-1) and a true and correct copy of the B&L Settlement was previously filed with the Court (ECF No. 1037-1).

44. As described in greater detail below, the Settlements were reached in the absence of collusion and are the product of good-faith, informed, and arm's-length negotiations by competent counsel.

45. Lead Counsel believe that the Settlements are fair, reasonable, and adequate and that they fit well within the range of reasonableness, such that Final Approval of both is appropriate.

46. Lead Counsel believe that the benefits of the Settlements 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.

47. The Settlements are the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation and the legal and factual issues of this Action. All negotiations were arm's-length and extensive.

48. Furthermore, Lead Counsel are particularly experienced in the litigation, certification, trial, and settlement of nationwide class action cases. Lead Counsel have zealously represented Plaintiffs and the classes throughout this Action. Lead Counsel ultimately prevailed at class certification, where this Court made its own independent determination that "Lead Counsel are skilled and adequate in all respects" (ECF No. 940 at 127), and at summary judgment.

49. Lead Counsel are confident in the strength of this Action, but are also pragmatic in their awareness of the defenses available to CVI and B&L, and the risks inherent in trial and post-judgment appeal. Lead Counsel are also highly familiar with the challenged practices and

defenses at issue in this Action through their experience litigating similar cases in MDL No. 1030 and elsewhere. Lead Counsel believe that these Settlements are fair and reasonable.

A. CVI Settlement

50. Lead Counsel and counsel for CVI began settlement discussions in July of 2017.

51. 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 litigation against CVI based on CVI's payment of \$3,000,000.

52. Based on Dr. William's calculations in his Class Report (*see* ECF No. 612), the \$3,000,000 cash payment represents 38% of the maximum recovery Lead Counsel could have achieved at trial against CVI on Plaintiffs' vertical claims (before trebling).

53. On August 30, 2017, Plaintiffs and CVI executed the CVI Settlement.

54. The CVI Settlement defines the settlement class as follows:

[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.

ECF No. 781-1 ¶ 1.37.

B. B&L Settlement

55. Beginning in the summer of 2018, Lead Counsel and counsel for B&L began bilateral settlement discussions. Ultimately, after approximately 12 months of negotiations, which included both in-person, written, and telephonic communications, and exchanges of

various proposals for settlement, the parties reached an agreement-in-principle on August 17, 2019, to resolve the litigation against B&L based on B&L's payment of \$10,000,000.

56. Based on Dr. Williams' calculations in his Merits Report (*see* ECF No. 918-2), the \$10,000,000 cash payment represents between 72% and 81% of the maximum recovery Lead Counsel could have achieved at trial against B&L on Plaintiffs' vertical claims (before trebling).

57. On August 19, 2019, the parties executed the B&L Settlement.

58. The B&L Settlement defines the settlement class as follows:

[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., or B&L during the Settlement Class Period for their own use and not for resale, where the prices for such contact lenses were subject to a Unilateral Pricing Policy and the purchase occurred during the period when the Unilateral Pricing Policy was in effect. Excluded from the Settlement Class are any purchases from 1-800-Contacts of disposable contact lenses subject to B&L's Unilateral Pricing Policy, where the purchase occurred on or after July 1, 2015. Also 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.

ECF No. 1037-1 ¶ 1.35.

59. The settlement class defined in the B&L Settlement is consistent with the horizontal litigation class certified by the Court pursuant to F.R.C.P. 23(b)(3) on December 4, 2018. *See* ECF No. 940.

III. LEAD COUNSEL'S EXPENSES

60. Lead Counsel established a litigation fund in order to pay common litigation expenses.

61. Non-common expenses (*e.g.*, travel, lodging, legal research, long-distance phone calls, etc.) have not been paid from the litigation fund, and Lead Counsel may seek the reimbursement of these expenses at an appropriate point in the future.

62. As detailed and categorized in the below schedule, Lead Counsel have incurred a total of **\$3,530,057.11** in unreimbursed common expenses in connection with the prosecution of this Action through January 16, 2020. These common expenses have been paid, or will be paid, from the litigation fund, were reasonably necessary to the prosecution of this Action, and are of the type that Lead Counsel normally incurs in litigation and that would be reimbursed by clients under fee arrangements where the client was paying expenses.

63. The following schedule was prepared from accounting records from the litigation fund and regularly prepared and maintained by Lead Counsel, which are available for *in camera* review at the request of the Court.

| # | Expense Category | Amount |
|---------------|--|-----------------------|
| 1 | Experts & Consultants | \$2,837,535.69 |
| 2 | Mediation Services | \$18,400.00 |
| 3 | Document Review Related Charges ² | \$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 |

64. In addition, Lead Counsel anticipates that they will incur at least an additional **\$977,100** in common expenses to prosecute this case through trial. The following schedule

² *E.g.*, hosting, collection, processing, production, etc.

sets out the expenses Lead Counsel reasonably anticipates incurring through trial at this point in time:

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

65. Thus, in total, Lead Counsel reasonably anticipate that have or will incur at least **\$4,507,157.11** in unreimbursed common expenses through trial. This is in addition to the non-common expenses Lead Counsel have and will continue to incur, but for which they are not seeking reimbursement at this time.

IV. PLAINTIFFS' INVOLVEMENT IN THE LITIGATION

66. Each Plaintiff has been actively involved in this litigation, has produced documents, and has sat for a deposition.

67. The below chart sets forth the dates of each Plaintiff's deposition.

| # | Plaintiff | Date of Deposition |
|----|--------------------------------|--------------------|
| 1 | Brett Watson | 3/22/2017 |
| 2 | Kathleen Schirf | 3/23/2017 |
| 3 | John Machikawa | 4/2/2017 |
| 4 | Tamara O'Brien | 4/4/2017 |
| 5 | Joe Felson | 4/5/2017 |
| 6 | Susan Gordon | 4/5/2017 |
| 7 | Amanda Cunha | 4/11/2017 |
| 8 | Catherine Dingle | 4/13/2017 |
| 9 | Pamela Mazzarella ⁴ | 4/13/2017 |
| 10 | Miriam Pardoll | 4/14/2017 |

³ E.g., hotel, "war room," printing, couriers, shredding, courtroom logistics, supplies, etc.

⁴ Ms. Mazzarella is no longer a class representative in this Action, but was up through the CVI Settlement, searched for and produced documents, and sat for a full deposition.

| # | Plaintiff | Date of Deposition |
|-----------|------------------|---------------------------|
| 11 | Rachel Berg | 4/19/2017 |
| 12 | Cora Beth Smith | 4/20/2017 |
| 13 | Alexis Ito | 4/25/2017 |
| 14 | Elyse Ulino | 4/30/2017 |
| 15 | Sheryl Marean | 5/5/2017 |
| 16 | Jennifer Sineni | 5/9/2017 |

68. In addition, each Plaintiff has been kept apprised of developments of the Action, and some have attended Court proceedings in this Action.

69. Finally, Lead Counsel intends to call one or more of these Plaintiffs to testify in their case-in-chief at trial, and Defendants have indicated that they may attempt to call one or more Plaintiffs in their defense. Appearing at trial will require an additional time commitment from these Plaintiffs.

70. In Lead Counsel's view, an incentive award of \$2,500 per Plaintiff is appropriate and reasonable in litigation of this nature at this stage of the proceedings.

We declare under penalty of perjury that the foregoing is true and correct.

[SIGNATURES TO FOLLOW]

DATED: January 16, 2020



Christopher Lebsock



Eamon O'Kelly



Joseph Guglielmo