

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

In Re: DISPOSABLE CONTACT LENS ANTITRUST LITIGATION	Case No. 3:15-md-2626-HES-JRK Judge Harvey E. Schlesinger Magistrate Judge James R. Klindt
THIS DOCUMENT RELATES TO: All Class Actions	

**PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF
SETTLEMENT AGREEMENT WITH DEFENDANT ABB OPTICAL GROUP LLC
AND PROPOSED NOTICE PLAN**

TABLE OF CONTENTS

I. INTRODUCTION 2

II. STATEMENT OF FACTS 5

 A. Procedural History 5

 1. Lead Counsel’s Investigation..... 5

 2. The Course of Proceedings 5

 3. The CVI and B&L Settlements..... 7

 4. The ABB Settlement 8

 B. Summary of the ABB Settlement Terms 9

 1. The Settlement Class..... 9

 2. Monetary Relief for the Benefit of the Class 9

 3. Class Release 10

 4. Settlement Termination..... 10

 5. Class Representatives’ Service Award 10

 6. Attorneys’ Fees and Costs 11

 7. Notice and Distribution..... 11

III. ARGUMENT 12

 A. The Legal Standard for Preliminary Approval 12

 B. This Settlement Satisfies the Criteria for Preliminary Approval 13

 C. This Settlement Is the Product of Good-Faith, Informed, and Arm’s-Length
 Negotiations 14

 D. The Facts Support a Preliminary Determination that the Settlement Is Fair,
 Adequate, and Reasonable 16

 1. Likelihood of Success at Trial 16

 2. Range of Possible Recovery and the Point on or Below the Range of
 Recovery at Which a Settlement Is Fair 17

 3. Complexity, Expense, and Duration of Litigation 18

 4. Stage of the Proceedings 18

 E. The Proposed Notice Plan Is Substantially the Same and Builds off of the Prior
 Approved Notice Plan from the B&L and CVI Settlements..... 19

F.	The Court Should Set a Schedule for Notice and Final Approval of the ABB Settlement	21
G.	With Only Trial Remaining, Distribution of Funds Should Be Postponed to Save the Class from Incurring Unnecessary Costs	22
IV.	CONCLUSION.....	23

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Ackal v. Centennial Beauregard Cellular L.L.C.</i> , 700 F.3d 212 (5th Cir. 2012)	20
<i>Ass’n for Disabled Americans, Inc. v. Amoco Oil Co.</i> , 211 F.R.D. 457 (S.D. Fla. 2002).....	12
<i>Behrens v. Wometco Enters., Inc.</i> , 118 F.R.D. 534 (S.D. Fla. 1988), <i>aff’d</i> , 899 F.2d 21 (11th Cir. 1990)	14, 17, 18
<i>Bennett v. Behring Corp.</i> , 737 F.2d 982 (11th Cir. 1984)	12, 13
<i>Cotton v. Hinton</i> , 559 F.2d 1326 (5th Cir. 1977)	12, 14, 17
<i>Faught v. Am. Home Shield Corp.</i> , 668 F.3d 1233 (11th Cir. 2011)	22
<i>Francisco v. Numismatic Guaranty Corp. of Am.</i> , No. 06-61677, 2008 WL 649124 (S.D. Fla. Jan. 31, 2008).....	15
<i>Greco v. Ginn Dev. Co., LLC</i> , 635 Fed. Appx. 628 (11th Cir. 2015).....	21
<i>In re Auto. Parts Antitrust Litig.</i> , No. 12-cv-00103, 2017 WL 3499291 (E.D. Mich. July 10, 2017).....	22
<i>In re Pool Prods. Distrib. Mkt. Antitrust Litig.</i> , 310 F.R.D. 300 (E.D. La. 2015).....	20
<i>In re Transpacific Passenger Air Transp. Antitrust Litig.</i> , No. 07-cv-05634, ECF No. 968 (N.D. Cal. Dec. 15, 2014).....	22
<i>In re U.S. Oil and Gas Litig.</i> , 967 F.2d 489 (11th Cir. 1992)	12
<i>Juris v. Inamed Corp.</i> , 685 F.3d 1294 (11th Cir. 2012)	20
<i>Legg v. Spirit Airlines, Inc.</i> , No. 15-cv-61375, 2015 WL 11197784 (S.D. Fla. Oct. 28, 2015)	21

Lipuma v. Am. Express Co.,
406 F. Supp. 2d 1298 (S.D. Fla. 2005)14, 16, 17, 18

Meredith Corp. v. SESAC, LLC,
87 F. Supp. 3d 650 (S.D.N.Y. 2015).....22

Morgan v. Public Storage,
301 F. Supp. 3d 1237 (S.D. Fla. 2016)20

Prather v. Wells Fargo Bank, N.A.,
15-cv-04231, 2017 WL 770132 (N.D. Ga. Feb. 24, 2017).....21

Ressler v. Jacobson,
822 F. Supp. 1551 (M.D. Fla. 1992).....18

Smith v. Wm. Wrigley Jr. Co.,
No. 09-cv-60646, 2010 WL 2401149 (S.D. Fla. June 15, 2010).....12, 13

Turner v. Gen. Elec. Co.,
No. 2:05-CV-186-FTM-99DNF8, 2006 WL 2620275 (M.D. Fla. Sept. 13,
2006)14

Statutes, Rules, and Regulations

Federal Rules of Civil Procedure

Rule 231, 11

Rule 23(b)(3).....8, 9, 10, 21

Rule 23(c)(2)(B).....11, 20

Rule 23(e).....11, 12

Other Authorities

MANUAL FOR COMPLEX LITIGATION, Third (West 1995)

§13.14.....13

§30.42.....12

4 NEWBERG ON CLASS ACTIONS (4th ed. 2002)

§11.26.....12

§11.41.....12, 14

Plaintiffs and Lead Counsel respectfully submit this memorandum of law in support of their Motion for Preliminary Approval of the Settlement Agreement with ABB Optical Group LLC (“ABB”), attached as Exhibit A (“Settlement” or “Agreement”), which will resolve all claims against ABB in the Action.¹

As discussed in greater detail below, the Court should grant Preliminary Approval because this 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 ABB will pay \$30,200,000 (thirty million, two hundred thousand dollars) in cash to create a non-reversionary Settlement Fund, is an excellent result for the Settlement Class. *See* Declaration of Joseph P. Guglielmo (“Guglielmo Decl.”), ¶2, attached hereto as Exhibit B. The Settlement satisfies Rule 23 and all Eleventh Circuit criteria for Preliminary Approval.

In addition, and also as detailed below, the Court should approve the notice plan for the ABB Settlement. First, the notice plan is substantially the same as the notice disseminated for the B&L and CVI settlements, which the Court noted:

constitutes notice that was reasonably calculated, under the circumstances, to apprise the Settlement Classes . . . constitutes due, adequate, and sufficient notice to all persons and entities entitled to receive notice of the Settlement Agreements and . . . satisfies the requirement of Rule 23 of the Federal Rules of Civil procedure and the United States Constitution (including the Due Process Clause.)

(ECF No. 1164.) Importantly, class members who already made a timely and valid claim in the CVI and/or B&L settlements will not need to make a new claim in the ABB Settlement in order to benefit from this settlement. Second, due to an oversight in the earlier-disseminated notice, as

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

described further below, the proposed notice would give consumers who purchased *only* B&L contact lenses subject to a UPP an additional opportunity to opt-out of the Litigation Classes.

Accordingly, Plaintiffs and Lead Counsel respectfully request that the Court take the following initial steps in the settlement approval process: (1) grant Preliminary Approval to the Settlement; (2) approve and order the notice plan and the proposed opt-out and objection procedures; (3) stay the Action against ABB pending final approval of the Settlement; (4) establish a schedule with deadlines for notice, opting out, objecting, filing claims, and setting a fairness hearing; and (5) enter the [Proposed] Order Preliminarily Approving Class Settlement and Notice Plan, attached hereto as Exhibit C.

I. INTRODUCTION

Beginning in early 2015, Plaintiffs filed suits against the major manufacturers of disposable contact lenses, Bausch & Lomb, Inc. (“B&L”), Johnson & Johnson Vision Care (“JJVC”), Alcon Laboratories, Inc. (“Alcon”), CooperVision, Inc. (“CVI”), and their primary distributor, ABB, collectively, “Defendants,” alleging that the manufacturers’ “Unilateral Pricing Policies” (“UPPs”) on certain disposable contact lenses were illegal restraints on competition under Section 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.)

This litigation has involved sharply opposed positions on several fundamental legal questions, including whether Defendants, including ABB, entered into a conspiracy to restrict pricing competition in violation of federal and state competition laws. Guglielmo Decl., ¶4. ABB consistently argued that there was no collusion in the adoption, implementation, or enforcement of the UPPs and any actions taken were within the bounds of established law. *Id.*

On August 8, 2018, Plaintiffs filed their Uncontested Motion for Appointment of a Notice Administrator, Approval of Notice Plan, Approval of Deferring Distribution of the CVI Net Settlement Fund, and Setting a Schedule for Notice and Final Approval of the CVI Settlement (ECF No. 1011) (the “Motion for Notice”).

On August 30, 2017, Plaintiffs reached a \$3,000,000 settlement with Defendant CVI. Guglielmo Decl., ¶31. On July 10, 2018, the Court preliminarily approved the settlement with Defendant CVI and delayed dissemination of notice until a later date. (ECF No. 841.) On September 17, 2019, Plaintiffs filed their Motion for Settlement Preliminary Approval and Approval of Amendment of Proposed Notice Plan regarding the \$10,000,000 settlement reached with B&L. (ECF No. 1037.) The notice plan was to be amended, in part, to provide potential class members of the now-certified Litigation Classes. *Id.* On October 8, 2019, the Court preliminarily approved the B&L settlement and amendment of the Notice Plan to include notice to the certified Litigation Classes along with the CVI and B&L Settlement Classes. (ECF No. 1046.)

On January 16, 2020, Plaintiffs filed a motion requesting final approval of the B&L and CVI settlements. (ECF Nos. 1136-39.) On February 25, 2020, the Court held a fairness hearing on both settlements. (ECF No. 1154.) On March 4, 2020, the Court granted final approval of the B&L and CooperVision settlements. (ECF No. 1164.) The claims period for both settlements ended on March 31, 2020. (ECF No. 1176.)

On April 3, 2020, this Court entered an Order regarding the impact of the COVID-19 pandemic on the case schedule which, among other things, indefinitely suspended the case’s trial date. (ECF No. 1180.) In the final paragraph of the Order, the Court stated as follows:

Notwithstanding the paragraph above, because of this life and death crisis, the Court sincerely urges the Parties to earnestly confer with each other in

a deliberate attempt to reach an agreement that completely resolves this litigation. Specifically, the Court implores the remaining Defendants to have their corporate executives seriously consider this request and the basis for it.

Id. at 5.

Plaintiffs and ABB took the Court's words to heart. On Sunday, August 30, 2020, they engaged in a day-long mediation session with former U.S. District Judge Layn Phillips via video conference. Guglielmo Decl., ¶29. Prior to the August 30, 2020 mediation session, the parties engaged in a series of pre-mediation discussions with Judge Phillips over the terms of a proposed settlement. *Id.* With Judge Phillips' guidance and assistance, the Parties were able to reach an agreement to resolve the case against ABB. *Id.* ABB will pay \$30,200,000 into a settlement fund in exchange for dismissal of all claims against it.² *Id.*, ¶2. The Parties fully executed the Settlement Agreement on September 22, 2020. *Id.*, ¶30.

Plaintiffs and Lead Counsel now seek Preliminary Approval of the ABB Settlement and approval of their proposed notice. The proposed notice would provide putative members of the Settlement Class with information regarding the terms of the Settlement and provide them with an opportunity to opt-out of, or object to, the Settlement. It also gives class members who purchased *only* B&L contact lenses subject to a UPP an additional opportunity to opt-out of the Litigation Classes.

Copies of the proposed Notice Plan are attached as Exhibits 1 - 5 to the Declaration of Cameron R. Azari, Esq. on Notice Plan, filed herewith ("Azari Decl."). For the reasons set forth

² ABB will pay \$500,000 of the Settlement Amount in cash into the Escrow Account controlled by the Escrow Agent within fifteen (15) days of the Court's entry of the Preliminary Approval Order and the remainder of the Settlement Amount (\$29,700,000) into the Escrow Account as follows: 50% of the remainder (\$14,850,000) by April 15, 2021, and 50% of the remainder (\$14,850,000) by January 14, 2022. Agreement, ¶3.1.

herein and in the Guglielmo and Azari Declarations, Plaintiffs and Lead Counsel respectfully request that the Court grant Preliminary Approval to the ABB Settlement and approve the proposed Notice Plan.

II. STATEMENT OF FACTS

A. Procedural History

Plaintiffs are seeking monetary damages and injunctive relief from the Defendants, on behalf of themselves and all others similarly situated who purchased disposable contact lenses subject to a UPP. Plaintiffs alleged that Defendants jointly adopted, implemented, and enforced UPPs to certain disposable contact lenses in the United States. Plaintiffs further alleged that Defendants' actions violated Section 1 of the Sherman Act and several states' competition laws. Guglielmo Decl., ¶6.

ABB and other Defendants have denied all of Plaintiffs' allegations of wrongdoing. ABB consistently defended its conduct by, *inter alia*, arguing that the UPPs complied with the law, and that it never entered into an agreement with manufactures, retailers, or with the other Defendants to adopt, implement, or enforce the UPPs. ABB advanced additional defenses. *Id.*, ¶4.

1. Lead Counsel's Investigation

As set forth in detail in the declaration supporting preliminary approval of the B&L and CVI settlements, Lead Counsel have devoted substantial time to investigating the potential claims against Defendants. (ECF No. 1037.) Plaintiffs incorporate by reference the facts regarding their investigation from those declarations into this brief.

2. The Course of Proceedings

An exhausting accounting of the course of proceedings in this case through September 19, 2019 is set forth in the motion and declaration supporting preliminary approval of the B&L

settlement. (ECF Nos. 1037, 1037-2.) Plaintiffs incorporate by reference the facts regarding this case history from that declaration into this brief.

Plaintiffs and Lead Counsel have continued litigating this case with vigor against ABB since the filing of the B&L preliminary approval motion. The ABB-specific facts and recent case history are described in greater detail below.

Plaintiffs have undertaken substantial discovery of ABB. Throughout discovery, ABB produced more than 68,761 documents, totaling more than 287,875 pages. In addition, Plaintiffs' counsel took five depositions of current and former ABB employees. Guglielmo Decl., ¶15.

The parties briefed Defendants' motions for summary judgment. This involved thousands of pages of briefing, exhibits, multiple expert reports, and two days of argument. *Id.*, ¶24. On November 27, 2019, the Court denied Defendants' motions for summary judgement. (ECF No. 1091.) In relevant part, the Court concluded as follows:

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.

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.

(ECF No. 1091 at 23.)

For the next few months, the Parties worked to prepare their respective cases for the February trial date that was originally scheduled. Guglielmo Decl., ¶26. This included drafting, exchanging, and meeting and conferring regarding proposed jury instructions, witnesses, and exhibit lists. *Id.* The Parties also filed competing motions *in limine* (ECF Nos. 1160, 1103, 1092, 1064, 1061, 1060, 1059, 1058, 1056, and 1055), which this Court ultimately ruled on, granting some in favor of Defendants and some in favor of Plaintiffs. (ECF Nos. 1142, 1150, and 1174.)

On March 30, 2020, Plaintiffs and Defendants filed a Joint Notice in which they requested the Court's guidance on pre-trial and trial scheduling issues regarding the impact of the COVID-19 pandemic. (ECF No. 1178.) On April 3, 2020, the Court issued its Order in response, delaying the start of trial indefinitely on account of the many difficulties and dangers of attempting to hold a trial during the pandemic. (ECF No. 1180.) The Court also called for Plaintiffs and Defendants to use the down time to seriously consider resolving the litigation through settlement. *Id.*

3. The CVI and B&L Settlements

On August 30, 2017, Plaintiffs reached a settlement agreement with Defendant CVI. Guglielmo Decl., ¶31. The settlement included a monetary payment of \$3,000,000 and was reached on behalf of a settlement class defined as follows:

All 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) (the "CVI Settlement Class"). On July 10, 2018, the Court preliminarily approved the settlement with Defendant CVI and delayed dissemination of notice until a later date. (ECF No. 841.)

On August 19, 2019, Plaintiffs signed a settlement agreement with B&L. Guglielmo Decl., ¶33. The settlement included a monetary payment of \$10,000,000 and was reached on behalf of a settlement class defined 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. 781-1, ¶1.37) (the "B&L Settlement Class"). The B&L Settlement Class is coterminous with the Horizontal Class certified by the Court pursuant to Fed. R. Civ. P. 23(b)(3) on December 4, 2018. (ECF No. 940.) On October 8, 2019, the Court granted preliminary approval of the B&L settlement and approved the notice to be disseminated to putative members of the litigation classes, the CVI Settlement Class, and the B&L Settlement Class. (ECF No. 1046.)

On January 16, 2020, Plaintiffs filed their Motion for Final Approval of Settlement Agreements with Defendants Bausch & Lomb, Inc. and CooperVision, Inc. (ECF No. 1136.) On February 25, 2020, the Court held a fairness hearing regarding the CVI settlement. (ECF Nos. 1154 and 2/25/20 Hr'g Trans.) On March 4, 2020, the Court issued its Final Approval Order and Final Judgment and Order of Dismissal with Prejudice as to Bausch & Lomb, Inc. and CooperVision, Inc., which granted the CVI and B&L settlements final approval. (ECF No. 1164.)

4. The ABB Settlement

The ABB Settlement was reached after an all-day session on Sunday, August 30, 2020, with former U.S. District Judge Layn Phillips. Guglielmo Decl., ¶29. Prior to the start of the

mediation, ABB and Plaintiffs each separately participated in several discussions with Judge Phillips' staff regarding the strengths and weaknesses of their respective cases and exchanged detailed mediation briefs. *Id.*

B. Summary of the ABB Settlement Terms

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

1. The Settlement Class

The Settlement Class is an opt-out class under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The Settlement Class is coterminous with the CVI Settlement Class given that ABB was a distributor of contact lenses made by all of the manufacturer Defendants including Alcon, JJVC, CVI, and B&L, and is defined as follows:

[A]ll persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, CVI, 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 alleged co-conspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

Agreement, ¶1.35.

2. Monetary Relief for the Benefit of the Class

The Settlement requires ABB to deposit \$500,000 into an Escrow Account within 15 days following Preliminary Approval. Agreement, ¶3.1. That deposit will create the Settlement Fund. ABB will then deposit the remainder of the Settlement Amount (\$29,700,000) into the Escrow Account as follows: 50% of the remainder (\$14,850,000) by April 15, 2021, and 50% of the remainder (\$14,850,000) by January 14, 2022. *Id.*

The Net Settlement Fund – which Lead Counsel intend to distribute 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: (i) the amount of any Fee and Expense Award and any Plaintiffs’ Service Award (if requested and to the extent allowed by the Court); (ii) Class Notice and Administration Expenses; (iii) Taxes and Tax Expenses; and (iv) any other fees or expenses approved by the Court. Agreement, ¶1.16.

3. Class Release

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

4. 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.

5. Class Representatives’ Service Award

Lead Counsel have not yet determined whether they will seek Service Awards. The Settlement provides that, prior to the deadline to opt out or object to the Settlement, Lead Counsel may seek, and ABB will not oppose, reasonable Service Awards for the Class Representatives. Agreement, ¶9.2. If any such Service Awards are requested, Lead Counsel will do so as part of a motion filed at least 14 days before the deadline to opt-out or object to the Settlement. 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 if requested and permitted would 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 ABB.

6. Attorneys' Fees and Costs

The Settlement also provides that, prior to the deadline to opt out or object to the Settlement, Lead Counsel may apply for, and ABB will not oppose, attorneys' fees that represent a reasonable percentage of the Settlement Fund, plus reimbursement of litigation costs and expenses. Agreement, ¶9.1. Lead Counsel will file any motion for fees and costs at least 14 days before the deadline to opt out or object to the Settlement.

7. Notice and Distribution

The Settlement provides that Claims Notice and Administration Expenses will be paid out of the Settlement Fund. Agreement, ¶¶1.16, 8.2. The Settlement Agreement further provides that Lead Counsel, without further approval of ABB, may pay from the Settlement Fund an amount to cover Class Notice and Administration Expenses, Taxes and Tax Expenses associated with providing notice to the Settlement Class up to \$500,000. Agreement, ¶¶3.9, 8.1-8.2. Plaintiffs request that the Court authorize Lead Counsel to spend up to \$500,000 of the Settlement Fund for Class Notice and Administration Expenses for the purposes of effectuating notice consistent with the Settlement Agreement and Rule 23. Any notice costs above \$500,000 will only be paid from the Settlement Fund subject to further application by Lead Counsel and Court approval.

Specifically, 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. As set forth below and in the declarations and exhibits supporting this motion, Plaintiffs have proposed the best notice practicable in accordance with the standards laid out under Rule 23(c)(2)(B).

III. ARGUMENT

Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Preliminary Approval of the ABB Settlement, authorize that up to \$500,000 of the Settlement Fund be utilized to provide notice, and approve the Notice Plan as described herein.

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-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 also looked to six factors set forth in *Bennett* (the “Bennett 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

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 COMPLEX 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. Guglielmo Decl., ¶44. Furthermore, a preliminary review of the factors related to the fairness, adequacy, and

³ Lead Counsel do not address the fifth factor related to objections to the Settlement because, at the preliminary-approval stage, notice has not yet been disseminated.

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 Lead Counsel believe that the claims asserted are meritorious and that Plaintiffs would prevail if this matter proceeded to trial. ABB 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. *Id.*, ¶45.

C. 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. Am. Express Co.*, 406 F. Supp. 2d 1298, 1318-19 (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 Lead 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. Gen. Elec. 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. . . .” (quoting *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 538 (S.D. Fla. 1988), *aff’d*, 899 F.2d 21 (11th Cir. 1990)); *see also* 4 NEWBERG ON CLASS ACTIONS §11.41.

The Settlement here is the result of intensive 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 overseen by former Judge Layn Phillips, one of the top mediators in the field. Guglielmo Decl., ¶29. As noted above, ABB and Plaintiffs also each separately participated in discussions with Judge Phillips’ staff regarding the strengths and weaknesses of their respective cases and exchanged detailed mediation briefs. *Id.*

Furthermore, Lead Counsel are particularly experienced in the litigation, certification, trial, and settlement of nationwide class action cases. *Id.*, ¶47. Lead Counsel zealously represented their clients throughout the litigation including, *inter alia*, prevailing at the motion to dismiss stage, conducting motion practice throughout the discovery process, which included review of more than 4.1 million pages of documents and electronic data as well as taking and defending approximately 68 depositions of party and non-party witnesses. *Id.*, ¶16. Lead Counsel ultimately prevailed at class certification and summary judgment, where this Court made its own independent determination that “Plaintiffs’ counsel are skilled and adequate in all respects.” (ECF No. 940 at 127 and No. 1091.)

In negotiating this Settlement, Lead 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. Lead Counsel conducted a thorough investigation and analysis of Plaintiffs’ claims and engaged in extensive discovery with ABB. Guglielmo Decl., ¶48. Lead 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. *See Francisco v. Numismatic Guaranty Corp. of Am.*, 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).

D. 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.⁴

1. Likelihood of Success at Trial

Plaintiffs and Lead Counsel are confident in the strength of their case but are also pragmatic in their awareness of the defenses available to ABB, and the risks inherent in trial and post-judgment appeal. As noted above, Plaintiffs defeated Defendants’ dismissal motions and successfully certified a class. The success of Plaintiffs’ claims, however, turned on questions that could arise again at trial and during any post-judgment appeal. Under the circumstances, Lead Counsel appropriately determined that the Settlement outweighs the risks of continued litigation. Guglielmo Decl., ¶48.

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

⁴ In addition to the reasons detailed herein, the Court should also preliminarily approve the ABB Settlement Class because the Settlement Class is substantively the same as the CVI settlement class already certified by the Court and substantially similar to the approved B&L settlement class and the Litigation Horizontal Class certified by the Court in its Order Granting Motion to Certify Class. *Compare* Agreement, ¶1.35 with ECF Nos. 940 and 1164.

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

2. 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 \$30,200,000 cash recovery is fair, particularly given the complexity of the litigation and the significant risks and barriers that loomed in the absence of Settlement including, but not limited to, further pre-trial motion, a jury trial, and any possible appellate review. As referenced above, the \$30,200,000 cash payment represents an increase in the settlements in this litigation when compared to the previously approved settlements with CVI and B&L in terms of dollar value of UPP commerce in the United States. During the Class Period, the volume of commerce of UPP lenses sold in the United States was approximately \$5.3 billion. *Guglielmo Decl.*, ¶41. During the Class Period, ABB distributed \$994,371,643 in UPP lens commerce. *Id.* The \$30.2 million settlement represents a total over 3% of ABB’s total UPP lens sales throughout the class period

and an over threefold increase in the dollar value of the settlement compared to the previously approved B&L settlement. *Id.*⁵

In light of ABB's defenses, and the challenging and unpredictable path of litigation and any appeal Plaintiffs and all Settlement Class Members would face absent a settlement, this Settlement is a good result and represents a fair and reasonable recovery for the Settlement Class.

3. 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).

4. 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 over five years of vigorously contested litigation including extensive pretrial discovery (including significant motion practice), the production and review of more than 571,000 documents, totaling more than 4.1 million pages, including more than 287,875 pages of documents produced by ABB alone. The Parties took 68 depositions of

⁵ For comparison, CVI's \$3 million settlement represented 1.6% of CVI's total UPP lens commerce and B&L's \$10 million settlement represented 2.7% of its UPP sales. *Id.*

Plaintiffs and Defendants' employees, and 35 depositions of third parties. This included five depositions of current and former ABB employees. The Parties also engaged in contested expert discovery and motions to exclude Plaintiffs' experts. Guglielmo Decl., ¶19.

Further, as detailed above, the Parties here had already litigated motions to dismiss, class certification, motions for summary judgment, and motions *in limine*. As a result, Lead 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.* Lead 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. Guglielmo Decl., ¶48.

E. The Proposed Notice Plan Is Substantially the Same and Builds off of the Prior Approved Notice Plan from the B&L and CVI Settlements

Plaintiffs previously sought and obtained approval of a notice plan that provided putative members of the CVI Settlement Class, the B&L Settlement Class, and the Litigation Classes of their rights. *See* ECF Nos. 1011, 11037, 1046, and 1164.

As described in greater detail below, Plaintiffs intend to use effectively the same means to provide notice as previously approved by this Court with two important additions. First, class members that have provided their email addresses to the claims administrator (*e.g.*, class members who submitted an electronic claim in one of the earlier settlements) will receive notice to the email account they provided. Second, class members who have made a timely and valid claim in the B&L and/or CVI settlements will not need to make a claim in the ABB settlement; they will be able to benefit without taking any further action. Using the same general means of notice, with these two additions, will promote efficiency, streamline costs, and avoid confusion.

Specifically, the notice plan here, like the earlier notice, features a multi-layered approach incorporating direct mailings, email, social media ads, and traditional publication notice. Azari,

Decl., ¶¶13-26. According to the proposed notice provider, Epiq, the various components of the Notice Plan will “effectively reach at least an estimated 70% of the Class (users of disposable contact lenses).” Azari Decl., ¶12. Courts routinely approve similar multi-layered notice programs. *See Morgan v. Public Storage*, 301 F. Supp. 3d 1237, 1261-66 (S.D. Fla. 2016) (notice primarily by email and newspaper advertising); *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 310 F.R.D. 300, 317-8 (E.D. La. 2015) (email, digital ads, and print publication). In addition, courts have consistently recognized that, in cases such as this where direct contact information is not available for all class members, “due process does not require that class members actually receive notice.” *Juris v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir. 2012).

Under the proposed Notice Plan, the first deadline for providing notice does not fall until 60 days after the Court approves the Notice Plan. Plaintiffs and the proposed Notice Administrator have already developed long form and short form notices with details about the ABB Settlement Agreement for the Court’s approval. *See* Azari Decl., Exs. 1 and 2. Because the Notice Plan includes “individual notice to all members who can be identified through reasonable efforts,” Fed. R. Civ. P. 23(c)(2)(B); *see also* Azari Decl., ¶10, it provides the “best notice practicable under the circumstances,” *id.*, ¶32, and should be approved.

Under the proposed Notice Plan, potential Settlement Class Members will be notified that those who have already made claims in either or both of the CVI and B&L settlements need not make another claim to be paid out of the ABB Settlement Fund, but will still have the right to object or opt out of the ABB Settlement, should they choose to do so. Azari Decl., Ex. 1, p. 1. This will limit duplicative claims and therefore save the Class money by reducing processing fees.

In addition, and due to an oversight in the earlier-disseminated notice concerning potential class members who only purchased B&L lenses, the proposed notice will also give class members

who purchased *only* B&L contact lenses subject to a UPP an additional opportunity to opt out of the Litigation Classes. Azari Decl., Ex. 1, pp. 1, 9; *see also Ackal v. Centennial Beauregard Cellular L.L.C.*, 700 F.3d 212, 216 (5th Cir. 2012) (“For any class certified under Rule 23(b)(3), the court must direct to class members . . . notice . . . that the court will exclude from the class any member who requests exclusion.”).

F. The Court Should Set a Schedule for Notice and Final Approval of the ABB Settlement

Plaintiffs request that the Court enter the below schedule:

Notice Date (Notice Mailing Completion, Updating of Website and Publication Notice)	60 Days After Preliminary Approval and Approval of Notice Plan
Plaintiffs’ Motions for Final Approval, Fees, Expenses, and/or Incentive Awards for the ABB Settlement	45 Days After Notice Date
Opt-Out, Objection, and Claim Deadline for ABB Settlement Class; and Opt-Out Deadline for B&L Only Purchasers from the Litigation Classes	60 Days After Notice Date
Plaintiffs’ Replies in Support of Motions for Final Approval, Fees, Expenses, and/or Incentive Awards for the ABB Settlement	90 Days After Notice Date
Fairness Hearing on ABB Settlement	115 Days After Notice Date

The proposed schedule, which gives members of the Settlement Class and the Litigation Classes 60 days from the Notice Date to exercise their rights, is consistent with schedules approved by other courts in antitrust and consumer class actions. *See Prather v. Wells Fargo Bank, N.A.*, 15-cv-04231, 2017 WL 770132, at *4 (N.D. Ga. Feb. 24, 2017) (approving 60-day opt-out and objection deadline); *Legg v. Spirit Airlines, Inc.*, No. 15-cv-61375, 2015 WL 11197784, at *2 (S.D. Fla. Oct. 28, 2015) (same); *see also Greco v. Ginn Dev. Co., LLC*, 635 Fed. Appx. 628, 634 (11th Cir. 2015) (“Courts have consistently held that 30 to 60 days between the mailing . . . of class notice and the last date to object or opt out, coupled with a few more weeks between the close of

objections and the settlement hearing, affords class members an adequate opportunity to evaluate and, if desired, take action concerning a proposed settlement.”) (citation omitted).

G. With Only Trial Remaining, Distribution of Funds Should Be Postponed to Save the Class from Incurring Unnecessary Costs

Plaintiffs respectfully request that the Court permit them to defer distribution of the net settlement funds for the CVI, B&L, and ABB settlements until a later date. The proposed Long Form Notice informs members of the Classes of Plaintiffs’ intention to defer distribution, and courts have considerable discretion in determining whether the distribution plan is “fair, reasonable and adequate.” *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1239 (11th Cir. 2011) (noting district court’s discretion); *see also Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015) (A plan for distribution need only “have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.”) (citation omitted).

In order to minimize administrative expenses and make distribution efficient, Plaintiffs propose to distribute the net settlement funds from the CVI, B&L, and ABB settlements, and any other judgments or settlements that may occur, once trial and any possible appeals are completed. By aggregating the disbursement of future settlements or judgments, Plaintiffs will minimize the impact of administrative fees on the total Net Settlement Funds. Deferral of disbursement of settlement funds is fair, reasonable, and adequate here because it will likely maximize class member recovery. *See, e.g., In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. 07-cv-05634, ECF No. 968 (N.D. Cal. Dec. 15, 2014) (order granting plan of allocation related to settling Defendants with claims not being paid until end of case); *In re Auto. Parts Antitrust Litig.*, No. 12-cv-00103, 2017 WL 3499291 (E.D. Mich. July 10, 2017) (approving plan of allocation for second round of settlements that contemplates paying class members at the end of the case to save expenses). Moreover, because the ABB Settlement Fund will not be fully funded until January

14, 2022, Agreement, ¶3.1, delaying distribution until more money is available to be distributed is in the best interests of the class members.

Once this litigation has been completely resolved, Plaintiffs intend to distribute the Net Settlement Funds to class members that made claims on a *pro rata* basis, subject to details specified in a motion to distribute funds be filed at a later date. The Notice Plan submitted herewith informs potential class members of this fact. *See* Azari Decl., Exs. 1-5.

IV. CONCLUSION

Based on the foregoing, Plaintiffs and Lead Counsel respectfully request that the Court: (1) grant Preliminary Approval to the Settlement; (2) approve and order the notice plan and the proposed opt-out and objection procedures; (3) stay the Action against ABB pending final approval of the Settlement; (4) establish a schedule with deadlines for notice, opting out, objecting, filing claims, and setting a fairness hearing, and (5) enter the [Proposed] Order Preliminarily Approving Class Settlement and Notice Plan, attached hereto as Exhibit C.

Dated: October 22, 2020

Respectfully submitted,

s/ Joseph P. Guglielmo
Joseph P. Guglielmo
Thomas K. Boardman
SCOTT+SCOTT
ATTORNEYS AT LAW LLP
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: (212) 223-6444
Facsimile: (212) 223-6334
jguglielmo@scott-scott.com
tboardman@scott-scott.com

John A. DeVault, III
Florida Bar No. 103979
BEDELL, DITTMAR, DEVAULT,
PILLANS & COXE, P.A.
101 East Adams Street
Jacksonville, FL 32202
Telephone: (904) 353-0211
Facsimile: (904) 353-9307
jad@bedellfirm.com

Plaintiffs' Local Counsel

Christopher M. Burke
SCOTT+SCOTT
ATTORNEYS AT LAW LLP
600 W. Broadway, Suite 3300
San Diego, CA 92101
Telephone: (619) 233-4565
Facsimile: (619) 233-0508
cburke@scott-scott.com

Co-Lead Class Counsel

Michael E. Lockamy
Florida Bar No. 69626
BEDELL, DITTMAR, DEVAULT,
PILLANS & COXE, P.A.
101 East Adams Street
Jacksonville, FL 32202
Telephone: (904) 353-0211
Facsimile: (904) 353-9307
mel@bedellfirm.com

Robert C. Gilbert
Florida Bar No. 561861
KOPELOWITZ OSTROW FERGUSON
WEISELBERG GILBERT
2800 Ponce de Leon Boulevard, Suite 1100
Coral Gables, FL 33134
Telephone: (305) 384-7270
gilbert@kolawyers.com

Plaintiffs' Liaison Counsel

Hollis Salzman
Eamon O'Kelly
Benjamin Steinberg
ROBINS KAPLAN LLP
399 Park Avenue, Suite 3600
New York, NY 10022
Telephone: (212) 980-7400
Facsimile: (212) 980-7499
hsalzman@robinskaplan.com
eokelly@robinskaplan.com
bsteinberg@robinskaplan.com

Co-Lead Class Counsel

Michael D. Hausfeld
James J. Pizzirusso
Nathaniel C. Giddings
HAUSFELD LLP
1700 K. St., NW, Suite 650
Washington, DC 20006
Telephone: (202) 540-7200
Facsimile: (202) 540-7201
mhausfeld@hausfeld.com
jpizzirusso@hausfeld.com
ngiddings@hausfeld.com

Michael P. Lehmann
Bonny E. Sweeney
Christopher L. Lebsock
HAUSFELD LLP
600 Montgomery Street, Suite 3200
San Francisco, CA 94111
Telephone: (415) 633-1908
Facsimile: (415) 217-6813
mlehmann@hausfeld.com
bsweeney@hausfeld.com
clebsock@hausfeld.com

Co-Lead Class Counsel

George W. Sampson
SAMPSON DUNLAP LLP
1001 4th Ave., Suite 3200
Seattle, WA 98154
Telephone: (206) 414-8340
george@sampsondunlap.com

Plaintiffs' Trial Counsel

Dennis Stewart
HULETT HARPER STEWART LLP
225 Broadway, Suite 1350
San Diego, CA 92101
Telephone: (619) 338-1133
Facsimile: (619) 338-1139
dennis@huletttharper.com

Plaintiffs' Trial Counsel

Steven C. Marks
PODHURST ORSECK, P.A.
One S.E. 3rd Avenue
Miami, FL 33131
Telephone: (305) 358-2800
Facsimile: (305) 358-2382
smarks@podhurst.com

Plaintiffs' Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 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.

Dated: October 22, 2020

s/ Joseph P. Guglielmo
Joseph P. Guglielmo

EXHIBIT A

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

In Re: DISPOSABLE CONTACT LENS ANTITRUST LITIGATION	Case No. 3:15-md-2626-HES-JRK Judge Harvey E. Schlesinger Magistrate Judge James R. Klindt
THIS DOCUMENT RELATES TO: All Class Actions	

SETTLEMENT AGREEMENT

This Stipulation and Agreement of Settlement (the “Stipulation” or the “Settlement Agreement”), dated September 22, 2020 (the “Execution Date”), submitted pursuant to Rule 23 of the Federal Rules of Civil Procedure and Rule 408 of the Federal Rules of Evidence, embodies a settlement (the “Settlement”) made and entered into by and among: (i) 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 (collectively, “Plaintiffs”), for themselves and on behalf of each Settlement Class Member, on the one hand, and (ii) Defendant ABB Optical Group LLC (“ABB”), on the other hand, by and through their counsel of record in the above-captioned litigation pending in the United States District Court for the Middle District of Florida, Jacksonville Division, and any other actions that may be transferred or consolidated into this litigation (the “Action”). This Stipulation is intended by the parties to fully, finally, and forever resolve, discharge, and settle the Released Claims upon and subject to the terms and conditions hereof and subject to the approval of the Court. Throughout this Stipulation, all capitalized terms used, but not immediately defined, have the meanings given to them in Section IV.1 below.

I. PLAINTIFFS’ CLAIMS AND BENEFITS OF SETTLEMENT

Plaintiffs’ Lead Counsel believe Plaintiffs’ claims asserted in the Action have merit. However, Lead Counsel recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the Action against ABB through trial and potential appeal. Lead Counsel also have taken into account the uncertain outcome and risks of further litigation, especially in complex matters such as this Action. Lead Counsel also are aware of the risks presented by ABB’s arguments at trial or on appeal. Lead Counsel believe that the Settlement set forth in this Stipulation confers substantial benefits upon the Settlement Class in light of the circumstances present here. Based on their evaluation, Lead Counsel have determined that the

Settlement set forth in this Stipulation is in the best interests of Plaintiffs and the Settlement Class, and is fair, reasonable, and adequate.

II. ABB'S DENIALS OF WRONGDOING AND LIABILITY

ABB has consistently denied and continues to deny that it has violated any laws and maintains that its conduct was at all times proper and in compliance with all applicable provisions of law in all material respects. ABB has denied and continues to deny specifically each and all of the claims and contentions of wrongful conduct alleged in the Action, along with all charges of wrongdoing or liability against it arising out of any of the conduct alleged, or that could have been alleged, in the Action.

III. ABB'S USE OF UNILATERAL PRICING POLICIES TO DATE

Commencing in approximately mid-2013 and ending in 2017, Alcon Vision LCC f/k/a Alcon Laboratories, Inc. ("Alcon"); Bausch & Lomb, Inc. ("B&L"); Johnson & Johnson Vision Care, Inc. ("JJVC"); and Cooper Vision, Inc. ("CVI") (collectively the "Manufacturers") adopted "Unilateral Pricing Policies" or "UPPs" on certain brands of disposable contact lenses. During the Settlement Class Period, ABB was an authorized distributor of disposable contact lenses subject to the UPPs.

IV. TERMS OF STIPULATION AND AGREEMENT OF SETTLEMENT

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among the Plaintiffs, on the one hand, and ABB, on the other hand, by and through their respective counsel of record, that, subject to the approval of the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, in consideration of the benefits flowing to the parties from the Settlement set forth herein, the Released Claims shall be finally and fully compromised, settled, and released as to all Released Parties, and the Action shall be settled, compromised, and dismissed with prejudice as to the Released ABB Parties, without costs, except as stated herein, and with releases extended as set

forth in this Settlement Agreement, upon and subject to the terms and conditions of the Stipulation, as follows.

1. Definitions

As used in this Stipulation the following terms have the meanings specified below:

1.1. “Amended Complaint” means the Plaintiffs’ Interlineation to Corrected Consolidated Class Action Complaint, filed in this Action on March 1, 2017.

1.2. “Authorized Claimant” means any Settlement Class Member who submits a timely and valid Proof of Claim and Release Form and whose claim for recovery has been allowed pursuant to the terms of the Stipulation.

1.3. “Bar Date” is defined in Paragraph 8.5.

1.4. “Claims Administrator” means an administrator to be chosen at a later date by Plaintiffs.

1.5. “Class Notice and Administration Expenses” means the fees and expenses reasonably and actually incurred in connection with providing notice, locating Settlement Class Members, assisting with the filing of claims, administering and distributing the Net Settlement Fund to Authorized Claimants, processing Proof of Claim and Release Forms, and paying escrow fees and costs, if any.

1.6. “Court” means the United States District Court for the Middle District of Florida, Jacksonville Division.

1.7. “Defendants” means any and all parties named as defendants in the Amended Complaint and/or in any further amended complaint or pleading filed in this Action, including Alcon Vision LLC f/k/a Alcon Laboratories, Inc. (“Alcon”); Bausch & Lomb, Inc. (“B&L”); Johnson & Johnson Vision Care, Inc. (“JJVC”); Cooper Vision, Inc. (“CVI”); and ABB.

1.8. “Effective Date” means the first date by which all of the events and conditions

specified in Paragraph 10.1 of the Stipulation have been met and have occurred.

1.9. “Escrow Account” means the account controlled by the Escrow Agent into which the sum of \$30,200,000 (thirty million, two hundred thousand dollars) shall be deposited by or on behalf of ABB on the schedule set forth in paragraph 3.1 of this Settlement Agreement.

1.10. “Escrow Agent” means Huntington National Bank.

1.11. “Fee and Expense Application” is defined in Paragraph 9.1.

1.12. “Fee and Expense Award” is defined in Paragraph 9.1.

1.13. “Final” means when the last of the following with respect to the judgment approving the Settlement shall occur: (i) the expiration of the time to file a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) without any such motion having been filed; (ii) the expiration of the time in which to appeal the judgment without any appeal having been taken, which date shall be deemed to be thirty (30) days following the entry of the judgment, unless the date to take such an appeal shall have been extended by Court order or otherwise, or unless the 30th day falls on a weekend or a Court holiday, in which case the date for purposes of this Stipulation shall be deemed to be the next business day after such 30th day; and (iii) if a motion to alter or amend is filed under Federal Rule of Civil Procedure 59(e) or if an appeal is taken, immediately after the determination of that motion or appeal so that it is no longer subject to any further judicial review or appeal whatsoever, whether by reason of affirmance by a court of last resort, lapse of time, voluntary dismissal of the appeal or otherwise, and in such a manner as to permit the consummation of the Settlement substantially in accordance with the terms and conditions of this Stipulation. For purposes of this paragraph, an “appeal” shall include any petition for a writ of certiorari or other writ that may be filed in connection with approval or disapproval of this Settlement, but shall not include any appeal that concerns only the issue of attorneys’ fees

and expenses, any service awards to Plaintiffs, or any Plan of Allocation of the Net Settlement Fund.

1.14. “Judgment and Order of Dismissal” means the judgment and order of dismissal with prejudice to be rendered by the Court upon approval of the Settlement, in substantially the form of Exhibit B attached hereto, or such other substantially similar form agreed to by the Settling Parties.

1.15. “Lead Counsel” or “Plaintiffs’ Lead Counsel” means Scott+Scott, Attorneys at Law, LLP, Hausfeld, LLP, and Robins Kaplan LLP.

1.16. “Net Settlement Fund” means the Settlement Fund less: (i) the amount of the Fee and Expense Award and any Plaintiffs’ Service Award, if requested, and to the extent allowed by the Court; (ii) Class Notice and Administration Expenses; (iii) Taxes and Tax Expenses; and (iv) any other fees or expenses approved by the Court.

1.17. “Notice” means the Notice of Pendency and Proposed Settlement of Class Action to be sent to Settlement Class Members, as approved by the Court. Plaintiffs have full discretion as to when to inform the Court to issue notice of this Settlement, provided that Plaintiffs will file a motion for preliminary approval of the settlement within 30 (thirty) days of execution of this Settlement Agreement.

1.18. “Opt-Outs” is defined in Paragraph 10.4.

1.19. “Person” means a natural person, individual, corporation, partnership, limited partnership, association, pension fund, mutual fund, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, any business or legal entity and his, her or its spouses, heirs, predecessors, successors, representatives, beneficiaries, trustees, or assignees, and any other entity on behalf of

whom the person has a legal right to make or release a claim.

1.20. “Plaintiffs” means 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.

1.21. “Plaintiffs’ Counsel” means Lead Counsel and any counsel who appeared on behalf of Plaintiffs in the Action.

1.22. “Plaintiffs’ Service Award” is defined in Paragraph 9.2.

1.23. “Plaintiffs’ Service Award Application” is defined in Paragraph 9.2.

1.24. “Plan of Allocation” means a plan or formula of allocation of the Net Settlement Fund pursuant to which the Net Settlement Fund shall be distributed to Authorized Claimants. Any Plan of Allocation is not part of the Stipulation, and the Released ABB Parties shall have no responsibility or liability with respect to the Plan of Allocation.

1.25. “Preliminary Approval Order” means the order requesting, *inter alia*, the preliminary approval of the Settlement set forth in the Stipulation, in substantially the form of Exhibit A attached hereto, or such other substantially similar form agreed to by the Settling Parties. Plaintiffs will file a motion for preliminary approval of the settlement within 30 (thirty) days of execution of this Settlement Agreement.

1.26. “Proof of Claim and Release Form” means the form as eventually approved by the Court for such use.

1.27. “Released Claims” means the Released Class Claims and the Released ABB Parties’ Claims.

1.28. “Released Class Claims” means that upon final judicial approval of the settlement, Plaintiffs and the Settlement Class Members will release and covenant not to sue ABB and each

of ABB's past or present direct and indirect parents (including holding companies), subsidiaries, affiliates, associates (all as defined in SEC Rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), divisions, joint ventures, predecessors, successors, agents, attorneys, legal or other representatives, insurers (including reinsurers and co-insurers), assigns, assignees, and current and former employees, officers, directors, and shareholders of any of the foregoing entities, to the fullest extent that the law permits their release, with respect to any and all manner of claims, including Unknown Claims, causes of action, cross-claims, counter-claims, charges, liabilities, demands, judgments, suits, obligations, debts, setoffs, rights of recovery, or liabilities for any obligations of any kind whatsoever (however denominated), whether class or individual, in law or equity or arising under constitution, statute, regulation, ordinance, contract, or otherwise in nature, for fees, costs, penalties, fines, debts, expenses, attorneys' fees, and damages, whenever incurred, and liabilities of any nature whatsoever (including joint and several), known or unknown, suspected or unsuspected, asserted or unasserted, which the Plaintiffs and each of the Settlement Class Members ever had, now have, or hereafter can, shall or may have, whether individually, representatively, derivatively, or in any other capacity, arising from or relating in any way to the adoption, implementation, and/or enforcement of minimum resale price maintenance policies in the distribution, pricing, marketing, advertising, purchase, sale, and/or use of disposable contact lenses subject to a UPP during the Settlement Class Period, as defined below.

1.29. "Released Class Parties" and "Releasing Class Parties" means each of the Plaintiffs and each Settlement Class Member.

1.30. "Released Parties' Claims" means any and all manner of claims, including Unknown Claims, that arise out of or relate in any way to the Releasing Class Parties' or Lead Counsel's institution, prosecution, or settlement of the claims, except for claims relating to the

enforcement of the Settlement.

1.31. “Released ABB Parties,” or “Releasing ABB Parties” means ABB and each of ABB’s past or present direct and indirect parents (including holding companies), subsidiaries, affiliates, associates (all as defined in SEC Rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), divisions, joint ventures, predecessors, successors, agents, attorneys, legal or other representatives, insurers (including reinsurers and co-insurers), assigns, assignees, and current and former employees, officers, directors, and shareholders of any of the foregoing entities.

1.32. “Released Parties” means Released ABB Parties and Released Class Parties.

1.33. “Releasing Parties” means the Releasing ABB Parties and the Releasing Class Parties.

1.34. “Settlement Amount” means \$30,200,000 (thirty million, two hundred thousand dollars) in cash.

1.35. “Settlement Class” means all persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, CVI, 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 alleged co-conspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

1.36. “Settlement Class Member” means a Person who falls within the definition of the

Settlement Class and has not timely and validly excluded himself, herself, or itself in accordance with the procedures established by the Court.

1.37. “Settlement Class Period” means the period June 1, 2013 to December 4, 2018.

1.38. “Settlement Fund” means the Settlement Amount, together with all interest and income earned thereon after being transferred to the Escrow Account.

1.39. “Settlement Hearing” is defined in Paragraph 6.3.

1.40. “Settling Parties” means Plaintiffs and ABB.

1.41. “Summary Notice” means the summary notice form as eventually approved by the Court.

1.42. “Taxes” is defined in Paragraph 4.3.

1.43. “Tax Expenses” is defined in Paragraph 4.3.

1.44. “Termination Notice” is defined in Paragraph 10.2.

1.45. “Unknown Claims” means any and all Released Claims against the Released Parties which Releasing Parties do not know or suspect to exist in his, her, or its favor as of the Effective Date, which if known by the Releasing Parties or Released Parties might have affected his, her, or its decision(s) with respect to the Settlement. With respect to any and all Released Claims, the parties stipulate and agree that, by operation of the Judgment and Order of Dismissal, upon the Effective Date, Releasing and Released Parties shall have expressly waived, and each Settlement Class Member shall be deemed to have waived and by operation of the Judgment and Order of Dismissal shall have expressly waived, the provisions, rights, and benefits of Cal. Civ. Code Section 1542, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE

MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

and any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to Cal. Civ. Code Section 1542. The Releasing Parties and Released Parties may hereafter discover facts other than or different from those which he, she, or it now knows or believes to be true with respect to the subject matter of the Released Claims. Nevertheless, the Releasing Parties shall expressly, fully, finally, and forever settle and release, and each Settlement Class Member upon the Effective Date shall be deemed to have and by operation of the Judgment and Order of Dismissal shall have, fully, finally, and forever settled and released, any and all of their respective Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. The Settling Parties acknowledge that the inclusion of Unknown Claims in the definition of Released Claims was separately bargained for and was a key element of the Settlement Agreement.

1.46. “Unilateral Pricing Policy” or “UPP” means a policy enacted by a manufacturer which announces a minimum retail price for one or more of its contact lenses and states that it will not make such lenses available to customers that continue to resell or advertise the product below the announced minimum price.

2. CAFA Notice

2.1. Pursuant to the Class Action Fairness Act (“CAFA”), no later than ten (10) days after the Settlement Agreement is filed with the Court, Lead Counsel shall cause its notice vendor to timely serve, on ABB’s behalf, proper notice of the proposed Settlement upon those who are entitled to such notice pursuant to CAFA.

3. The Settlement

A. The Settlement Fund

3.1. ABB shall pay \$500,000 of the Settlement Amount in cash into the Escrow Account controlled by the Escrow Agent within fifteen (15) days of the Court's entry of the Preliminary Approval Order, provided that the time by which ABB must pay into the Escrow Account does not begin to run until Lead Counsel has provided ABB with such information as ABB may require to complete the wire transfer. ABB shall deposit the remainder of the Settlement Amount (\$29,700,000) into the Escrow Account as follows: 50% of the remainder (\$14,850,000) by April 15, 2021, and 50% of the remainder, (\$14,850,000) by January 14, 2022.

3.2. Plaintiffs shall have the right, but not the obligation, to terminate the Settlement Agreement after the failure of ABB to timely pay the Settlement Amount in accordance with Paragraph 3.1, if ABB fails to cure such failure within seven (7) business days of receiving a written notice from Lead Counsel demanding such cure. In the event of such a termination under this paragraph, any judgment dismissing ABB from the litigation shall be vacated pursuant to an *ex parte* application of Lead Counsel to the Court, and the litigation shall thereafter resume against ABB, provided, however, that any expenses actually incurred or due and owing from the Escrow Account prior to the termination of the Settlement Agreement shall not be refunded to ABB, and ABB shall have no right to seek reimbursement from any Person for such amount.

3.3. Except as required by Paragraph 3.1 concerning payment of the Settlement Amount, and except as provided in Paragraphs 3.2 and 5.1 concerning refund upon termination of the Settlement, ABB shall have no responsibility for any other costs, including any attorneys' fees and expenses or costs of class notice and claims administration, but all such fees, expenses, and costs shall be paid from the Settlement Fund, as approved by the Court. For the sake of clarity, ABB shall bear its own cost in complying with its obligations set forth in Section 11.

B. The Escrow Agent

3.4. The Escrow Agent shall invest the Settlement Amount deposited pursuant to Paragraph 3.1 in instruments backed by the full faith and credit of the United States Government or fully insured by the United States Government or an agency thereof and shall reinvest the proceeds of these instruments as they mature in similar instruments at their then-current market rates. All costs and risks related to the investment of the Settlement Fund in accordance with the guidelines set forth in this paragraph shall be borne by the Settlement Fund.

3.5. Neither the Settling Parties nor their counsel shall have any responsibility for or liability whatsoever with respect to any losses suffered by, or fluctuations in the value of, the Settlement Fund.

3.6. The Escrow Agent shall not disburse the Settlement Fund except: (a) as provided in the Stipulation; (b) by an order of the Court; or (c) with the written agreement of counsel for the Settling Parties.

3.7. Subject to further order(s) and/or directions as may be made by the Court, or as provided in the Stipulation, the Escrow Agent is authorized to execute such transactions as are consistent with the terms of the Stipulation. The Released Parties shall have no responsibility for, interest in, or liability whatsoever with respect to the actions of the Escrow Agent or any transaction executed by the Escrow Agent.

3.8. All funds held by the Escrow Agent shall be deemed and considered to be in *custodia legis* of the Court and shall remain subject to the jurisdiction of the Court until such time as such funds shall be distributed in their entirety in accordance with Paragraphs 8.4, 8.5, 8.8, and 8.10.

3.9. Prior to the Effective Date, Lead Counsel, without further approval of ABB, may pay from the Settlement Fund an amount up to \$500,000.00 to cover Class Notice and

Administration Expenses, Taxes, and Tax Expenses associated with providing notice to the Settlement Class and the administration of the Settlement. Subsequent to the Effective Date, without further approval by ABB, the Settlement Fund may be used by Lead Counsel to pay all reasonable and necessary Class Notice and Administration Expenses.

4. Taxes

4.1. The Settling Parties agree to treat the Settlement Fund as being at all times a “Qualified Settlement Fund” within the meaning of Treasury Regulations §1.468B-1 and agree not to take any position for tax purposes inconsistent therewith. In addition, the Escrow Agent shall timely make such elections as necessary or advisable to carry out the provisions of this Section 4, including the “relation-back election” (as defined in Treasury Regulations §1.468B-1) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Escrow Agent to timely and properly prepare and deliver, or cause to be prepared and delivered, the necessary documentation for signature by all necessary parties, and thereafter to cause the appropriate filing to occur.

4.2. For the purpose of Section 468B of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder, the “administrator” shall be the Escrow Agent. The Escrow Agent shall timely and properly file, or cause to be filed, all informational and other tax returns necessary or advisable with respect to the Settlement Fund (including, without limitation, the returns described in Treasury Regulations §1.468B-2(k)).

4.3. All (a) taxes (including any estimated taxes, interest, or penalties) arising with respect to the income earned on the Settlement Amount, including any taxes or tax detriments that may be imposed upon the Settling Parties or their counsel with respect to any income earned on the Settlement Amount for any period during which the Settlement Amount does not qualify as a

“Qualified Settlement Fund” for federal or state income tax purposes (“Taxes”), and (b) expenses and costs incurred in connection with the operation and implementation of this Section 4 (including, without limitation, expenses of tax attorneys and/or accountants, mailing and distribution costs and expenses relating to filing (or failing to file) the returns described in this Section 4) (“Tax Expenses”), shall be paid out of the Settlement Amount; in all events the Settling Parties and their counsel shall have no liability or responsibility for the Taxes or the Tax Expenses. Further, Taxes and Tax Expenses shall be treated as, and considered to be, a cost of administration of the Settlement Fund and shall be timely paid by the Escrow Agent out of the Escrow Account without prior approval of ABB, and the Escrow Agent shall be obligated (notwithstanding anything herein to the contrary) to withhold from distribution to Authorized Claimants any funds necessary to pay such amounts, including the establishment of adequate reserves for any Taxes and Tax Expenses (as well as any amounts that may be required to be withheld under Treasury Regulation §1.468B-2(1)(2)). The Settling Parties hereto agree to cooperate with the Escrow Agent, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions of this Section 4.

5. Refund upon Termination of Settlement

5.1. In the event the Settlement: (i) is not approved; (ii) is terminated, canceled, or fails to become effective for any reason, including, without limitation, in the event the Judgment and Order of Dismissal is reversed or vacated following any appeal taken therefrom; or (iii) is successfully collaterally attacked, the Settlement Fund (including accrued interest) less up to \$500,000 in expenses actually incurred or due and owing for Class Notice and Administration Expenses, Taxes, or Tax Expenses pursuant to Paragraphs 3.9 and 4.3, shall be refunded to ABB. ABB shall have no right to seek reimbursement from any Person for the expenses actually incurred or due and owing for Class Notice and Administration Expenses, Taxes, or Tax Expenses.

6. Preliminary Approval Order and Settlement Hearing

6.1. Lead Counsel shall submit the Stipulation to the Court and shall apply for entry of the Preliminary Approval Order in the form of Exhibit A attached hereto, requesting, *inter alia*, the preliminary approval of the Settlement set forth in the Stipulation. Though the parties agree that it is not practical to establish a timeline or to create the detailed contents of a Notice at this time, the eventual Notice, to also be approved by the Court prior to distribution, will set forth a summary of the terms of the Stipulation (including a description of the Released Class Claims); the proposed Plan of Allocation and Lead Counsel's request for attorneys' fees, costs and expenses; the date and time of the Settlement Hearing; the right to object to the Settlement, proposed Plan of Allocation, or request for fees and expenses; the right to appear at the Settlement Hearing; and the right to request exclusion from the Settlement Class.

6.2. It shall be the Claims Administrator's responsibility, under supervision of Lead Counsel, to disseminate the Notice and Summary Notice in accordance with this Stipulation and as ordered by the Court. Settlement Class Members shall have no recourse as to the Released ABB Parties, counsel for ABB, Plaintiffs, and Plaintiffs' Counsel with respect to any claims they may have that arise from any failure of the notice process.

6.3. Lead Counsel shall request that after notice is given to the Settlement Class, the Court hold a hearing (the "Settlement Hearing") and approve the Settlement of the Action as set forth herein. At or after the Settlement Hearing, Lead Counsel also shall request that the Court approve the proposed Plan of Allocation and the Fee and Expense Award and, if requested, the Plaintiffs' Service Award.

7. Releases

7.1. Upon the Effective Date, Plaintiffs and each of the Settlement Class Members shall be deemed to have, and by operation of the Judgment and Order of Dismissal shall have, fully,

finally, and forever released, relinquished, and discharged against the Released ABB Parties (whether or not such Settlement Class Member executes and delivers a Proof of Claim and Release Form) any and all Released Class Claims (including, without limitation, Unknown Claims). Claims to enforce the terms of this Stipulation are not released. The Released ABB Parties and Plaintiffs acknowledge, and each of the Settlement Class Members shall be deemed by operation of law to acknowledge, that the waiver of Unknown Claims, and of the provisions, rights and benefits of Section 1542 of the California Civil Code, was bargained for and is a key element of the Settlement of which the release in this paragraph is a part. The releases set forth herein are to be construed pursuant to New York law, including N.Y. General Obligations Law Section 15-108, which bars claims for contribution by joint tortfeasors and other similar claims. It is an express and material condition of this Agreement that it is intended to absolve the Released ABB Parties of any claims for contribution, indemnification or similar claims from any Person, including any other Defendants in the Action, arising out of or related to the Released Claims, in the manner and to the fullest extent permitted under the law of New York or any other jurisdiction that might be construed or deemed to apply to any claims for contribution, indemnification or similar claims against any of the Released ABB Parties. The Judgment and Order of Dismissal shall, to the extent not prohibited by law, contain a bar on such claims for all or a portion of any amounts paid or awarded in the Action by way of settlement, judgment, or otherwise.

7.2. Upon the Effective Date, Plaintiffs and each of the Settlement Class Members and anyone claiming through or on behalf of them, shall be permanently barred and enjoined from the commencement, assertion, institution, maintenance, prosecution, or enforcement of any action or other proceeding in any court of law or equity, arbitration tribunal, administrative forum, or forum of any kind, asserting any of the Released Class Claims against the Released ABB Parties and any

claims arising out of, relating to, or in connection with the defense, settlement, or resolution of the Action or the Released Class Claims, except for claims relating to the enforcement of the Settlement.

7.3. Upon the Effective Date, each of the Releasing ABB Parties shall be deemed to have, and by operation of the Judgment and Order of Dismissal shall have, fully, finally, and forever released, relinquished, and discharged Plaintiffs, each and all of the Settlement Class Members, and Plaintiffs' Counsel from any and all Released ABB Parties' Claims (including, without limitation, Unknown Claims) arising out of, relating to, or in connection with, the institution, prosecution, assertion, settlement, or resolution of the Action or the Released Class Claims, except for claims relating to the enforcement of the Settlement. The Releasing ABB Parties, Plaintiffs, and Plaintiffs' Counsel acknowledge, and the Settlement Class Members shall be deemed by operation of law to acknowledge, that the waiver of Unknown Claims, and of the provisions, rights, and benefits of Section 1542 of the California Civil Code, was bargained for and is a key element of the Settlement of which the release in this paragraph is a part.

8. Administration and Calculation of Claims, Final Awards, and Supervision and Distribution of the Settlement Fund

8.1. The Claims Administrator, subject to such supervision and direction of the Court or Lead Counsel, shall provide notice of the Settlement to the Class, shall administer and calculate the claims submitted by Settlement Class Members pursuant to the Plan of Allocation, and shall oversee distribution of the Net Settlement Fund to Authorized Claimants. In no case shall notice of settlement include the logos of ABB or the products it sells, disparage ABB, or otherwise suggest that the settlement is an admission of liability or damages.

8.2. The Notice and Proof of Claim and Release Form shall also be posted on the Claims Administrator's website. In accordance with the schedule to be approved by the Court, the

Summary Notice will be distributed by means approved by the Court. The cost of providing such notice shall be paid out of the Settlement Fund and not by ABB.

8.3. The Settlement Fund shall be applied as follows:

8.3.1. to pay all Class Notice and Administration Expenses;

8.3.2. to pay the Taxes and Tax Expenses;

8.3.3. to pay the Fee and Expense Award subject to the approval of the Court;

8.3.4. to pay any Plaintiffs' Service Award subject to the approval of the Court; and

8.3.5. after the Effective Date, to distribute the Net Settlement Fund to Authorized Claimants pursuant to the Stipulation and the Plan of Allocation, as approved by the Court.

8.4. Upon the Effective Date and thereafter, and in accordance with the terms of the Stipulation, the Plan of Allocation, or such further approval and further order(s) of the Court as may be necessary or as circumstances may require, the Net Settlement Fund shall be distributed to Authorized Claimants, subject to and in accordance with the following.

8.5. Each Person claiming to be an Authorized Claimant shall be required to submit to the Claims Administrator a completed Proof of Claim and Release Form postmarked or submitted electronically by the date specified in the Preliminary Approval Order, or such other time as may be set by the Court (the "Bar Date"), supported by such documents as are specified in the Proof of Claim and Release Form.

8.6. Except as otherwise ordered by the Court, all Settlement Class Members who fail to submit a Proof of Claim and Release Form by the Bar Date, or such other period as may be ordered by the Court, or who submit a Proof of Claim and Release Form that is rejected, shall be

forever barred from receiving any payments pursuant to the Stipulation and the Settlement set forth herein, but will in all other respects be subject to and bound by the provisions of the Stipulation, the releases contained herein, and the Judgment and Order of Dismissal. Notwithstanding the foregoing, Lead Counsel shall have the discretion (but not the obligation) to accept late-submitted claims for processing by the Claims Administrator, so long as the distribution of the Net Settlement Fund to Authorized Claimants is not materially delayed thereby. No Person shall have any claim against Plaintiffs, Plaintiffs' Counsel, or the Claims Administrator by reason of the decision to exercise or not exercise such discretion.

8.7. The Claims Administrator shall calculate the claims of Authorized Claimants substantially in accordance with the Plan of Allocation set forth in the Notice and approved by the Court. ABB will have no involvement in reviewing or challenging claims. Following the Effective Date, the Claims Administrator shall distribute the Net Settlement to Authorized Claimants pursuant to the Plan of Allocation.

8.8. Lead Counsel shall provide the Plan of Allocation to ABB for review and comment at least ten (10) business days before submitting it to the Court. ABB shall provide its comments on the Plan of Allocation to Lead Counsel within seven (7) business days of receiving it. ABB shall take no position in any Court proceedings with respect to the Plan of Allocation or any other such plan as may be approved by the Court.

8.9. Other than in the event of the termination of the Settlement pursuant to Paragraphs 3.2, 5.1 or as provided in Paragraphs 9.3 and 10.6, ABB shall not have a reversionary interest in the Net Settlement Fund. If there is any balance remaining in the Net Settlement Fund after a reasonable period of time after the initial date of distribution of the Net Settlement Fund, the Claims Administrator shall, if feasible, allocate such balance among Authorized Claimants in an

equitable and economic fashion. These redistributions shall be repeated until the remaining balance in the Net Settlement Fund is de minimis, and any such remaining balance shall be donated to an appropriate 501(c)(3) non-profit organization selected by Lead Counsel and approved by the Court.

8.10. The finality of the Court's Judgment and Order of Dismissal approving the Stipulation shall not be conditioned on any ruling by the Court concerning the Plan of Allocation of the Net Settlement Fund. Any order or proceeding relating to a request for approval of the Plan of Allocation, or any appeal from any order relating thereto or reversal or modification thereof, shall not operate to terminate the Settlement Agreement or affect or delay the Effective Date or the effectiveness or finality of the Judgment and Order of Dismissal and the release of the Released Claims.

8.11. No Person shall have any claim against Plaintiffs, Plaintiffs' Counsel, Released Parties, ABB, ABB's counsel, or the Claims Administrator based on distributions made substantially in accordance with the Stipulation and the Settlement contained herein, the Plan of Allocation, or otherwise as further ordered by the Court. This provision does not include any claim by any party for breach of this Stipulation.

9. Plaintiffs' Counsel's Attorneys' Fees, Costs, Charges, and Expenses

9.1. Plaintiffs' Counsel will submit an application or applications (the "Fee and Expense Application") to the Court for an award from the Settlement Fund of: (i) attorneys' fees, in an amount that is a reasonable percentage of the Settlement Fund; (ii) reimbursement of litigation expenses and costs incurred in connection with the prosecution of the Action; (iii) interest on such attorneys' fees, expenses, and costs at the same rate as the earnings in the Settlement Fund, accruing from the inception of the Settlement Fund until the attorneys' fee, expenses, and costs are paid; and (iv) service awards (if any) for Plaintiffs in conjunction with their representation of the Class. All such requested amounts will be disclosed in the notices provided to members of the

Settlement Class. Attorneys' fees, expenses, and costs, and interest awarded by the Court (the "Fee and Expense Award") to Plaintiffs' Counsel shall be paid from the Settlement Fund to Plaintiffs' Counsel immediately upon entry by the Court of an order awarding such amounts, notwithstanding the existence of any timely filed objections. Lead Counsel shall in its sole discretion determine whether any portion of any Fee and Expense Award shall be distributed to Plaintiffs' Counsel before the Effective Date. Lead Counsel shall allocate any Fee and Expense Award among Plaintiffs' Counsel in a manner which they in good faith believe reflects the contribution of those counsel to the prosecution and settlement of the Action. Service awards awarded by the Court to Plaintiffs shall be paid from the Settlement Fund to Plaintiffs only after the Effective Date has occurred.

9.2. Plaintiffs may submit an application or applications to the Court (the "Plaintiffs' Service Award Application") for an award for their time and expense in representing the Settlement Class. Any such amounts awarded to Plaintiffs, as approved by the Court (the "Plaintiffs' Service Award"), shall be payable solely out of the Settlement Fund.

9.3. The Fee and Expense Award shall be paid to Lead Counsel from the Settlement Fund, as ordered, immediately following entry of an order by the Court granting such award. In the event that the Effective Date does not occur, or the order making the Fee and Expense Award pursuant to Paragraph 9.1 is reversed or modified by final non-appealable order, or if this Stipulation is cancelled or terminated for any reason, and in the event any part of the Fee and Expense Award has been paid, then Plaintiffs' Counsel shall, in an amount consistent with such reversal, modification, cancellation, or termination, refund such fees or expenses to the Settlement Fund, plus interest earned thereon at the same rate as earned on the Settlement Fund, within thirty (30) days from receiving notice from ABB's counsel or from a court of competent jurisdiction.

Any refunds required pursuant to this paragraph shall be the several obligation of each Plaintiffs' Counsel receiving fees or expenses to make appropriate refunds or repayments to the Settlement Fund. Each Plaintiffs' Counsel, as a condition of receiving such fees and/or expenses on behalf of itself and each partner and/or shareholder of it, agrees that its law firm and its partners and/or shareholders are subject to the jurisdiction of the Court for the purpose of enforcing the provisions of this paragraph.

9.4. The procedure for and the allowance or disallowance by the Court of the Fee and Expense Award or Plaintiffs' Service Award to be paid out of the Settlement Fund are not part of the Settlement, and any order or proceeding relating to the Fee and Expense Application or Plaintiffs' Service Award, or any appeal from any order relating thereto or reversal or modification thereof, shall not operate to terminate or cancel the Settlement, or affect or delay the finality of the Judgment and Order of Dismissal (including the releases contained herein).

9.5. The Released ABB Parties shall not have any responsibility for or liability with respect to the payment of any Fee and Expense Award to any Plaintiffs' Counsel, or with respect to the allocation among Plaintiffs' Counsel and/or any other Person who may assert some claim thereto, of any Fee and Expense Award that the Court may make in the Action.

10. Conditions of Settlement and Effect of Disapproval, Cancellation, or Termination

10.1. The Effective Date of the Stipulation shall be conditioned on the occurrence of all of the following events:

- 10.1.1. execution of this Stipulation and such other documents as may be required to obtain final Court approval of the Stipulation;
- 10.1.2. ABB's initial contribution of the Settlement Amount has been deposited into the Escrow Account as provided by Paragraph 3.1;

10.1.3. no Settling Party has exercised its option to terminate the Stipulation pursuant to Paragraph 10.2;

10.1.4. the Court has entered the Preliminary Approval Order; and

10.1.5. the Court has entered the Judgment and Order of Dismissal that, *inter alia*, dismisses with prejudice the Action as to ABB.

10.2. Plaintiffs, through Lead Counsel, and ABB, through ABB's counsel, shall, in each of their separate discretions, have the right to terminate the Settlement set forth in this Settlement Agreement by providing written notice of their election to do so ("Termination Notice") to all other Parties hereto within thirty (30) days of the date on which: (i) the Court enters an order declining to enter the Preliminary Approval Order in any material respect; (ii) the Court enters an order refusing to approve this Settlement Agreement or any material part of it; (iii) the Court enters an order declining to enter the Judgment and Order of Dismissal in any material respect; or (iv) the Judgment and Order of Dismissal is modified or reversed by a court of appeal or any higher court in any material respect. Notwithstanding this paragraph, the Court's determination as to the Fee and Expense Application, Plaintiffs' Service Award Application, and/or any Plan of Allocation, or any determination on appeal from any such order, shall not provide grounds for termination of this Settlement Agreement or Settlement.

10.3. The Settlement is non-recapture, *i.e.*, this is not a claims-made settlement. As of the Effective Date, ABB shall not have any right to the return of the Settlement Fund or any portion thereof for any reason. Upon the occurrence of all of the events referenced in Paragraph 10.1, any and all remaining interest or right of ABB, if any, in or to the Settlement Fund shall be absolutely and forever extinguished. If all of the conditions specified in Paragraph 10.1 are not met, then the Stipulation shall be canceled and terminated subject to Paragraph 10.6, unless Lead Counsel and

counsel for ABB mutually agree in writing to proceed with the Settlement.

10.4. If, prior to the Settlement Hearing, one or more putative members of the Settlement Class timely exercise their rights to be excluded from the Settlement Class (“Opt-Outs”), the processes set forth in this paragraph shall apply. Any Settlement Class Member who does not request exclusion from the Settlement has the right to object to the Settlement. Settlement Class Members may not both object and opt out of the Settlement. Any Settlement Class Member who wishes to object must timely submit an objection before the Settlement Hearing. If a Settlement Class Member submits both an objection and a written request for exclusion, he or she shall be deemed to have requested exclusion and shall not be bound by the Agreement if approved by the Court and the objection will not be considered by the Court. There is no reversion of the Settlement Amount or Opt-Out reduction to ABB or any other person or entity funding the settlement.

10.5. The Settling Parties and their respective counsel agree that they will make no effort to suggest, solicit, facilitate, or otherwise encourage potential Settlement Class Members to exclude themselves from the Settlement.

10.6. Unless otherwise ordered by the Court, in the event the Stipulation shall terminate as set forth herein or shall not become effective by order of Court, counsel for ABB or Lead Counsel shall provide notice to the Escrow Agent and within five (5) business days after written notification, the Settlement Fund, less up to \$500,000 in Class Notice and Administration Expenses, Taxes, and Tax Expenses reasonably and actually incurred, shall be refunded pursuant to written instructions from counsel for ABB. At the written direction of counsel for ABB, the Escrow Agent or its designee shall apply for any tax refund owed on the Settlement Fund and pay the proceeds, after deduction of any expenses incurred in connection with such application(s) for refund.

10.7. Except as otherwise provided herein, in the event that the Stipulation is not approved by the Court or the Settlement set forth in the Stipulation is terminated or fails to become effective in accordance with its terms, the Releasing Parties shall not forfeit or waive any factual or legal claim, defense, or contention in the Action.

11. Resolution of Outstanding Litigation Obligations

11.1. In consideration for the dismissal of the Action and the release of the Released Class Claims as against ABB, ABB agrees as follows.

11.2. To the extent any of ABB's documents produced in this Action (or any documents produced by Defendants or Plaintiffs that were generated by or sent to employees of ABB) are authentic and/or business records, ABB will cooperate in providing a custodian-of-records declaration for authentication of documents (or, if necessary, make a custodian of records available for trial) in this litigation, provided that Lead Counsel agrees to use reasonable efforts to minimize the burden to ABB of such authentication or business record testimony.

11.3. ABB and Angel Alvarez will not oppose the trial subpoena served on Mr. Alvarez in this litigation, subject to reasonable scheduling accommodations. ABB will also not oppose any non-ABB trial witnesses.

12. Injunctive Relief

12.1. As a material condition of this Settlement, ABB consents to the entry of an order requiring ABB for a period of 3 (three) years following the Effective Date of this Settlement Agreement (the "Injunctive Relief Period") to not participate in any unlawful conduct that limits or otherwise restrains competition in violation of any state or federal antitrust and/or unfair competition laws concerning the sale, distribution, and marketing of disposable contact lenses.

13. Miscellaneous Provisions

13.1. The Settling Parties: (a) acknowledge that it is their intent to consummate this

Settlement; and (b) agree to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of the Stipulation and to exercise their best efforts to accomplish the foregoing terms and conditions of the Stipulation expeditiously.

13.2. The Settling Parties intend this Settlement to be a final and complete resolution of all disputes between them with respect to the Action and the Released Claims, or which could have been asserted with respect to the Action based on the same factual predicate. The Settlement and all negotiations, discussions, and proceedings leading up to and in connection herewith shall not be deemed to constitute a presumption, concession, or an admission by any Settling Party or any of the Released Parties of any fault, liability, or wrongdoing by it, or as to the merits of any claim or defense.

13.3. The Settling Parties and their counsel agree that they shall not assert any claims of any violation of Rule 11 of the Federal Rules of Civil Procedure relating to the prosecution, defense, or settlement of the Action. The Settling Parties agree that the Settlement Amount and the other terms of the Settlement were negotiated in good faith at arm's length by the Settling Parties and reflect a settlement that was reached voluntarily after consultation with competent legal counsel.

13.4. Neither the Stipulation nor the Settlement contained herein, nor any negotiations, discussions, proceedings, or acts performed or documents executed pursuant to or in furtherance of the Stipulation or the Settlement: (a) are or may be deemed to be or may be used as admissions of, or evidence of, the validity of any Released Claim, or of any wrongdoing or liability of ABB; or (b) are or may be deemed to be or may be used as admissions of, or evidence of, any fault or omission of ABB in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal. The Released ABB Parties, Plaintiffs, Settlement Class Members, and

Plaintiffs' Counsel may file the Stipulation and/or the Judgment and Order of Dismissal in any action that may be brought against them in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion, issue preclusion or similar defense or counterclaim, or in connection with any proceeding to enforce the terms of this Stipulation.

13.5. All agreements made and orders entered during the course of the Action relating to the confidentiality of documents and information shall survive this Stipulation, pursuant to their terms.

13.6. All of the Exhibits to the Stipulation are material and integral parts hereof and are fully incorporated herein by this reference.

13.7. This Stipulation shall not be construed more strictly against one Settling Party than another merely by virtue of the fact that it, or any part of it, may have been prepared by counsel for one of the Settling Parties, it being recognized that it is the result of arm's-length negotiations between the Settling Parties and that all Settling Parties have contributed substantially and materially to the preparation of this Stipulation.

13.8. The Stipulation may be amended or modified only by a written instrument signed by or on behalf of all Settling Parties or their respective successors-in-interest.

13.9. No waiver of any term or provision of this Settlement Agreement, or of any breach or default hereof or hereunder, shall be valid or effective unless in writing and signed by or on behalf of all Settling Parties or their respective successors-in-interest. No waiver of any term or provision of this Settlement Agreement, or of any breach or default hereof or hereunder, shall be construed as a waiver of the same or any other term or provision or of any previous or subsequent breach thereof.

13.10. The Stipulation and the Exhibits attached hereto constitute the entire agreement among the Settling Parties and no representations, warranties, or inducements have been made to any Settling Party concerning the Stipulation or its Exhibits other than the representations, warranties, and covenants contained and memorialized in such documents. Except as otherwise provided herein, each Settling Party shall bear its own costs.

13.11. Lead Counsel, on behalf of the Settlement Class, are expressly authorized by Plaintiffs to take all appropriate action required or permitted to be taken by the Settlement Class pursuant to the Stipulation to effectuate its terms and also are expressly authorized to enter into any modifications or amendments to the Stipulation on behalf of the Settlement Class which they deem appropriate.

13.12. Each counsel or other Person executing the Stipulation or any of its Exhibits on behalf of any Settling Party hereby warrants that such Person has the full authority to do so.

13.13. All notices, requests, demands, claims, and other communications hereunder shall be in writing and shall be deemed duly given (a) when emailed to the recipient, (b) when delivered personally to the recipient, (c) one (1) business day after being sent to the recipient by reputable overnight courier service (charges prepaid), or (d) five (5) business days after being mailed to the recipient by certified or registered mail, return receipt requested and postage prepaid, and addressed to the intended recipient as set forth below:

- (a) If to Plaintiffs or to Lead Counsel:

Joseph P. Guglielmo
Scott + Scott Attorneys at Law LLP
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: 212-223-6444

- (b) If to ABB or to ABB's counsel:

Edwin John U
Kirkland & Ellis LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-389-5000
Via E-mail: edwin.u@kirkland.com

With a copy to ABB's Local Counsel
Dennis Waggoner
Hill Ward Henderson
101 East Kennedy Boulevard
Suite 3700
Tampa, FL 33602
Telephone: 813-227-8426
dennis.waggoner@hwlaw.com

13.14. The Stipulation may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. A complete set of executed counterparts shall be filed with the Court. Signatures sent by facsimile or by PDF via email shall be deemed originals.

13.15. The Stipulation shall be binding upon, and inure to the benefit of, the heirs, successors, and assigns of the Settling Parties hereto.

13.16. The Court shall have exclusive jurisdiction with respect to implementation and enforcement of the terms of the Stipulation, and all Settling Parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the Settlement embodied in the Stipulation.

13.17. This Stipulation shall be governed by, construed, and enforced in accordance with the law of the State of New York.

13.18. This Stipulation represents the entire agreement between the parties regarding the subject matter herein and supersedes and replaces any and all prior agreements.

IN WITNESS WHEREOF, the parties hereto have caused the Stipulation to be executed,

by their duly authorized attorneys, dated September 22, 2020.

 **For ABB**

Edwin John U, P.C.
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., N.W.
Washington, DC 20004
Telephone: 202-389-5000
Facsimile: 202-389-5200
edwin.u@kirkland.com

Dennis P. Waggoner
HILL WARD HENDERSON
101 East Kennedy Boulevard
Suite 3700
Tampa, FL 33602
Telephone: 813-227-8426
Facsimile: 813-221-2900
dennis.waggoner@hwlaw.com

Counsel for ABB Optical Group



Christopher Lebsock (signing on behalf
of all Plaintiffs)
Michael P. Lehmann
HAUSFELD LLP
600 Montgomery Street, Suite 3200
San Francisco, CA 94111
Telephone: 415-633-1908
Facsimile: 415-217-6813
mlehmann@hausfeld.com
clebsock@hausfeld.com

Michael D. Hausfeld
Nathaniel C. Giddings
HAUSFELD LLP
1700 K. St., NW, Suite 650
Washington, DC 20006
Telephone: 202-540-7200
Facsimile: 202-540-7201
mhausfeld@hausfeld.com
ngiddings@hausfeld.com

Christopher M. Burke
SCOTT + SCOTT,
ATTORNEYS AT LAW, LLP
707 Broadway, Suite 1000
San Diego, CA 92101
Telephone: (619) 233-4565
Facsimile: (619) 233-0508
cburke@scott-scott.com

Joseph P. Guglielmo
Thomas K. Boardman
SCOTT+SCOTT,
ATTORNEYS AT LAW, LLP
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: (212) 223-6444
Facsimile: (212) 223-6334
jguglielmo@scott-scott.com
tboardman@scott-scott.com

Hollis Salzman
Eamon O'Kelly
Benjamin Steinberg
ROBINS KAPLAN LLP
399 Park Avenue, Suite 3600
New York, NY 10022
Telephone: (212) 980-7400
Facsimile: (212) 980-7499
hsalzman@robinskaplan.com
eokelly@RobinsKaplan.com
bsteinberg@RobinsKaplan.com

Co-Lead Class Counsel

EXHIBIT A

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

In Re: DISPOSABLE CONTACT LENS ANTITRUST LITIGATION	Case No. 3:15-md-2626-HES-JRK Judge Harvey E. Schlesinger Magistrate Judge James R. Klindt
THIS DOCUMENT RELATES TO: All Class Actions	

**[PROPOSED] ORDER PRELIMINARILY APPROVING SETTLEMENT AGREEMENT
WITH ABB OPTICAL GROUP LLC**

WHEREAS, the Action¹ is pending before this Court;

WHEREAS, Plaintiffs² have entered into and executed the Stipulation and Agreement of Settlement (“Settlement Agreement”) with ABB Optical Group LLC (“ABB,” and together with Plaintiffs, the “Settling Parties”), which, if finally approved by the Court, will result in the settlement of all claims against ABB;

WHEREAS, in full and final settlement of the claims asserted against ABB in this Action, ABB agreed to pay the amount of \$30,200,000 (the “Settlement Funds”), and to provide limited cooperation as set forth in the Settlement Agreement;

WHEREAS, Plaintiffs, having made an application, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for an order preliminarily approving the Settlement Agreement, which sets forth the terms and conditions of the Settlement of the Action against ABB and for dismissal of the Action against ABB with prejudice upon the terms and conditions set forth in the Settlement Agreement;

WHEREAS, the Court has previously certified litigation classes pursuant to Federal Rule of Civil Procedure 23 (ECF No. 940);

WHEREAS, the Court has appointed Scott+Scott, LLP, Hausfeld, LLP, and Robins Kaplan, LLP (“Lead Counsel”) as class counsel (ECF No. 940);

WHEREAS, the Court has appointed Rachel Berg, Miriam Pardoll, Jennifer Sineni, Elyse Ulino, Susan Gordon, Cora Beth Smith, Brett Watson, Tamara O’Brien, Sheryl Marean, Catherine

¹ As defined in the Settlement Agreement, the “Action” means the above-captioned litigation pending in the United States District Court for the Middle District of Florida, Jacksonville Division, and any other actions that may be transferred or consolidated into this litigation.

² As defined in the Settlement Agreement, “Plaintiffs” are 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.

Dingle, Amanda Cunha, Alexis Ito, Kathleen Schirf, John Machikawa, and Joseph Felson as class representatives (ECF No. 940);

WHEREAS, the Settling Parties have agreed to the entry of this [Proposed] Order Preliminarily Approving Settlement Agreement; and

WHEREAS, the Court has read and considered the Settlement Agreement and the exhibits annexed thereto and other documents submitted in connection with Plaintiffs' Motion for Preliminary Approval of the Settlement Agreement, and good cause appearing therefor;

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. All terms in initial capitalization used in this Order shall have the same meanings as set forth in the Settlement Agreement, unless otherwise noted or defined herein.

I. PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

2. Upon review of the record, the Court preliminarily finds that the Settlement Agreement resulted from arm's-length negotiations between highly experienced counsel and falls within the range of possible approval. The Court hereby preliminarily approves the Settlement Agreement, subject to further consideration at the Fairness Hearing described below. The Court preliminarily finds that the settlement encompassed by the Settlement Agreement raises no obvious reasons to doubt its fairness and provides a reasonable basis for presuming that the Settlement Agreement satisfies the requirements of Rules 23(c)(2) and 23(e) of the Federal Rules of Civil Procedure and due process so that an appropriate notice of the Settlement Agreement should be given, subject to the Court's approval of a notice plan as provided in this Order.

II. NOTICE PLAN AND FAIRNESS HEARING

3. Plaintiffs shall submit for the Court's approval a proposed notice plan for purposes of advising members of the Settlement Class, among other things, of their right to object to the Settlement Agreement, their right to exclude themselves from the Settlement Class, the procedure

for submitting a request for exclusion, the time, date, and location of the Settlement Hearing to be scheduled by the Court, and their right to appear at the Settlement Hearing at or after the Settlement Hearing, the Court shall determine whether the Settlement Agreement, any proposed Plan of Distribution, any application for service awards, and any application for attorneys' fees and/or expenses for Lead Counsel should be finally approved.

III. OTHER PROVISIONS

4. The Court approves of Plaintiffs' designation of Huntington National Bank as Escrow Agent. Absent further order of the Court, the Escrow Agent shall establish the Escrow Account at Huntington National Bank and have such duties and responsibilities in such capacity as are set forth in the Settlement Agreement.

5. The Court approves the establishment of the Escrow Account under the Settlement Agreement as Qualified Settlement Funds ("QSFs") pursuant to Internal Revenue Code §468B and the Treasury Regulations promulgated thereunder, and retains continuing jurisdiction as to any issue that may arise in connection with the formulation or administration of the QSFs. All funds held by the Escrow Agent shall be deemed and considered to be in custodia legis, and shall remain subject to the jurisdiction of the Court, until such time as such funds shall be distributed pursuant to the Settlement Agreement and further order(s) of the Court.

6. All reasonable expenses incurred in identifying and notifying potential Settlement Class Members as well as administering the Net Settlement Fund shall be paid, as set forth herein and in Paragraph 3.9 of the Settlement Agreement. In the event the Court does not approve the Settlement Agreement, or if the Settlement Agreement otherwise fails to become effective, neither Plaintiffs nor any of their counsel shall have any obligation to repay any amounts incurred or disbursed pursuant to Paragraph 3.9 of the Settlement Agreement.

7. In the event that the Settlement Agreement is terminated, is vacated, is not

approved, or the Effective Date fails to occur for any reason, then the Settling Parties shall be deemed to have reverted to their respective status in the Action as of the Execution Date, and, except as otherwise expressly provided herein, such parties shall proceed in all respects as if such Settlement Agreement and any related orders had not been entered, and such Settlement Agreement (including any amendment(s) thereto) and this Order shall be null and void, of no further force or effect, and without prejudice to any such Settling Parties, and may not be introduced as evidence or referred to in any actions or proceedings by any Person; provided, however, that in the event of termination of the Settlement Agreement, Paragraphs 3.2, 5.1, 9.3, and 10.6 of the Settlement Agreement shall nonetheless survive and continue to be of effect and have binding force. Any portion of the Settlement Fund previously paid, together with any interest earned thereon (and, if applicable, re-payment of any Fee and Expense Award referred to in Paragraph 9.3 of such Settlement Agreement), less Taxes due, if any, with respect to such income, and less up to \$500,000 in the costs of administration and notice actually incurred and paid or payable from the Settlement Fund, shall be returned to ABB within five (5) business days after written notification of such event is sent by counsel for ABB or Lead Counsel to the Escrow Agent. At the request of ABB, the Escrow Agent shall apply for any tax refund owed on the Settlement Fund and pay the proceeds to ABB.

8. The Court's certification of the Settlement Class as provided herein is without prejudice to, or waiver of, the rights of any non-settling Defendant to contest certification of any non-settlement class proposed in this Action. The Court's findings in this Order shall have no effect on the Court's ruling on any motion to certify any non-settlement class in this Action; and no party may cite or refer to the Court's approval of any Settlement Class as persuasive or binding authority with respect to any motion to certify any non-settlement class or any other dispositive

motion filed by a non-settling Defendant. Nor shall such preliminary approval prejudice any rights, claims, or defenses of any non-settling Defendant.

9. ABB has denied wrongdoing or liability in connection with the allegations in the Action. As such, nothing in the Settlement Agreement constitutes an admission by ABB as to the merits of the allegations made in the Action, the validity of any defenses that could be or have been asserted, or the appropriateness of the certification of any class.

10. All proceedings in the Action with respect to ABB are stayed until further order of the Court. Such stay does not apply, however, to the extent actions are necessary to implement or comply with the terms of the Settlement Agreement.

11. All Class Members shall be bound by all determinations and judgments in the Action concerning the settlement set forth in the Settlement Agreement, whether favorable or unfavorable to the Settlement Class.

12. Any member of the Settlement Class may enter an appearance in the Action, at his, her, or its own expense, individually or through counsel of his, her, or its own choice. Any member of the Settlement Class who does not enter an appearance will be represented by Lead Counsel.

IT IS SO ORDERED.

DATED: _____

JUDGE HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

EXHIBIT B

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

In Re: DISPOSABLE CONTACT LENS ANTITRUST LITIGATION	Case No. 3:15-md-2626-HES-JRK Judge Harvey E. Schlesinger Magistrate Judge James R. Klindt
THIS DOCUMENT RELATES TO: All Class Actions	

**[PROPOSED] FINAL JUDGMENT AND ORDER OF DISMISSAL RE ABB OPTICAL
GROUP LLC (“ABB”)**

This matter came before the Court for hearing pursuant to Plaintiffs’ application for final approval of the settlement set forth in the Stipulation and Agreement of Settlement with ABB Optical Group LLC (“ABB”) dated September 22, 2020 (the “Settlement Agreement”). The Court has considered all papers filed and proceedings held herein and is fully informed of these matters. For good cause shown, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. This Final Judgment and Order of Dismissal incorporates by reference the definitions in the Settlement Agreement, and all capitalized terms used, but not defined, herein shall have the same meanings as in the Settlement Agreement.

2. This Court has jurisdiction over the subject matter of the Action and over all parties to the Action, including all Settlement Class Members.

3. The notice provisions of the Class Action Fairness Act, 28 U.S.C. §1715, have been satisfied.

4. Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Court grants final approval of the Settlement set forth in the Settlement Agreement on the basis that the settlement is fair, reasonable, and adequate as to, and in the best interests of, all Settlement Class Members, and is in compliance with all applicable requirements of the Federal Rules of Civil Procedure. In reaching this conclusion, the Court considered the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Moreover, the Court concludes that:

a. The Settlement set forth in the Settlement Agreement was fairly and honestly negotiated by counsel with significant experience litigating antitrust class actions and other complex litigation and is the result of vigorous arm’s-length negotiations

undertaken in good faith;

b. This Action is likely to involve contested and serious questions of law and fact, such that the value of an immediate monetary recovery outweighs the mere possibility of future relief after protracted and expensive litigation;

c. Success in complex cases such as this one is inherently uncertain, and there is no guarantee that continued litigation would yield a superior result; and

d. The Settlement Class Members' reaction to the Settlement set forth in the Settlement Agreement is entitled to great weight.

5. Except as to any individual claim of those Persons (identified in Exhibit 1 hereto) who have validly and timely requested exclusion from the Settlement Class ("Opt-Outs"), the Action and all claims contained therein, as well as all of the Released Class Claims, against ABB and Released ABB Parties by the Plaintiffs and Releasing Class Parties are dismissed with prejudice. The Settling Parties are to bear their own costs, except as otherwise provided in the Settlement Agreement and the orders of this Court.

6. The Opt-Outs identified in Exhibit 1 hereto have timely and validly requested exclusion from the Settlement Class and are excluded from the Settlement Class for all purposes, are not bound by this Final Judgment and Order of Dismissal, and may not make any claim or receive any benefit from the Settlement Agreement or any other settlement from which members of Settlement Class are entitled to recover.

7. Upon the Effective Date: (i) Plaintiffs and each of the Settlement Class Members shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished, and discharged against the Released ABB Parties (whether or not such Settlement Class Member executes and delivers a Proof of Claim and Release form) any and all

Released Class Claims (including, without limitation, Unknown Claims); and (ii) Plaintiffs and each of the Settlement Class Members and anyone claiming through or on behalf of them, shall be permanently barred and enjoined from the commencement, assertion, institution, maintenance or prosecution of any of the Released Class Claims against any Released ABB Parties in any action or other proceeding in any court of law or equity, arbitration tribunal, administrative forum, or forum of any kind. This Final Judgment and Order of Dismissal shall not affect in any way the right of Plaintiffs or Releasing Class Parties to pursue claims, if any, outside the scope of the Released Class Claims. Claims to enforce the terms of the Settlement Agreement are not released.

8. Upon the Effective Date, each of the Releasing ABB Parties: (i) shall be deemed to have, and by operation of the Judgment and Order of Dismissal shall have, fully, finally, and forever released, relinquished, and discharged Plaintiffs, each and all of the Settlement Class Members, and Plaintiffs' Counsel from any and all Released ABB Parties' Claims (including, without limitation, Unknown Claims); and (ii) shall be permanently barred and enjoined from the commencement, assertion, institution, maintenance or prosecution against any counsel for Plaintiffs and Settlement Class Members in any action or other proceeding in any court of law or equity, arbitration tribunal, administrative forum, or forum of any kind, asserting any of the Released Defendants' Claims. This Final Judgment and Order of Dismissal shall not affect in any way the right of ABB or Releasing ABB Parties to pursue claims, if any, outside the scope of the Released ABB Parties' Claims. Claims to enforce the terms of the Settlement Agreement are not released.

9. Upon the Effective Date, any claims for contribution, indemnification, or similar claims from any Person, including any other Defendants in the Action against any of the Released ABB Parties, arising out of or related to the Released Class Claims, are barred in the manner and

to the fullest extent permitted under the law of New York or any other jurisdiction that might be construed or deemed to apply to any claims for contribution, indemnification or similar claims against any of the Released ABB Parties.

10. All rights of any Settlement Class Member against (i) any of the other Defendants (apart from ABB) currently named in the Action; (ii) any other Person formerly named in the Action; or (iii) any alleged co-conspirators or any other Person subsequently added or joined in the Action, other than ABB and the Released ABB Parties with respect to Released Class Claims are specifically reserved by Plaintiffs and the Settlement Class Members. To the extent permitted and/or authorized by law, all UPP transactions by Class Members directly or indirectly through ABB during the Settlement Class Period, remain in the case against (i) any of the other Defendants (other than ABB) currently named in the Action; (ii) any other Person formerly named in the Action; or (iii) any alleged co-conspirators or any other Person subsequently added or joined in the Action, other than ABB and the Released ABB Parties, as a potential basis for damage claims and may be part of any joint and several liability claims.

11. The mailing and distribution of the Notice to all members of the Settlement Class who could be identified through reasonable effort and the publication of the Summary Notice satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process, constitute the best notice practicable under the circumstances, and constitute due and sufficient notice to all Persons entitled to notice.

12. The Plan of Distribution submitted by Plaintiffs is approved as fair, reasonable, and adequate.

13. Neither the Settlement Agreement nor the Settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Settlement Agreement or the

Settlement: (a) is or may be deemed to be or may be used as an admission or evidence of the validity of any Released Class Claim, or of any wrongdoing or liability of ABB and the Released ABB Parties; or (b) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any of ABB and the Released ABB Parties in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal. The Settlement Agreement may be filed in an action to enforce or interpret the terms of the Settlement Agreement, the Settlement contained therein, and any other documents executed in connection with the performance of the Settlement embodied therein. ABB and the Released ABB Parties may file the Settlement Agreement and/or this Final Judgment and Order of Dismissal in any action that may be brought against them in order to support a defense or counterclaim based on the principles of res judicata, collateral estoppel, full faith and credit, release, good faith settlement, judgment bar, or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

14. Without affecting the finality of this Final Judgment and Order of Dismissal in any way, this Court retains continuing and exclusive jurisdiction over: (a) implementation and enforcement of the terms set forth in the Settlement Agreement; (b) any award, distribution, or disposition of the Settlement Fund, including interest earned thereon; (c) hearing and determining applications for attorneys' fees, costs, expenses including expert fees, and incentive awards; and (d) all Settling Parties, Released Parties, and Releasing Parties for the purpose of construing, enforcing, and administering the Settlement Agreement.

15. In the event that the Settlement does not become effective in accordance with the terms of the Settlement Agreement, then this Final Order and Judgment of Dismissal shall be rendered null and void and shall be vacated. In such event, all orders entered and releases delivered

in connection herewith shall be null and void, and the Settling Parties shall be deemed to have reverted to their respective status in the Action as of the Execution Date, and, except as otherwise expressly provided herein, the Settling Parties shall proceed in all respects as if the Settlement Agreement and any related orders had not been entered; provided, however, that in the event of termination of the Settlement, Paragraphs 3.2, 5.1, 9.3, and 10.6 of the Settlement Agreement shall nonetheless survive and continue to be of effect and have binding force.

16. The Settling Parties are directed to consummate the Settlement according to the terms of the Settlement Agreement. Without further Court order, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

17. There is no just reason for delay in the entry of this Final Judgment and Order of Dismissal. The Clerk of the Court is directed to enter this Final Judgment and Order of Dismissal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure immediately.

IT IS SO ORDERED.

DATED: _____

JUDGE HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

EXHIBIT B

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

In Re: DISPOSABLE CONTACT LENS ANTITRUST LITIGATION	Case No. 3:15-md-2626-HES-JRK Judge Harvey E. Schlesinger Magistrate Judge James R. Klindt
THIS DOCUMENT RELATES TO: All Class Actions	

**DECLARATION OF JOSEPH P. GUGLIELMO IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT WITH
DEFENDANT ABB OPTICAL GROUP LLC AND PROPOSED NOTICE PLAN**

I, Joseph P. Guglielmo, pursuant to 28 U.S.C. §1746, declare as follows:

1. I am a member of Scott+Scott Attorneys at Law LLP, Co-Lead Counsel for the Plaintiffs in the above-captioned litigation. I make this declaration in further support of Plaintiffs' Motion for Preliminary Approval of Settlement Agreement with Defendant ABB Optical Group, LLC ("ABB") and Proposed Notice Plan. I have personal knowledge of the matters stated herein and, if called upon, I could and would competently testify thereto.

2. Plaintiffs have consummated a Settlement Agreement attached as Exhibit A to Plaintiffs' Motion for Preliminary Approval ("Settlement" or "Agreement"), which will resolve all claims against ABB in the Action.¹ The Settlement provides that ABB will pay \$30,200,000 (thirty million, two hundred thousand dollars) in cash to create a Settlement Fund. This is substantial and meaningful relief and is a great result for the Settlement Class.

I. PROCEDURAL HISTORY

3. Plaintiffs are seeking monetary damages and injunctive relief from the Defendants, on behalf of themselves and all others similarly situated who purchased disposable contact lenses subject to "Unilateral Pricing Policies" ("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.

4. ABB and the other Defendants have denied all of Plaintiffs' allegations of wrongdoing. ABB consistently defended its conduct by, *inter alia*, arguing that its UPP complied with the law and that it never entered into an agreement with the other Defendants to adopt, implement, or enforce the UPPs. ABB advanced additional arguments in its defense as well.

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

A. Lead Counsel’s Investigation

5. Lead Counsel devoted substantial time to investigating the potential claims against Defendants. Lead Counsel interviewed customers and potential plaintiffs to gather information about Defendants’ conduct and the impact on customers. This information was essential to Lead Counsel’s ability to understand the nature of ABB’s conduct, the nature of the UPPs, and potential remedies. Lead Counsel also consulted with experts to develop and refine their legal and damages theories.

B. The Course of Proceedings

6. 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 the major manufacturers of disposable contact lenses, B&L, Johnson & Johnson Vision Care (“JJVC”), Alcon Laboratories, Inc. (“Alcon”), CooperVision, Inc. (“CVI”), and their primary distributor, ABB Concise Optical Group (“ABB”), collectively, “Defendants,” alleging that their UPPs were illegal restraints on competition under §1 of the Sherman Act and various state unfair competition laws.

7. Numerous additional suits were filed following the March 3, 2015 complaint. 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.

8. 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.)

9. On October 7, 2015, the Court granted Lead 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, 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.)

10. 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.)

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

C. Discovery Proceedings

12. Discovery commenced on April 1, 2016. (ECF No. 204.) During the course of discovery, Lead Counsel also served written discovery requests on Defendants and certain third parties.

13. Defendants and 35 third parties produced approximately 4.1 million pages of documents, as well as voluminous electronic data files and spreadsheets in native format. Lead Counsel and their experts reviewed and analyzed substantially all of the documents and electronic data files produced by Defendants.

14. Discovery specific to ABB was similarly hard-fought and vigorous.

15. Throughout discovery, ABB produced more than 68,761 documents totaling roughly 287,875 pages. In addition, Plaintiffs' counsel took five depositions of current and former ABB employees, including current and former high-level executives.

16. In addition to the discovery from ABB, during this time, 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 4.1 million pages of documents and voluminous electronically stored information by Defendants, including ABB, as well as from third parties.

17. Over the course of the litigation, Plaintiffs and Defendants have participated in regularly scheduled status calls with Magistrate Judge James R. Klindt. These calls have been the primary means through which discovery disputes have been litigated.

D. Class Certification and Summary Judgment Proceedings

18. The parties briefed and argued Plaintiffs' motion for class certification, involving thousands of pages of briefing, expert reports, and two days of argument. The parties also briefed Defendants' motions for summary judgment, involving thousands of pages of briefing and six expert reports.

19. 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 Motion to Strike certain portions of Plaintiffs' Expert Reports and their Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification, accompanying expert reports, and other declarations. (ECF Nos. 500-10, 693). Plaintiffs filed their Reply and supporting declarations to the Class Certification Opposition on September 8, 2017 as well as their oppositions to Defendants' Motion to Strike certain portions of Plaintiffs' Expert Reports. (ECF

Nos. 611-18, 715.) 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.)

20. 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' motion to strike portions of Plaintiffs' expert reports. (ECF Nos. 865-1, 865-2, 866.)

21. On December 4, 2018, the Court issued an order granting Plaintiffs' motion for class certification and certified the following horizontal class (the "Litigation Horizontal Class"), among other classes:

All 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. 940) ("Class Certification Order"). The Court appointed Hausfeld LLP, Scott+Scott Attorneys at Law LLP, and Robins Kaplan LLP as counsel for the litigation classes, and appointed 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.

22. On December 18, 2018, Defendants filed petitions to appeal the Court's class certification order pursuant to F.R.C.P. 23(f). The parties briefed Defendants' petitions.

23. On April 5, 2019, the Eleventh Circuit denied Defendants ABB's and JJVC's petition to appeal, and on June 20, 2019, the Eleventh Circuit denied Defendants Alcon's and B&L's petition.

24. On August 20, 2018, Defendants filed multiple motions for summary judgment, including multiple declarations and dozens of exhibits, arguing that Plaintiffs lacked evidence to support their allegations of both the horizontal and vertical conspiracies. (ECF Nos. 871-77.) On October 22, 2018, Plaintiffs opposed Defendants' summary judgment motions. (ECF Nos. 917-23.) On November 19, 2018, Defendants filed their replies in support of their motions. (ECF Nos. 930-35.) On December 17, 2018, Plaintiffs filed their sur-reply in opposition. (ECF No. 942.) On August 21-22, 2019, the Court held oral argument on the summary judgment motions. (ECF Nos. 1015-16.)

25. On November 27, 2019 the Court denied Defendants' motions for summary judgement. (ECF No. 1091.) In relevant part, the Court found as follows:

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.

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.

(ECF No. 1091, at p. 23.)

26. Since the Court's order on summary judgment, the Parties have attempted to ready the case for trial. This includes negotiating and briefing motions *in limine*, drafting, exchanging, and meeting and conferring regarding proposed jury instructions, witnesses, and exhibit lists. These efforts have included multiple meet and confers on the various trial-related topics.

27. The Parties also filed competing motions *in limine* (ECF Nos. 1160, 1103, 1092, 1064, 1061, 1060, 1059, 1058, 1056, and 1055), which this Court ultimately ruled on, granting some in favor of Defendants and some in favor of Plaintiffs. (ECF Nos. 1142, 1150, and 1174.)

28. On April 3, 2020, this Court entered an Order regarding the impact of the COVID-19 pandemic on the case schedule which, among other changes, indefinitely suspended the case's trial date. (ECF No. 1180.) In the final paragraph of the Order, the Court stated as follows:

Notwithstanding the paragraph above, because of this life and death crisis, the Court sincerely urges the Parties to earnestly confer with each other in a deliberate attempt to reach an agreement that completely resolves this litigation. Specifically, the Court implores the remaining Defendants to have their corporate executives seriously consider this request and the basis for it.

29. On Sunday, August 30, 2020, Plaintiffs and ABB engaged in a day-long mediation session with former U.S. District Judge Layn Phillips via video conference. Prior to the start of the of the mediation, ABB and Plaintiffs each separately participated in several discussions with Judge Phillips' staff regarding the strengths and weaknesses of their respective cases and exchanged several rounds of mediation briefs. With Judge Phillips' guidance, the Parties were able to reach an agreement to resolve the case against ABB.

30. The Parties fully executed the Settlement Agreement on September 22, 2020.

E. CVI and B&L Settlements

31. On August 30, 2017, Plaintiffs reached a settlement agreement with Defendant CVI. The settlement included a monetary payment of \$3,000,000 on behalf of a Settlement Class defined 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.)

32. On July 10, 2018, the Court preliminarily approved the settlement with Defendant CVI but delayed dissemination of notice until later in the litigation. (ECF No. 1011.)

33. On August 19, 2019, Plaintiffs reached a settlement agreement with Defendant B&L. The settlement included a monetary payment of \$10,000,000 on behalf of a Settlement Class defined as follows:

all 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) (the "B&L Settlement Class").

34. The primary difference between the CVI Settlement Class and the B&L Settlement Class was that the former includes consumers who purchased *only* CVI contact lenses subject to a

UPP while the latter does not. The B&L Settlement Class was coterminous with the Litigation Horizontal Class, and as set forth below, the ABB Settlement Class is coterminous with the CVI Settlement Class given that ABB was a distributor of contact lenses made by all of the Defendant manufacturers including Alcon, JJVC, CVI, and B&L.

35. On October 8, 2019, the Court granted preliminary approval of the B&L settlement and approved the notice plan to putative members of the CVI Settlement Class, the B&L Settlement Class, and the Litigation Classes. (ECF No. 1046.)

36. The approved notice for the CVI and B&L settlements as well as the Litigation Classes provided the timelines for making a claim, opting out of the settlements and/or litigation, and objection to the settlements and litigation classes. (ECF Nos. 1037-4, 1046.) The approved notice also described the differences between the Litigation Classes, the B&L Settlement Class, and the CVI Settlement Class and notified putative members of the classes that distribution would be delayed until later in the case. (ECF No. 1037-4.)

37. On January 16, 2020, Plaintiffs sought final approval of the settlements with B&L and CVI (ECF No. 1136), and on February 25, 2020, the Court held a fairness hearing regarding these settlements. (ECF Nos. 1154, 1158 (2/25/2020 Hr’g Trans.))

38. On March 4, 2020, the Court issued its Final Approval Order and Final Judgment and Order of Dismissal with Prejudice as to Bausch & Lomb, Inc. and CooperVision, Inc. which granted final approval to the CVI and B&L settlements. (ECF No. 1164.)

F. The ABB Settlement Class

39. The ABB Settlement Class is defined as follows in the Settlement Agreement:

all persons and entities residing in the United States who made retail purchases of disposable contact lenses manufactured by Alcon, JJVC, CVI, 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 alleged co-conspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

(Agreement, ¶1.35.)

40. As noted above, given that ABB was a distributor of contact lenses manufactured by all of the Defendant manufacturers including Alcon, JJVC, CVI, and B&L.

41. During the Class Period, the volume of commerce of UPP lenses sold in the United States was \$5,331,411,117.51. According to Plaintiffs' calculations, ABB distributed roughly 23% of this commerce and during the Class Period, distributed \$994,371,643 in UPP lens commerce. The \$30.2 million settlement represents a total over 3% of ABB's total UPP lens sales throughout the class period and an over threefold increase in the dollar value of the settlement compared to the previously approved \$10 million B&L settlement. B&L's \$10 million settlement represented 2.7% of its UPP sales. CVI's \$3 million settlement represented 1.6% of CVI's total UPP lens commerce.

42. 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: (i) any Fee and Expense Award and any Plaintiffs' Service Awards (if requested and to the extent allowed by the Court); (ii) Class Notice and Administration Expenses; (iii) Taxes and Tax Expenses; and (iv) any other fees or expenses approved by the Court. (Agreement, ¶1.16.)

43. 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 to Authorized Claimants until no funds remain, or there is a *de minimus* amount the remaining in the Settlement Fund. *Id.* If a *de minimus* amount remains after distribution to Authorized Claimants, any remaining balance shall be donated to an appropriate 501(c)(3) non-profit organization selected by Lead Counsel and approved by the Court. *Id.*

44. 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. I believe that 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.

45. Lead Counsel believe 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.

46. The Settlement here is the result of intensive, arm’s-length negotiations over an extended period 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.

47. Furthermore, Lead Counsel are particularly experienced in the litigation, certification, trial, and settlement of nationwide class action cases. Lead Counsel zealously represented Plaintiffs and the classes throughout the litigation. 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.)

48. Plaintiffs and Lead Counsel are confident in the strength of their case but are also pragmatic in their awareness of the defenses available to ABB, and the risks inherent in trial and post-judgment appeal. Lead Counsel believes that the Settlement outweighs the risks of continued litigation. Lead 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.

G. Conclusion

49. Lead Counsel believe that the Settlement is fair and reasonable and satisfies the requirements for preliminary approval.

I declare under penalty of perjury under the laws of the United States that the above statements are true to the best of my knowledge and belief.

Dated: New York, New York
October 22, 2020

s/ Joseph P. Guglielmo
Joseph P. Guglielmo

EXHIBIT C

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

In Re: DISPOSABLE CONTACT LENS ANTITRUST LITIGATION	Case No. 3:15-md-2626-HES-JRK Judge Harvey E. Schlesinger Magistrate Judge James R. Klindt
THIS DOCUMENT RELATES TO: All Class Actions	

**[PROPOSED] ORDER PRELIMINARILY APPROVING SETTLEMENT
AGREEMENT WITH ABB OPTICAL GROUP LLC
AND PROPOSED NOTICE PLAN**

WHEREAS, the Action¹ is pending before this Court;

WHEREAS, Plaintiffs² have entered into and executed a Stipulation and Agreement of Settlement (“Settlement Agreement”) with ABB Optical Group LLC (“ABB” and together with Plaintiffs, the “Settling Parties”), which, if finally approved by the Court, will result in the settlement of all claims against ABB;

WHEREAS, in full and final settlement of the claims asserted against ABB in this Action, ABB has agreed to pay the amount of \$30,200,000 (the “Settlement Funds”), and to provide limited cooperation as set forth in the Settlement Agreement;

WHEREAS, Plaintiffs have made an application pursuant to Rule 23(e) of the Federal Rules of Civil Procedure for an order preliminarily approving the Settlement Agreement, which sets forth the terms and conditions of the Settlement of the Action against ABB and for dismissal of the Action against ABB with prejudice upon the terms and conditions set forth in the Settlement Agreement;

WHEREAS, Plaintiffs have also filed a proposed Notice Plan with their Motion for Preliminary Approval of the ABB Settlement;

WHEREAS, the Court has previously certified litigation classes pursuant to Federal Rule of Civil Procedure 23 (ECF No. 940);

WHEREAS, the Court has previously certified other settlement classes pursuant to Federal Rule of Civil Procedure 23 (ECF No. 1164);

¹ As defined in the Settlement Agreement, the “Action” means the above-captioned litigation pending in the United States District Court for the Middle District of Florida, Jacksonville Division, and any other actions that may be transferred or consolidated into this litigation.

² As defined in the Settlement Agreement, “Plaintiffs” are 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.

WHEREAS, the Court has appointed Scott+Scott Attorneys at Law LLP, Hausfeld LLP, and Robins Kaplan, LLP (“Lead Counsel”) as class counsel (ECF No. 940);

WHEREAS, the Court has appointed 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 (ECF No. 940);

WHEREAS, the Settling Parties have agreed to the entry of this [Proposed] Order Preliminarily Approving Settlement Agreement; and

WHEREAS, the Court has read and considered the Settlement Agreement and the exhibits annexed thereto and other documents submitted in connection with Plaintiffs’ Motion for Preliminary Approval of the Settlement Agreement, and good cause appearing therefor;

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. All terms in initial capitalization used in this Order shall have the same meanings as set forth in the Settlement Agreement, unless otherwise noted or defined herein.

I. PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

2. Upon review of the record, the Court preliminarily finds that the Settlement Agreement resulted from arm’s-length negotiations between highly experienced counsel and falls within the range of possible approval. The Court also finds that the proposed Notice Plan satisfies the standards of Rule 23, in that it is best notice practicable under the circumstances and includes individual notice to all members who can be identified through reasonable effort. Among other things, the Notice Plan informs potential settlement class members of their right to object to the Settlement Agreement, their right to exclude themselves from the Settlement Class, the procedure for submitting a request for exclusion, the time, date, and location of the

Settlement Hearing to be scheduled by the Court, and their right to appear at the Settlement Hearing. The Court hereby preliminarily approves the Settlement Agreement and Notice Plan, subject to further consideration at the Fairness Hearing described below. The Court preliminarily finds that the settlement encompassed by the Settlement Agreement raises no obvious reasons to doubt its fairness and provides a reasonable basis for presuming that the Settlement Agreement satisfies the requirements of Rules 23(c)(2) and 23(e) of the Federal Rules of Civil Procedure and due process so that an appropriate notice of the Settlement Agreement should be given, subject to the Court’s approval of a notice plan as provided in this Order.

II. PLAN OF DISTRIBUTION AND FAIRNESS HEARING

3. At a later date Plaintiffs shall submit for the Court’s approval a proposed Plan of Allocation of the Net Settlement Fund (and including all interest and income earned thereon after being transferred to the Escrow Account).

4. At or after the Settlement Hearing, the Court shall determine whether the Settlement Agreement, the proposed Plan of Distribution (if one is proposed), any application for service awards, and any application for attorneys’ fees and/or expenses for Lead Counsel should be finally approved.

5. The Court sets the following schedule for upcoming dates and deadlines related to the ABB Settlement:

Notice Date (Notice Mailing Completion, Updating of Website and Publication Notice)	60 Days After Preliminary Approval and Approval of Notice Plan
Plaintiffs’ Motions for Final Approval, Fees, Expenses, and/or Incentive Awards for the ABB Settlement	45 Days After Notice Date
Opt-Out, Objection, and Claim Deadline for ABB Settlement Class; and	60 Days After Notice Date

Opt-Out Deadline for B&L Only Purchasers from the Litigation Classes	
Plaintiffs' Replies in Support of Motions for Final Approval, Fees, Expenses, and/or Incentive Awards for the ABB Settlement	90 Days After Notice Date
Fairness Hearing on ABB Settlement	115 Days After Notice Date

III. OTHER PROVISIONS

6. The notice requirements of the Class Action Fairness Act, 28 U.S.C. §1715, have been met.

7. The Court approves of Plaintiffs' designated Claims Administrator, Epiq Class Action & Claims Solutions, Inc. Absent further order of the Court, the Claims Administrator shall have such duties and responsibilities as are set forth in the Settlement Agreement.

8. The Court approves Plaintiffs' designation of Huntington National Bank as Escrow Agent. Absent further order of the Court, the Escrow Agent shall establish the Escrow Account at Huntington National Bank and have such duties and responsibilities in such capacity as are set forth in the Settlement Agreement.

9. The Court approves the establishment of the Escrow Account under the Settlement Agreement as Qualified Settlement Funds ("QSFs") pursuant to Internal Revenue Code §468B and the Treasury Regulations promulgated thereunder, and retains continuing jurisdiction as to any issue that may arise in connection with the formulation or administration of the QSFs. All funds held by the Escrow Agent shall be deemed and considered to be in *custodia legis*, and shall remain subject to the jurisdiction of the Court, until such time as such funds shall be distributed pursuant to the Settlement Agreement and further order(s) of the Court.

10. The Court approves the request that up to \$500,000 of the Settlement Fund be used to pay for Class Notice and Administration Expenses.

11. All reasonable expenses incurred in identifying and notifying potential Settlement Class Members as well as administering the Net Settlement Fund shall be paid, as set forth herein and in ¶3.9 of the Settlement Agreement. In the event the Court does not approve the Settlement Agreement, or if the Settlement Agreement otherwise fails to become effective, neither Plaintiffs nor any of their counsel shall have any obligation to repay any amounts incurred or disbursed pursuant to ¶3.9 of the Settlement Agreement.

12. In the event that the Settlement Agreement is terminated, is vacated, is not approved, or the Effective Date fails to occur for any reason, then the Settling Parties shall be deemed to have reverted to their respective status in the Action as of the Execution Date, and, except as otherwise expressly provided herein, such parties shall proceed in all respects as if such Settlement Agreement and any related orders had not been entered, and such Settlement Agreement (including any amendment(s) thereto) and this Order shall be null and void, of no further force or effect, and without prejudice to any such Settling Parties, and may not be introduced as evidence or referred to in any actions or proceedings by any Person; provided, however, that in the event of termination of the Settlement Agreement, ¶¶ 3.2, 5.1, 9.3, and 10.6, of the Settlement Agreement shall nonetheless survive and continue to be of effect and have binding force. Any portion of the Settlement Fund previously paid, together with any interest earned thereon (and, if applicable, re-payment of any Fee and Expense Award referred to in ¶9.3 of such Settlement Agreement), less Taxes due, if any, with respect to such income, and less up to \$500,000 in the costs of administration and notice actually incurred and paid or payable from the Settlement Fund shall be returned to ABB within five (5) business days after written

notification of such event is sent by counsel for ABB or Lead Counsel to the Escrow Agent. At the request of ABB, the Escrow Agent shall apply for any tax refund owed on the Settlement Fund and pay the proceeds to ABB.

13. The Court's certification of the Settlement Class as provided herein is without prejudice to, or waiver of, the rights of any non-settling Defendant to contest certification of any non-settlement class proposed in this Action. The Court's findings in this Order shall have no effect on the Court's ruling on any motion to certify any non-settlement class in this Action; and no party may cite or refer to the Court's approval of any Settlement Class as persuasive or binding authority with respect to any motion to certify any non-settlement class or any other dispositive motion filed by a non-settling Defendant. Nor shall such preliminary approval prejudice any rights, claims, or defenses of any non-settling Defendant.

14. ABB has denied wrongdoing or liability in connection with the allegations in the Action. As such, nothing in the Settlement Agreement constitutes an admission by ABB as to the merits of the allegations made in the Action, the validity of any defenses that could be or have been asserted, or the appropriateness of certification of any class.

15. All proceedings in the Action with respect to ABB are stayed until further order of the Court. Such stay does not apply, however, to the extent actions are necessary to implement or comply with the terms of the Settlement Agreement.

16. All Class Members shall be bound by all determinations and judgments in the Action concerning the settlement set forth in the Settlement Agreement, whether favorable or unfavorable to the Settlement Class.

17. Any member of the Settlement Class may enter an appearance in the Action, at his, her, or its own expense, individually or through counsel of his, her, or its own choice.

Any member of the Settlement Class who does not enter an appearance will be represented by
Lead Counsel.

IT IS SO ORDERED.

DATED: _____, 2020

JUDGE HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE