

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

<p>In Re: DISPOSABLE CONTACT LENS ANTITRUST LITIGATION</p>	<p>Case No. 3:15-md-2626-J-20JRK Judge Harvey E. Schlesinger Magistrate Judge James R. Klindt</p>
<p>THIS DOCUMENT RELATES TO: All Class Actions</p>	

[PROPOSED] ORDER PRELIMINARILY APPROVING SETTLEMENT AGREEMENT WITH COOPERVISION, INC., CERTIFYING THE SETTLEMENT CLASS, AND APPOINTING CLASS COUNSEL AND CLASS REPRESENTATIVES FOR THE SETTLEMENT CLASS

THIS CAUSE came before the Court for hearing on June 19, 2018, pursuant to the Court’s Order dated May 16, 2018 (Dkt. 822) for consideration of Plaintiffs’ and Class Counsel’s Motion for Preliminary Approval of Class Settlement and for Certification of Settlement Class, and Incorporated Memorandum of Law (the “Motion”) (Dkt. 781). The Court now enters this Order based on the court independent review of the Motion, including the exhibits attached thereto, and the presentations of counsel.

WHEREAS, the Action¹ is pending before this Court;

WHEREAS, Plaintiffs² entered into and executed a Settlement Agreement (“Settlement Agreement”) with CooperVision, Inc. (“CVI” and together with Plaintiffs, the “Settling

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,

Parties”), which, if finally approved by the Court, will result in the settlement of all claims against CVI;

WHEREAS, in full and final settlement of the claims asserted against CVI in this Action, CVI agreed to pay the amount of \$3,000,000 (the “Settlement Funds”), and to provide limited confirmatory discovery 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 CVI and for dismissal of the Action against CVI with prejudice upon the terms and conditions set forth in the Settlement Agreement;

WHEREAS, Plaintiffs have sought, and CVI does not object to, the certification of the Settlement Class (as defined below) solely for settlement purposes;

WHEREAS, the Court has preliminarily appointed, solely for settlement purposes, Scott+Scott, Attorneys at Law, LLP, Hausfeld LLP, and Robins Kaplan LLP (“Lead Counsel”) as settlement class counsel for the Settlement Class and Plaintiffs have requested such appointment be extended to this settlement;

WHEREAS, the Court has preliminarily appointed, solely for settlement purposes, 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 of the Settlement Class and Plaintiffs have requested such appointment be extended to this settlement;

WHEREAS, the Settling Parties have agreed to the entry of this [Proposed] Order Preliminarily Approving Settlement Agreement, Certifying the Settlement Class, and Appointing Class Counsel and Class Representatives for the Settlement Class (the “Order”); and

and Joseph Felson. Plaintiffs have withdrawn Pamela Mazzarella as a Proposed Class Representative. ECF No. 824.

WHEREAS, the Court has read and considered the Settlement Agreement and the exhibits annexed thereto and other documents submitted in connection with the Motion, 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.

PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

1. 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 a Settlement Hearing to be held at on later date. 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 future approval of a Notice Plan as provided in this Order.

PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS

1. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court preliminarily certifies, solely for settlement purposes, 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, counsel for the parties and any judges or justices assigned to hear any aspect of this action.

2. Solely for purposes of the settlement, the Court preliminarily finds that the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(3) have been satisfied, as follows: (a) the members of the Settlement Class are so numerous that joinder of all members of the Settlement Class is impracticable; (b) questions of law and fact common to the Settlement Class predominate over any individual questions; (c) the claims of Plaintiffs are typical of the claims of the members of the Settlement Class; (d) Plaintiffs and Lead Counsel have fairly and adequately represented and protected the interests of the Settlement Class; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy, considering: (i) the interests of members of the Settlement Class in individually controlling the prosecution of separate actions; (ii) the extent and nature of any litigation concerning the controversy already begun by members of the Settlement Class; (iii) the desirability or undesirability of concentrating the litigation of these claims in this particular forum; and (iv) the likely difficulties in managing this Action as a class action.

3. If the Effective Date does not occur with respect to the Settlement Agreement because of the failure of a condition that affects the Settlement Agreement, this conditional certification of the Settlement Class shall be deemed null and void as to the Settling Parties subject to the Settlement Agreement without the need for further action by the Court or any of the Settling Parties. In such circumstances, each of the Settling Parties shall retain their rights to seek or to object to certification of this litigation as a class action under Rule 23 of the Federal Rules of Civil Procedure, or under any other state or federal rule, statute, law, or provision thereof, and to contest and appeal any grant or denial of certification in this litigation or in any other litigation on any other grounds.

CLASS COUNSEL AND CLASS REPRESENTATIVES

1. The Court appoints Lead Counsel for the Settlement Class solely for the purpose of this settlement.

2. The Court appoints 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 Plaintiffs for the purpose of this settlement.

PLAN OF DISTRIBUTION, NOTICE, AND SETTLEMENT HEARING

1. The Court agrees that consideration and approval of the proposed forms of Notice and Summary Notice, Proof of Claim and Release Form, the Plan of Allocation, the Fee and Expense Application, and Plaintiffs' Service Award Application should be deferred until an appropriate date to be established after: (i) settlements with other Defendants are reached and have been granted preliminary approval; and/or (ii) the Court rules on Plaintiffs' pending Motion to Certify Class and any interlocutory appellate review of such ruling is exhausted.

2. Consistent with the timing described in the preceding paragraph, Lead Counsel, in consultation with counsel for CVI, are directed to notify the Court at such time as they have selected a Claims Administrator and it is appropriate for the Court to review and approve the proposed forms of Notice and Summary Notice, Proof of Claim and Release Form, and, at such time, to submit to the Court a request for approval of the Claims Administrator, the proposed forms of Notice and Summary Notice, a proposed plan for dissemination and/or publication of Notice and Summary Notice, proposed deadlines for filing of the Plan of Allocation, the Fee and Expense Application, Plaintiffs' Service Award Application, objections to and requests for exclusion from the Settlement, and such other matters as are necessary and/or appropriate in advance of the Settlement Hearing, as well as a proposed date[s] for the Settlement Hearing.

OTHER PROVISIONS

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

2. 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.

3. In connection with their Motion for Final Approval of the Settlement, Lead Counsel, on behalf of Class Counsel, may request an award of attorneys' fees not to exceed 35% of the Settlement Fund, plus litigation costs and expenses, and Service Awards for the Class Plaintiffs, subject to approval by the Court.

4. 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.

5. All reasonable expenses incurred in identifying and notifying potential Settlement Class Members as well as administering the Settlement Fund shall be paid, as set forth herein and in Paragraph 3.9 of the Settlement Agreement, up to the sum of \$500,000. In the event the Court does not approve the Settlement Agreement, or if the Effective Date of Settlement Agreement fails to occur, 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.

6. 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 5.1, 9.3, 10.5 and 12.8, 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 costs of administration and notice actually incurred and paid or payable from the Settlement Fund (not to exceed the sum of \$500,000 without the prior approval of the Court) shall be returned to CVI within five business days after written notification of such event is sent by counsel for CVI or Lead Counsel to the Escrow Agent. At the request of CVI, the Escrow Agent shall apply for any tax refund owed on the Settlement Fund and pay the proceeds to CVI.

7. 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.

8. CVI has denied wrongdoing or liability in connection with the allegations in the Action. As such, nothing in the Settlement Agreement constitutes an admission by CVI 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 other than the Class under Fed. R. Civ. P. 23 for purposes of settlement only.

9. All proceedings in the Action with respect to CVI 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.

10. All Settlement 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.

11. 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: July 9, 2018.



HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE