

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FILED

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IN RE: DISPOSABLE CONTACT
LENS ANTITRUST LITIGATION

MDL Docket
No. 1030

CLERK'S DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

**FINAL ORDER AND JUDGMENT APPROVING SETTLEMENT WITH, AND
DISMISSING ACTIONS AGAINST, JOHNSON & JOHNSON VISION CARE, INC.,
BAUSCH & LOMB, INC., AMERICAN OPTOMETRIC ASSOCIATION, AND
AMERICAN OPTOMETRIC ASSOCIATION DEFENDANTS**

On September 5, 1996, the Court, after briefing and argument, certified a consumer class in the Class Action consisting of: "All purchasers of Vistakon, Bausch & Lomb, and CIBA replacement contact lenses from eye care practitioners during the period 1988 to the present, excluding consumers in Florida represented by the Florida Attorney General in *State of Florida v. Johnson & Johnson Vision Products, et al.*, Case No. 94-619-Civ-J-20" (the "Litigation Class"), and determined that the class plaintiffs were adequate representatives of the Class and had claims which were typical of those of its members;

By Order dated July 28, 1997, the Court modified the Litigation Class to exclude residents of Georgia and Tennessee;

By Order dated September 20, 2000, and February 28, 2001, the Court preliminarily and finally approved a Settlement Class which included Georgia and Tennessee residents in connection with a prior partial settlement between the plaintiffs and CIBA Vision Corporation.

By Order dated May 22, 2001, the Court approved a notice of proposed settlement with all remaining defendants and a plan for the dissemination of that notice and such dissemination

was completed on July 22, 2001 which involved Defendant Johnson & Johnson Vision Products, Inc., now known as Johnson & Johnson Vision Care, Inc. ("Johnson & Johnson" or "Vistakon"), defendant American Optometric Association ("AOA"), defendant Bausch & Lomb Incorporated ("Bausch & Lomb"), and the individual defendants: L. Edward Elliot, John A. Gazaway, Richard Hopping, Earle Hunter, Timothy Kime, Paul Klein, James C. Leadingham, Melvin Remba, Lee Rigel, Ronald Snyder, Jack Solomon, William David Sullins, Jr., and Stanley Yamane ("Individual Defendants"); the plaintiffs, both individually and in their capacities as class representatives (the "class plaintiffs"), and their counsel, in Civil Action Nos. 94-657-CIV-J-20C, 94-635-CIV-J-20 and 94-780-CIV-J-20 (collectively, the "Class Action"); the plaintiff, both individually and in her capacity as a putative class representative ("Downey/Washington") and her counsel, in Civil Action No. 94-1215-CV-J-20 (the "Downey/Washington Action") pending in MDL 1030; the plaintiff, both individually and in his capacity as a putative class representative ("Morris") and his counsel, in Civil Action No. 94-1214-CV-J-20 (the "Morris Action") pending in MDL 1030; the plaintiff-states of Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Texas, Utah, West Virginia, and Wisconsin, and the Commonwealths of Massachusetts, Pennsylvania, and Virginia (collectively, the "States"), in their capacities as sovereigns, as *parens patriae* on behalf of natural persons for whom the States may act, and on behalf of the States' economies and general welfare in Civil Action No. 97-299-CIV-J-20A, 97-698-CIV-J-21C, 97-861-CIV-J-20A, 97-928-CIV-J-20A, 98-93-CIV-J-21A, 98-511-CIV-J-21B, 98-515-CIV-J-21C, 98-536-CIV-J-20A, and 98-638-CIV-J-21A (the "States Action"); and the

State of Florida ("Florida"), as sovereign, as *parens patriae* on behalf of natural persons for whom Florida may act, and on behalf of Florida's economy and general welfare in Civil Action No. 94-619-CIV-J-20 (the "Florida Action"). To resolve these cases the parties entered into four separate Settlement Agreements: 1) filed April 23, 2001 with Johnson & Johnson , 2) February 16, 2001 with Bausch & Lomb, 3) May 22, 2001 with both the AOA, and the Individual Defendants (the "Settlement Agreements"); The Settlement Agreement as to Johnson & Johnson is attached as Exhibit A. The Settlement Agreement as to Bausch & Lomb is attached as Exhibit B. The Settlement Agreement as to the AOA is attached as Exhibit C. The Settlement Agreement as to the Individual Defendants is attached as Exhibit D. These settlement agreements are incorporated herein and made a part of this Order and judgment.

The class plaintiffs, the States, Florida, Morris, Downey/Washington, the Individual Defendants, Bauch & Lomb, the AOA, and Johnson & Johnson have moved for final approval of the Settlement Agreements (Doc. No. 1275, filed August 24, 2001; Doc. No. 1278, filed August 24, 2001; and Doc. No. 1282, filed August 24, 2001) and, on that basis, dismissal of the claims against the AOA, the Individual Defendants, Bausch & Lomb, and Johnson & Johnson in the Class Action, Morris Action, Downey/Washington Action, Florida Action, and the States Action.

A hearing was held on September 7, 2001, to determine the fairness, reasonableness and adequacy of these Settlement Agreements;

IT IS HEREBY ORDERED AND ADJUDGED:

1. For purposes of this Final Order and Judgment, the following terms have the following meanings:

(a) The term "alternative channel of distribution" means any mail order

company, pharmacy, buying club, department store, mass merchandise outlet or other appropriate distribution alternative which does not require that an eye care practitioner (as defined herein), either available on, or side-by-side to, its premises, examine the purchaser's eyes in connection with the sale of contact lenses.

(b) The term "Settlement Class" means all purchasers of Vistakon, Bausch & Lomb and CIBA Vision replacement contact lenses from eye care practitioners during the period 1988 to the present excluding consumers in Florida represented by the Florida Attorney General in *State of Florida v. Johnson & Johnson Vision Products, et al.*, Case No. 94-619-Civ-J-20.

(c) The term "Settlement Class member" means a member of the Settlement Class.

(d) The term "contact lens" means a medical device made of plastic that is placed on the eye.

(e) The term "eye care practitioner" means an optometrist, ophthalmologist, or optician, including, but not limited to, any such person employed by or associated with a retail optical store (as defined herein).

(f) The term "Florida resident" means any natural person who was a resident of the State of Florida at the time he or she, or someone on his or her behalf, purchased Johnson & Johnson, CIBA Vision, and/or Bausch & Lomb contact lenses.

(g) The term "purchasers of Vistakon, Bausch & Lomb and CIBA Vision replacement contact lenses from eye care practitioners" means any natural person who bought, or on whose behalf someone bought, Johnson & Johnson, CIBA Vision, and/or Bausch & Lomb replacement contact lenses (as defined herein) from an eye care practitioner (as defined herein).

(h) The term "replacement contact lenses" means contact lenses that are sold or dispensed to replace the initial contact lenses.

(i) The term "retail optical store" means a store or a chain of stores that sells contact lenses to consumers and employs or has associated an eye care practitioner either available on, or side-by-side to, its premises to examine the purchaser's eyes in connection with the sale of contact lenses, including all stores or chains of stores to which Johnson & Johnson, CIBA Vision, and/or Bausch & Lomb or their authorized distributors sold contact lenses.

(j) The term "State resident" means any natural person who was a resident of any State at the time he or she, or someone on his or her behalf, purchased Johnson & Johnson, Bausch & Lomb, and/or CIBA Vision contact lenses.

2. The Court has personal jurisdiction over the parties and has subject matter jurisdiction over the Class Action pursuant to 28 U.S.C. §§1331 and 1337 and over the Florida and States Action pursuant to 28 U.S.C. §§1331, 1337 and 1367 and over the Morris Action and Downey/Washington Action pursuant to 28 U.S.C. §1331.

3. The Court finds that the plan for dissemination of notice, preliminarily approved and completed pursuant to an Order dated May 22, 2001, satisfies the requirements of Fed. R. Civ. P. 23(e), 15 U.S.C. §15c(c) and the Due Process Clause of the United States Constitution.

4. Pursuant to Fed. R. Civ. P. 23(e) and 15 U.S.C. §15c(c), the Court finds that the Settlement Agreements are fair, reasonable and adequate, and in the best interests of Settlement Class members, State residents and Florida residents. The Court carefully considered all of the objections filed in this case, including the objections made by those who sought to intervene, and whose intervention was denied in previous Orders (Doc. No. 1316, filed October 17, 2001, and

Doc. No. 1318, filed October 30, 2001). The objections are overruled because the Court finds the Settlement Agreements to be fair and reasonable without allowing for excessive attorney fees and under the circumstances provides reasonable and fair relief for the reasons states below to current users of contact lenses and to those who no longer wear contact lenses.

Accordingly, the Settlement Agreements are finally approved. In considering whether the settlement is fair, reasonable, and adequate, the Court specifically considered seven factors and found that all seven of the factors were satisfied.

a. Absence of Collusion - There is no evidence before the Court that would suggest the proposed settlements are the result of any collusion among the parties or their counsel. In fact, the record is to the contrary. Throughout the litigation, counsel on both sides aggressively and zealously pursued the interests of their respective clients. Each settlement was negotiated over an extended period of time during which experienced counsel adamantly advanced their respective positions. All settlement negotiations involved good-faith bargaining conducted at arms' length. Moreover, the Court supervised the settlement reached between plaintiffs and J&J during the middle of the trial. Under these circumstances there can be no doubt that the settlements were achieved without collusion.

b. The Likelihood of Success at Trial and the Range of Potential Recovery - Neither plaintiffs nor defendants were guaranteed success at trial. Both sides had an enormous burden of explaining a complex antitrust lawsuit, and the plaintiffs had the burden of establishing a conspiracy or conspiracies and an adverse market impact as a result of the conspiracies. After five weeks of trial, the Court is convinced from what is saw and heard up to that point that the jury could have reasonably found for either side. Plaintiffs' recovery is clearly

much more certain in light of the settlement. The cash and benefits packages portion of the settlements before the Court are valued at \$85,565,888.00. When added to the CIBA settlement, the total recovery for plaintiffs equals \$90,565,888.00 plus interest that has been earned on the deposited cash portions of the proposed settlements (which equals approximately \$92 million). In addition, the injunctive relief requiring a change in distribution policies is at least, if not more, valuable than the cash and coupon components of the settlement for the plaintiffs. These provisions alter the distribution policies of the manufacturers. Although difficult to quantify, plaintiffs anticipate that these changes will result in very considerable savings for class members in the future. Plaintiffs' damages expert testified that damages for the relevant period are \$355.85 million. The settlement provides an immediate and certain recovery of approximately twenty five percent of estimated damages and eliminates the risk of no recovery. After weighing the likelihood of success at trial and on subsequent appeals against the substantial and immediate gains available from the settlements, the balance weighs heavily in favor of approval of the settlements.

c. The Complexity, Expense, and Duration of the Litigation - Given the size of the national plaintiff class of twenty three million, the number of plaintiff states, and the inherent complicated nature of the subject matter of the litigation, it is clear that this litigation is very intricate, expensive, and likely to last for an extended period of time. Plaintiffs include a nationwide class of consumers as well as the attorneys general of thirty two states. Not only is the relationship between the parties complex, but proving the existence and amount of damages as a result of defendants' alleged antitrust violations involve complicated theories and statistical models proffered by experts. To add to the complexity of the case, there were federal as well as

numerous state law claims involved. The Court sua sponte raised the issue of severing the state and federal law claims because they would be too complicated for the jury to understand. The parties agreed that the jury would only decide the federal claims and the Court would decide the state claims. They also agreed that if the jury found no liability on the federal claims, then the Plaintiffs agreed to drop the state law claims. Given the complexity involved in trying numerous state and federal claims, settlement is preferable.

Both sides have also expended a great deal of time and expense in prosecuting and defending this action. To date, the plaintiffs have spent nearly \$8 million in expenses on this case (not including attorneys' fees). It is unlikely that those expenses would stop or even decrease as the litigation progressed. It is more likely the expenses would continue to grow, and for these reasons, settlement is preferable.

d. The Terms of the Settlements are Fair, Reasonable, and Adequate -

The settlements before the Court contain benefits packages as well as cash components and injunctive relief. These terms of the settlement are fair and reasonable for the following reasons:

1) there is a very high likelihood the coupons will be redeemed because they are for items which contact lens wearers use and must replace on a regular basis; 2) there are generous time limits placed on the use of the coupons; and 3) the benefits packages compare favorably to other promotional coupons, especially those that require a sizable expenditure in order to use them.

The injunctive relief provisions are also fair and reasonable. Three major manufacturers of contact lenses have agreed to sell and distribute to alternative channels of distribution which means that replacement contact lenses will be available to consumers through alternative, and potentially less expensive, channels. Although it is difficult to place a dollar value on these

savings, consumers, in most cases, will realize substantial savings as a result of the injunctive relief.

e. The Procedures Used to Notify Class Members and to Allow them to Present their Views - The dissemination of notice in this case was designed to reach the national class as well as consumers in the plaintiff states. Notices were published in 671 newspapers, including the weekend edition of *USA Today*. The expansive publication program reached a readership in excess of 143 million people. In addition, individual notices were mailed to over 160,000 class members, two settlement internet web-sites have been established, and toll free telephone numbers are available to request a copy of the notice.

The long-form notice sets forth the terms of each of the proposed settlements, a description of the claims asserted, the date and time of the fairness hearing, that the attorneys will seek fees and expenses from the cash portion of the settlement, and consumers' rights with respect to the proposed settlements. The short-form notices briefly describe the proposed settlements, the date and time of the fairness hearing, and consumers' rights.

f. The Judgment of Experienced Counsel Favors Approval of the Settlements - Counsel for all parties endorse the settlement before the Court. The views of the attorneys, while not conclusive, are entitled to significant weight. Counsels' view of the settlement in this case supports the Court's conclusion that the settlement is fair and reasonable.

g. The Stage of Proceedings at the Time of Settlement - The parties reached settlements at various stages of the case. The settlement with B&L and the Individual Defendants were reached just prior to the start of trial. The settlement with the AOA was reached during the second week of trial. J&J did not settle until after plaintiffs rested and J&J's

motions for directed verdict were denied. This demonstrates that the parties had ample basis to determine the strengths and weaknesses of their cases prior to settlement.

5. In accordance with the terms of the Settlement Agreements (and with the exception of those persons who have opted out of the plaintiff class):

(a) All claims asserted against the AOA, the Individual Defendants, Bausch & Lomb, and Johnson & Johnson in this Class Action, Florida Action, Morris Action, Downey/Washington Action, and the States Action are dismissed with prejudice.

(b) The Class plaintiffs and all Settlement Class members (both individually in their capacities as class representatives), State residents, Florida residents, Downey/Washington, Morris, and all their successors, heirs and assigns, and anyone acting on their behalf, including in a representative or derivative capacity; the States, in their capacities as sovereigns, as *parens patriae* on behalf of natural persons for whom they may act, and on behalf of their economies and general welfare, and their assigns, and anyone acting on their behalf, including in a representative or derivative capacity; and Florida, in its capacity as a sovereign, as *parens patriae* on behalf of natural persons for whom it may act, and on behalf of its economy and general welfare, and anyone acting on their behalf, including in a representative or derivative capacity, release and forever discharge Johnson & Johnson, Bausch & Lomb, the AOA, and the Individual Defendants, their present and former parents, subsidiaries, divisions, affiliates, stockholders, benefit plans, officers, directors, employees, agents, and any of their legal representatives, and the predecessors, heirs, executives, administrators, successors and assigns of each of the foregoing (the "Released Parties") from all manner of claims, liabilities, demands, actions, suits and causes of action, for damages, restitution, disgorgement, unjust enrichment,

civil penalties, statutory penalties, injunctive and/or declaratory relief, whether class, individual, representative, or otherwise in nature, including costs, expenses, penalties and attorneys' fees, known or unknown, suspected or unsuspected, in law or equity, that accrued prior to the date of this Order and that the Class plaintiffs, Settlement Class members, State residents, Florida residents, Downey/Washington, Morris, and the States and Florida ever had, now have or hereafter can, shall or may have, which have been asserted or could have been asserted in the Class Action, States Action, Florida Action, Downey/Washington Action, or Morris Action, including, but not limited to, claims under the Sherman Antitrust Act, 15 U.S.C. §§1 *et seq.* Alabama Restraint of Trade or Production Act, §§8-10-1 *et seq.*, *Code of Alabama* (1975), Alaska Monopolies and Restraint of trade Act, as 45.50.562 Arizona's Uniform State Antitrust Act, A.R.S. §§44-1402 *et seq.*, Ark. Code Ann. §§4-75-201 *et seq.*, California Business and Professions Code §§16700 *et seq.* (including Business and Professions Code §16720), California Business and Professions Code §17200 (including Business and Professions Code §§17203, 17204, 17206.1), Section 35-26 and 35-28 of the Connecticut General Statutes, Sections 35-32, 35-34, 35-35 and 35-38 of the Connecticut General Statutes, the Delaware Antitrust Act, 6 *Del C.* Chapter 21, Florida Deceptive and Unfair Trade Practices Act, Florida Statutes §§ 501.201 *et seq.* (including §501.204), Florida Antitrust Act, Florida Statutes §§542.15 *et seq.* (including §542.18), the Idaho Antitrust Law, Idaho Code §§48-101 *et seq.*, Idaho Code §48-603(18) of the Idaho Consumer Protection Act, the Illinois Antitrust Act, 740 I.L.C.S. 10/1 *et seq.*, Iowa Competition Law, Iowa Code §§553.1 *et seq.* (including §§553.4, 553.5), Kansas Restraint of Trade Act, KSA 50-101, *et seq.*, Kansas Consumer Protection Act, K.S.A. §§50-623 *et seq.*, Louisiana Rev. Stat. title 51, part IV, §§1401, *et seq.*, Maine Antitrust Statutes, 10 M.R.S.A.

§§101, *et seq.*, Maine Unfair Trade Practices Act, 5 M.R.S.A. §§205-A *et seq.* (including §207), Maryland Antitrust Act, Maryland Comm. Law Code Ann. 11-201 *et seq.*, Mass. Gen. Laws Ann. ch. 93 §§1-14A, and ch. 93A, §§2, 4, section 2 of the Michigan Antitrust Reform Act, MCL 445.772; MSA 28.70(2), the Minnesota Antitrust Law of 1971, Minn. Stat. §§325D.49-325D.66, the Missouri Antitrust Law, §§416.011 *et seq.*, the Missouri Merchandising Practices Act, §§407.010 *et seq.*, Nevada Unfair Trade Practices Act, NRS CH. 598A.010 *et seq.*, New Jersey Antitrust Act, N.J.S.A. 56:9-3 New York General Business Law §§340-347, North Carolina Antitrust Act, N.C. Gen. Stat. 75-1, *et seq.* (including §§75-1.1, 75.2), North Dakota's Uniform State Antitrust Act, N.D. Cent. Code §§51-08.1-01 *et seq.* (1995 Supp.), the Ohio Valentine Act, Ohio Rev. Code §§59.1-9.1 *et seq.*, Oregon Antitrust Law, ORS 646.705 *et seq.*, Texas Free Enterprise and Antitrust Act of 1983 Tex. Bus. Com. Code §15.01, *et seq.*, Utah Antitrust Act Utah Code Ann. §§76-10-911, *et seq.*, the Virginia Antitrust Act, Va. Code §59.1-9.1 *et seq.*, Revised Code of Washington §§19.86 *et seq.* (including §§19.86.030, 19.86.020), the West Virginia Antitrust Act, W. Va. Code §§47-18-1 *et seq.*, the West Virginia Consumer Credit and Protection Act, W. Va. Code §§46A-1-101 *et seq.*, the Wisconsin Trust and Monopolies Law, §§133.03(1), 133.04, 133.16, 133.17 and 133.18, Stats., or any state antitrust, unfair competition, unfair or deceptive trade practices, consumer protection, or similar law, arising out of or relating to Johnson & Johnson's or Bausch & Lomb's policies, practices, courses of dealing and/or decisions not to sell their contact lenses directly to alternative channels of distribution and/or restrain their authorized distributors from doing so and/or arising out of or relating to allegations that Johnson & Johnson or Bausch & Lomb took any action to limit consumers' ready access to the prescription, work order, or other information a consumer would need to purchase contact

lenses from alternative channels of distribution (collectively, the "Released Claims").

(c) The Class Plaintiffs, all Settlement Class members, Morris, Downey/Washington, State residents and Florida residents, their successors, heirs and assigns, and anyone acting on their behalf, including in a representative or derivative capacity, and the States and Florida (in their capacities as sovereigns, as *parens patriae* on behalf of natural persons for whom they may act, and on behalf of their economies and general welfare) and their assigns, and anyone acting on their behalf, including in a representative or derivative capacity, are hereby permanently enjoined from asserting, instituting or prosecuting, either directly or indirectly, in any suit, action, proceeding or dispute, any Released Claim, in whole or in part, against any Released Party in any state or federal court or other forum.

(d) With respect to the California state claim, the class plaintiffs, all Settlement Class members, Morris, Downey/Washington, State residents and Florida residents, their successors, heirs and assigns, and the States and Florida (in their capacities as sovereigns, as *parens patriae* on behalf of natural persons for whom they may act, and on behalf of their economies and general welfare) and their assigns, and anyone acting on their behalf, including in a representative or derivative capacity, are hereby deemed to have waived and released any and all provisions, rights and benefits conferred by §1542 of the California Civil Code, which reads:

Section 1542. **General Release; extent.** A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor;

and also are deemed to have waived and released 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 §1542 of the California Civil Code. The Class plaintiffs, Morris, Downey/Washington, all Settlement Class members, State residents and

Florida residents, their successors, heirs and assigns, and the States and Florida and their assigns, and anyone acting on their behalf, including in a representative or derivative capacity, may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the Released Claims, but class plaintiffs, Morris, Downey/Washington, all Settlement Class members, State residents and Florida residents, their successors, heirs and assigns, and the States and Florida and their assigns, and anyone acting on their behalf, including in a representative or derivative capacity, are hereby deemed to have expressly waived and fully, finally and forever settled and released any known or unknown, suspected or unsuspected, contingent or non-contingent Released Claim, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such other or different facts.

(e) In accordance with their jurisdiction, Attorneys General for the Plaintiff States agree to continue to administer or enforce their state laws regarding the sale, dispensing and/or furnishing of contact lenses, provided that nothing in this paragraph 5(f) is intended to create a private right of action.

(f) Nothing in this Final Order and Judgment or the Settlement Agreements is or shall be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing by Johnson & Johnson, Bausch & Lomb, the AOA, or the Individual Defendants. Nor is it to be construed as the truth of any of the claims or allegations in the Class Action, Florida Action, the States Action, the Morris Action, the Downey/Washington Action, or in any other action in MDL 1030. Neither these Settlement Agreements nor any of their provisions may be offered or received in evidence in any action or proceeding, or otherwise used in any court or other tribunal, as an admission or concession of the merit or lack of merit of any claim against Johnson & Johnson, Bausch & Lomb, the AOA, or the Individual Defendants or of the liability or wrongdoing of any nature on the part of Johnson & Johnson, Bausch & Lomb, the AOA, or the Individual Defendants. The terms of this paragraph do not limit the right of any party to use the Settlement Agreements and this judgment in any proceeding to enforce the terms hereof.

6. Without affecting the finality of this Final Order and Judgment, the Court retains exclusive jurisdiction for a period of five years from the date the Settlement Agreements becomes final: (a) over the Settlement Agreements, including their administration, consummation, and enforcement, and in order to determine issues relating to attorneys' fees, costs and expenses and to any distribution of the Settlement Fund to Settlement Class members, State residents or Florida residents; and (b) over Johnson & Johnson, Bausch & Lomb, the AOA, the Individual Defendants, the class plaintiffs, Settlement Class members, Morris, Downey/Washington, State residents, Florida residents, the States and Florida, for the purpose of enabling any of them to apply to the Court at any time for further orders and directions as may be necessary or appropriate for the construction and implementation of the terms of this Final Order and Judgment. The class plaintiffs, Morris, Downey/Washington, the States, Florida, and all Settlement Class members, State residents and Florida residents who did not file a notice with the clerk opting out of the settlement agreements are hereby deemed to have submitted irrevocably to the exclusive jurisdiction of this Court for any suit, action, proceeding or dispute arising out of or relating to this Final Order and Judgment and/or the Settlement Agreements, including their applicability, and to have irrevocably waived and agreed not to assert by way of motion, defense or otherwise, any claim or objection that they are not subject to the jurisdiction of the Court, or that this Court is, in any way, an improper venue or an inconvenient forum.

7. The terms and conditions of ¶¶(c) and (d) of this Court's *In Camera* Order dated April 23, 2001 remain in full force and effect. No provision in the Settlement Agreements or in this Order shall be deemed to supersede that *In Camera* Order or to relieve the parties of their obligations under that order, which continues to be an essential condition of the Settlement.

8. Plaintiffs' counsel attorneys' fees shall be awarded in the amount of \$29,000,000.00, which represents approximately 31.5% of the total monetary recovery in this litigation. The Court further awards any unclaimed funds that may remain in the Settlement Fund to Plaintiff States in the following manner: If additional funds become available for distribution, including, for example, accrued interest or funds currently committed to the B&L-

CIBA dropout fund or for administrative costs, those funds shall revert to Plaintiff States to be used at their discretion for (1) a *cypres* distribution to appropriate charities; (2) to fund antitrust or public protection enforcement purposes; or (3) as a contribution to the National Association of Attorneys General Milk Fund. Distribution of any payment by Johnson & Johnson pursuant to § 5(e) of the settlement among Plaintiffs and Johnson & Johnson shall be subject to Court review and approval.

9. The Court specifically considered the following factors in determining that the fees sought should be awarded in this case:

a. Time and Labor Required. The investigation and litigation of this case consumed over nine years and nearly 100,000 hours of attorney and paralegal time.

b. The Novelty and Difficulty of the Questions Involved. The case involved novel legal questions, including issues raised by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the effect of state regulatory regimes, the scope of permissible expert testimony, and other complex disputed factual and legal issues. The case's complexity made it an extremely difficult case both to prove and to present to a jury.

c. The Skill Requisite to Perform the Legal Service Properly. The case required extensive legal expertise involving antitrust law and class action law. Each issue was vigorously contested, and the case was tried for over five weeks.

d. The Preclusion of Other Employment by the Attorney Due to Acceptance of the Case. The extensive labor required precluded both the private and public attorneys from working on other matters, including the ability of government counsel to engage in other enforcement matters.

e. The Customary Fees. This factor does not apply.

f. Whether the Fee is Fixed or Contingent. The fee here was contingent. The Plaintiffs' attorneys risked nearly \$8 million in expenses that were advanced in the prosecution of this case as well as the nearly 100,000 hours of time expended to resolve this case.

g. Time Limitations Imposed by the Client or the Circumstances. This factor does not

apply.

h. The Amount Involved and the Results Obtained. The damages claims presented were in excess of \$350 million (excluding civil penalties and trebling). The amount recovered exceeds \$92 million plus injunctive relief, which requires the major manufacturers of replacement contact lenses, according to the terms of the injunctions, to distribute replacement contact lenses through alternative channels of distribution.

i. The Experience, Reputation, and Ability of the Attorneys. Plaintiffs' counsel had extensive background in handling antitrust class actions and *parens patriae* prosecutions and demonstrated high legal abilities.

j. The "Undesirability" of the Case. The volume of documents, the vigorous defense and difficult legal and factual issues presented made this case undesirable from a plaintiff's perspective.

k. The Nature and Length of the Professional Relationship with the Client. This factor does not apply.

l. Awards in similar cases. The factors discussed justify an upward adjustment of the percentage award from this circuit's benchmark. *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991). In a similar case that went to trial as this case did, *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999), the court determined that the benchmark was 30% and adjusted it upward to 33 1/3%. Here the Court settled on 31.5%.

10. After attorney fees are paid out of the cash portion of the settlement, there is \$9,854,000 plus interest remaining for unreimbursed expenses.

a. The law firm of Milberg Weiss, counsel for plaintiffs, shall receive \$739,665.25.

b. The law firm of Hagens Berman LLP, counsel for plaintiffs, shall receive \$386,452.11.

c. The law firm of Wechsler Harwood Halebian & Feffer LLP, counsel for class plaintiffs, shall receive \$97,764.17.

- d. The law firm of Douglas D. Chunn, P.A., counsel for class plaintiffs, shall receive \$4,449.45.
- e. The law firm of Burt & Pucillo, LLP, counsel for plaintiffs, shall receive \$89,371.05.
- f. The law firm of Kohn, Swift & Graf, P.C., counsel for plaintiffs, shall receive \$30,687.51.
- g. S. Perry Pendland, Esq., and associates, counsel for plaintiffs, shall receive \$15,987.24.
- h. The law firm of Smith Hulsey & Busey, counsel for plaintiffs, shall receive \$24,246.56.
- i. The Cuneo Law Group, P.C., counsel for plaintiffs, shall receive \$56,208.33.
- j. The law firm of Wolf Haldenstein Adler Freeman & Herz LLP, counsel for plaintiffs, shall receive \$49,361.02.
- k. The law firm of Thompson Muraro Razook & Hart, counsel for plaintiffs, shall receive \$67,174.39.
- l. The plaintiff states shall receive \$2,048,676.67 in expenses.
- m. The state of Florida shall receive \$2,458,861.21 in expenses.
- n. The NAAG New York Milk Fund shall receive \$129,487.71.
- o. The Plaintiffs' States Cost Share Fund shall receive \$1,495,990.69 to be redistributed to the states accordingly to their agreement.

11. The Court finds, pursuant to Fed. R. Civ. P. 54(b), that there is no just reason for delay, and directs the Clerk to enter this Final Order and Judgment as to Johnson & Johnson, Bausch & Lomb, the AOA, and the Individual Defendants. All pending motions in this case are terminated. The clerk shall close the file.

DONE AND ORDERED at Jacksonville, Florida, this 1st day of November, 2001.


HARVEY E. SCHLESINGER
United States District Judge

Copies to:
Counsel of Record
Garry Randolph
Law Clerk