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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

J THOMPSON, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. 1-800 CONTACTS, INC., et al., Defendants.	No. 2:16-cv-01183 CLASS ACTION Judge Tena Campbell Magistrate Judge Dustin B. Pead PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT WITH ARLINGTON CONTACT LENS SERVICE, INC. AND NATIONAL VISION, INC.

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Plaintiffs J Thompson, Iysha Abed, Daniel J. Bartolucci, Alexa Bean, William P. Duncanson, Tyler Nance, Leia Pinto, Jill Schulson, and Edward Ungvarsky ("plaintiffs") by their undersigned counsel, respectfully move this Court for entry of a Preliminary Approval Order: (i) granting preliminary approval of the Stipulation and Agreement of Settlement, dated September 19, 2017 ("Settlement Agreement"), between plaintiffs and defendants Arlington Contact Lens Service, Inc. and National Vision, Inc. (the "Settling Defendants") (attached as Exhibit 1 to the Jodlowski Decl.[1]); and (ii) certifying the Settlement Class.

As discussed further below, after extensive arm's-length negotiations by experienced counsel, plaintiffs have reached a settlement consisting of: (i) a substantial monetary component; and (ii) extensive cooperation from the Settling Defendants that will result in the production of evidence for plaintiffs' use in the continued prosecution of this action against the Non-Settling Defendants. The settlement agreement is fair, reasonable and adequate and certainly falls within the range of approval. In addition, because the requirements of Rule 23 for class certification of a Settlement Class are satisfied, and because a class action is the superior method for adjudicating this antitrust action, there are proper grounds upon which to certify a Settlement Class. Fed. R. Civ. P. 23. This motion is based on the following argument and points and authorities, the Jodlowski Declaration, any papers filed in reply, the argument of counsel, and all papers and records on file in this matter.

I. PRELIMINARY STATEMENT

Plaintiffs and the Settling Defendants Arlington Contact Lens Service, Inc. ("AC Lens") and National Vision, Inc. ("NVI") entered into the proposed Settlement, providing for payment of

[1] *See* Declaration of Steven M. Jodlowski in Support of Plaintiffs' Motion for Preliminary Approval of Settlement Agreement with Arlington Contact Lens Service, Inc. and National Vision, Inc., filed concurrently herewith ("Jodlowski Decl.").

$7,000,000 (the "Settlement Amount") to the Settlement Class. Unlike most class action settlements, Settling Defendants will also provide cooperation, including the production of important evidence that can be used against the Non-Settling Defendants. This cooperation will provide important evidence in support of plaintiffs' claims, which plaintiffs believe they can use at the pleading stage and later in the case. Courts have recognized that such cooperation – ***particularly at this stage in a complex matter*** – confers substantial and meaningful benefits to the class and weighs in favor of approval.

To grant preliminary approval, the Court need only determine the settlement is sufficiently fair, reasonable, and adequate to fall within the range of possible approval. The proposed Settlement plainly meets this standard. It was reached after extensive, arm's-length negotiations between experienced counsel, and the monetary relief together with the cooperation agreement are an excellent result for the Settlement Class. Accordingly, pursuant to Rule 23(e), plaintiffs respectfully seek entry of the accompanying Preliminary Approval Order submitted herewith. Fed. R. Civ. P. 23(e). Entry of the Preliminary Approval Order triggers Settling Defendants' cooperation obligations in addition to their obligations to fund the first half of the settlement.

II. SUMMARY OF THE ACTION

A. Procedural History

This litigation began in late 2016, when numerous class action complaints were filed against defendant 1-800 Contacts, Inc. ("1-800") in various judicial districts across country. These complaints alleged violations of federal antitrust law and related state law claims. Through a series of motions (or stipulations) filed in the various actions, all of the related cases were ultimately transferred to this Court and consolidated into one action.

On May 10, 2017, the Court appointed Boies Schiller Flexner LLP and Robbins Geller Rudman & Dowd LLP as Interim Class Counsel for plaintiffs and the putative class. Dkt. No. 70. That order authorized Interim Class Counsel to lead the prosecution of the action, including, among other things, handling settlement negotiations with defendants, executing necessary settlement documentation, and presenting any formalized settlement to the Court on behalf of the respective class. *Id.*

Plaintiffs filed a Consolidated Amended Complaint on May 31, 2017 ("Complaint"). Dkt. No. 72. The Complaint alleges a single claim for violation of Section 1 of the Sherman Act, 15 U.S.C. §1. *Id.*

Defendants are presently challenging that complaint through two separate dismissal motions brought under Fed. R. Civ. P. 12(b)(6) – one filed by defendant 1-800 and one filed by defendants Vision Direct, Inc., Walgreens Boots Alliance, Walgreen Co. and Luxottica Retail North America, Inc. Dkt. Nos. 116, 118. In those motions, defendants assert a number of procedural and substantive challenges to the Complaint, namely that: (i) the statute of limitations precludes plaintiffs' claims based on sales of contact lenses made prior to October 13, 2012; (ii) plaintiffs lack antitrust standing; (iii) plaintiffs fail to allege antitrust impact and injury; and (iv) plaintiffs' proposed relevant market is improperly defined. *Id.* Since the Non-Settling Defendants filed the dismissal motions, plaintiffs have been diligently drafting an opposition, and are prepared to vigorously contest these issues in the motions, which plaintiffs will file on October 3, 2017.

B. Factual Background

This action stems from a series of written agreements between 1-800 and at least 13 other online retail sellers of contact lenses. As detailed in the Complaint, through those agreements defendants committed to refrain from competing against one another in certain, critical online

advertising. *See generally* Complaint, ¶2. These agreements prohibited sellers of contact lenses from bidding on certain "keywords" in their online advertising campaigns through search engines such as Google. The agreements also committed the sellers to use "negative keywords," which are instructions to the search provider that a company's advertisement should not appear in response to a search query that contains a particular term or terms. *Id*., ¶¶6-7. Through the agreements, defendants were able to, and did, manipulate the market for contact lenses. *Id*., ¶10. National Vision and AC Lens – one of four sets of named defendants – entered into an agreement with 1-800 in March 2010, approximately six years after the first agreement (between 1-800 Contacts and Vision Direct) was executed. *Id*., ¶56.

III. TERMS OF THE SETTLEMENT

The Settlement Agreement provides for AC Lens and NVI collectively to pay $7,000,000 as settlement compensation to members of the proposed Settlement Class. In connection with the Settlement Amount, the Settling Defendants have also agreed to provide substantial cooperation to plaintiffs.

A. Stipulation as to Certification of the Settlement Class

The proposed Settlement Class is consistent with the proposed class set forth in the Complaint. The Settlement Class is defined as:

> [A]ll persons in the United States who made at least one online purchase of contact lenses from 1-800 Contacts, Inc., Arlington Contact Lens Service, Inc., or National Vision, Inc. from March 10, 2010 through September 19, 2017, who do not timely exclude themselves from the Class. Excluded from the Settlement Class are Defendants, their parent companies, subsidiaries and affiliates, any alleged co-conspirators, government entities and instrumentalities of government, states and their subdivisions, agencies and instrumentalities.

Compare Settlement Agreement, ¶1.31 *with* Complaint, ¶78.

B. The Settlement Amount

The Settling Defendants have agreed to pay monetary consideration for the settlement in an amount that is fair and reasonable. Collectively, AC Lens and NVI (which now owns AC Lens) have agreed to pay $7,000,000 as settlement compensation to members of the proposed class. Settlement Agreement, ¶1.30. As provided in the Settlement Agreement, all settlement funds are non-reversionary, provided the settlement receives final approval. That is, as of the Effective Date, Settling Defendants have no right to the return of the settlement fund or any portion thereof for any reason. *Id.*, ¶10.3. Fifty percent of the settlement monies will be paid into an escrow account within 10 days of the Court's order of a preliminary approval order, and the remaining 50% will be deposited after final approval. *Id.*, ¶3.1. Any interest earned on the settlement fund will become part of the settlement. *Id.*, ¶1.35.

C. The Settling Defendants' Cooperation

The Settlement Agreement includes cooperation in continued litigation in this matter. National Vision and AC Lens are required to provide: (i) all documents produced by Settling Defendants to the FTC; (ii) reasonably available transactional data related to the subject matter of this action; (iii) up to two current employees for interviews with plaintiffs' counsel; (iv) declarations or affidavits of two current employees; (v) witnesses for up to two depositions of current employees, and up to two employees for witness testimony at trial; and (vi) additional reasonably requested information, documentation or testimony, to be utilized by plaintiffs or plaintiffs' counsel to assist in the prosecution of this action. *See* Settlement Agreement, ¶11.1 & Exs. A-B, thereto.

Additionally, as part of their cooperation obligations, National Vision and AC Lens have agreed to provide a sworn declaration from Peter Clarkson, AC Lens' Chief Executive Officer, in which Mr. Clarkson will state, among other things, that "AC Lens currently believes that these

settlement agreements [between 1-800 and other ecommerce competitors in the online sale of contact lenses] likely prevented consumers from seeing ads for companies, including AC Lens, that typically sold contact lenses online for prices below the prices charged by 1-800 Contacts." Settlement Agreement, Ex. B. He will also state that the "agreements also likely enabled 1-800 Contacts to charge prices higher than it would have been able to charge absent the agreements." *Id.*

D. Scope of Release

In exchange for the consideration described above, the Settlement Agreement stipulates that there will a release of claims against the Settling Defendants. The Settlement Agreement describes the specific terms of the release provided to the Settling Defendants. Broadly speaking, however, the agreements release claims "arising from or relating in any way to any conduct alleged, or could have been alleged, based on the predicate of the action." *See* Settlement Agreement, ¶¶1.27, 1.28; *see also id.*, ¶¶7.1-7.3. The predicate of the action, of course, is the series of bidding agreements entered into between 1-800 and other online contact lens retailers between 2004 and 2013. *See* Complaint, ¶¶2, 56.

E. Termination Provisions

As provided in the termination, or "blow" provision, Settling Defendants may terminate the Settlement, or elect to proceed with the Settlement at their discretion, only if the class members who opt out represent at least 10% of the potential distributions from the Settlement Amount. Settlement Agreement, ¶10.4. The burden is on Settling Defendants to establish that the provision for termination is satisfied. *Id.*

F. Attorneys' Fees, Expenses and Service Awards

The Settlement Agreement reserves plaintiffs' right to request attorneys' fees, payment of expenses or charges in connection with prosecuting the action, and for the provision of plaintiffs'

service awards. Settlement Agreement, ¶¶9.1-9.5. The Settlement Class will, of course, be given notice of any such application or applications, which would be subject to Court approval.

IV. REQUESTED PROCEDURES

Plaintiffs propose to file a separate Motion for Approval of the Form and Manner of Notice to the Settlement Class and the Plan of Distribution ("Notice Motion"). The Notice Motion would be filed after: (i) Settling Defendants and 1-800 produce the transaction data for sales during the class period; (ii) plaintiffs develop a proposed Plan of Distribution based on transaction data analysis; and (iii) Settling Defendants and 1-800 produce the names and addresses of members of the individuals who made at least one online contact lens purchase during the class period, or make arrangements to provide notice by alternative means to those counterparties. Court approval of the relief set out in the Notice Motion would trigger notice to the Settlement Class. Currently, Settling Defendants are preparing to produce transaction data and class member lists. Settlement Agreement, ¶¶8.2, 10.1(f).

Interim Class Counsel recommend this two-step preliminary approval process for several reasons. First, entry of the Preliminary Approval Order triggers Settling Defendants' cooperation obligations. Interim Class Counsel expect that prompt production of Settling Defendants' documents and data will inform and assist plaintiffs' litigation efforts with respect to the Non-Settling Defendants. Settling Defendants' data is also necessary for plaintiffs to develop a plan of distribution. Second, entry of the Preliminary Approval Order triggers the initial funding of the settlement, allowing the funds in the Escrow Account to begin earning interest. And, third, deferring notice will result in a more efficient notice process. Deferring notice until a plan of distribution is developed will allow the notice to describe how claims will be treated in the distribution, giving members of the Settlement Class the information necessary to evaluate their options with respect to

the Settlements in a single communication. Deferring notice also has the advantage of potentially reducing the number of notices sent to the Settlement Class, should plaintiffs enter into additional settlements or the action reaches a merits conclusion.

For the foregoing reasons, plaintiffs request that the Court approve this two-step preliminary approval process. plaintiffs' motion for final approval would follow in due course.[2]

V. ARGUMENT

A. The Settlement Meets the Standard for Preliminary Approval

Rule 23(e) requires court approval of a class action settlement. Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled . . . only with the court's approval."); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) ("Rule 23(e) specifies that a class action cannot be settled without the court's approval . . . .").[3] Public policy favors the settlement of civil cases, especially complex class actions like this action. *See Newberg on Class Actions* §13:44 (5th ed. 2017) ("The law favors settlement, particularly in class actions" and "[t]his preference for settlement underscores the presumption . . . that courts will presume a proposed settlement to be fair in the presence of certain factors."); *Geiger*, 2015 WL 4523806, at *2 ("The law favors compromise and settlement of class action suits.").

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[2] Similar two-step preliminary approval processes have been adopted in several recent class action settlements. *See, e.g., In re Foreign Exchange Benchmark Rates Antitrust Litig.*, No. 13-cv-7789, 2015 U.S. Dist. LEXIS 175877, at *24-*25 (S.D.N.Y. Dec. 15, 2015) (preliminary approval of $2 billion settlements and ordering notice plan and plan of distribution to be submitted for approval at a later time); *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-CV-42 JG VVP, 2013 WL 4525323, at *6 (E.D.N.Y. Aug. 27, 2013) (separate orders granting preliminary approval of $112 million settlements and approving a notice program); *see also In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 480 (S.D.N.Y. 1998) (noting that "it is appropriate, and often prudent, in massive class actions" to defer consideration of the plan of distribution).

[3] Rule 23 also guides the Court in determining whether to conditionally certify a class for purposes of settlement where a litigation class has not yet been certified. *See Geiger v. Sisters of Charity of Leavenworth Health Sys., Inc.*, No. 14-2378, 2015 WL 4523806, at *2 (D. Kan. July 27, 2015).

Preliminary approval is the first step of a two-step process "to ensure the fairness of any class action settlement," and the purpose of preliminary approval is to make a "preliminary determination regarding the fairness, reasonableness, and adequacy of the settlement terms." *Rhodes v. Olson Assocs., P.C.*, 308 F.R.D. 664, 666 (D. Colo. 2015) (citing *Newberg on Class Actions*, §13:12 (5th ed.)). "The object of preliminary approval is for the Court 'to determine whether notice of the proposed settlement should be sent to the class . . . . Accordingly, the standard that governs the preliminary approval inquiry is less demanding than the standard that applies at the final approval phase.'" *Id.* Once preliminary approval is granted, the next step is to give notice to class members and to hold a hearing to make a final determination of the fairness of the proposed settlement. *Id.*; *see also McPolin v. Credit Serv. of Logan, Inc.*, No. 1:16-cv-00116 BSJ, 2017 U.S. Dist. LEXIS 59420, at *6 (D. Utah Apr. 17, 2017).

"The court has broad discretion in deciding whether to grant approval of a class action settlement." *Ashley v. Reg'l Transp. Dist. & Amalgamated Transit Union Div. 1001 Pension Fund Trust*, No. 05-cv-01567-WYD-BNB, 2008 WL 384579, at *4 (D. Colo. Feb. 11, 2008) (citing *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984)). "In exercising its discretion, the trial court must approve the settlement if it is fair and reasonable."[4] *Id.* Further, in making a preliminary approval determination, "the court should 'not decide the merits of the case or resolve unsettled legal questions.'" *Id.* (citing *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)); *see also CGC Holding Co., LLC v. Broad & Cassell*, 773 F.3d 1076, 1087 (10th Cir. 2014) ("For the purposes of class certification, our primary function is to ensure the requirements of Rule 23 are satisfied, not to make a determination on the merits of the putative class's claims."). Preliminary

[4] Unless otherwise noted, citations are omitted and emphasis is added, here and throughout.

approval is appropriate "where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious-deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval." *In re Motor Fuel Temp. Sales Practices Litig.*, No. 07-MD-1840-KHV, 2011 WL 4431090, at *5 (D. Kan. Sept. 22, 2011) (unpublished).

In the Tenth Circuit, courts consider the following factors in determining whether a proposed settlement is "fair, reasonable, and adequate": "(1) whether the proposed settlement was fairly and honestly negotiated; (2) the judgment of the parties that the settlement is fair and reasonable; (3) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; and (4) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation." *Rhodes*, 308 F.R.D. at 666-67 (citing *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002)). As demonstrated below, the Settlement Agreement warrants preliminary approval because it is substantively fair.

1. The Settlement Was Fairly and Honestly Negotiated

With respect to the first factor, the Court "'ensure[s] that the agreement is not illegal, a product of collusion, or against the public interest.'" *Ashley*, 2008 WL 384579, at *5. Interim Class Counsel are experienced in antitrust class actions, and "weight is given to their favorable judgment as to the merits, fairness, and reasonableness of the settlement." *Rhodes*, 308 F.R.D. at 667 (citing *Marcus v. Kan. Dep't of Revenue*, 209 F. Supp. 2d 1179, 1183 (D. Kan. 2002)) ("Counsels' judgment as to the fairness of the agreement is entitled to considerable weight."). The experience of Interim Class Counsel demonstrates that the Class was well-represented at the bargaining table, and further weighs in favor of approval of the Settlement on this case. *See Zapata v. IBP, Inc.*, 167 F.R.D. 147, 161 (D. Kan. 1996) ("In the absence of proof to the contrary, courts presume that class

counsel is competent and sufficiently experienced to vigorously prosecute the action on behalf of the class.").

Here, the Settlement Agreement is the product of arm's-length settlement negotiations that took place over the course of several months among experienced counsel. Discussions began in June 2017 and consisted of face-to-face meetings and telephonic conferences. The measure of relief afforded to the Settlement Class here is substantial and could only be achieved by Interim Class Counsel's diligent negotiations.

As a result of arm's-length negotiations, Interim Class Counsel achieved a sizeable monetary component, along with extensive cooperation obligations on behalf of Settling Defendants, which Interim Class Counsel diligently and thoughtfully negotiated to ensure the production of precisely the evidence needed to support plaintiffs' claims against Non-Settling Defendants. For example, the Settling Defendants have agreed to provide evidence that plaintiffs believe will help establish antitrust impact, thereby likely taking a major defense off the table for the Non-Settling Defendants. Cooperation obligations, including obligations weaker than those secured here, have been recognized to confer substantial benefits to a class. *See, e.g.*, *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003); *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1386 (D. Md. 1983) (a defendant's agreement to cooperate with plaintiffs "is an appropriate factor for a court to consider in approving a settlement"); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, Nos. 11 MDL 2262 (NRB), 11 CV 5450 (NRB), 2016 U.S. Dist. LEXIS 180481, at *100 (S.D.N.Y. Dec. 21, 2016) ("the intangible benefit of cooperation against the non-settling defendants" supports preliminary approval).

These elements point in favor of finding that "the settlement negotiations in the instant case were fair, honest, and conducted at arm's length." *Rhodes*, 308 F.R.D. at 667; *see also Geiger*, 2015 WL 4523806, at *2.

2. The Judgment of Plaintiffs and Settling Defendants Is Fair and Reasonable

In terms of the second factor, the Court should afford weight to the judgment of the plaintiffs, Settling Defendants and their counsel in reaching the settlement. "Obviously, it is the judgment of Interim Class Counsel, who specialize in this type of litigation, that the settlement is fair and reasonable. That judgment is entitled to some weight in considering this factor." *In re Qwest Commc'ns Int'l Inc., Sec. Litig.*, 625 F. Supp. 2d 1133, 1138 (D. Colo. 2009). As evidenced above, plaintiffs and Settling Defendants achieved settlement only after extensive, informed arm's-length negotiations. Negotiations with Settling Defendant were hard-fought and contentious.

Interim Class Counsel conducted an extensive pre-suit investigation and engaged in extensive preparation for settlement negotiations to inform their views on the strength of plaintiffs' claims and the defenses to liability. Interim Class Counsel has retained several economists and industry experts. Plaintiffs' investigation, along with their expert's advice, has informed Interim Class Counsel's views on the anticompetitive nature and impact of the bidding agreements, as well as their approach for analyzing the Settling Defendants' liability and exposure.

Plaintiffs and Settling Defendants have engaged in a detailed consideration of the facts, risks and terms of the proposed settlement. On their judgment, and the judgment of Interim Class Counsel, plaintiffs recommend this settlement, which provides an immediate benefit to the Settlement Class, and which will be useful in continuing to litigate this action against the Non-Settling Defendants. *See Rhodes*, 308 F.R.D. at 667 ("Class Counsel are experienced in consumer

class actions, and weight is given to their favorable judgment as to the merits, fairness, and reasonableness of the settlement.").

3. Serious Questions of Law and Fact Exist

The third factor of this Circuit's "fairness" test requires that the Court examine whether questions of law and fact exist to justify the settlement:

> This factor requires an examination of whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt. The presence of such doubt augurs in favor of settlement because settlement creates a certainty of some recovery, and eliminates doubt, meaning the possibility of no recovery after long and expensive litigation.

In re Qwest, 625 F. Supp. 2d at 1138; *see also Ashley*, 2008 WL 384579, at *6. While the Court need not make a determination as to the merits of the claims in this action, it is clear based on the arm's length negotiations between plaintiffs and the Settling Defendants that the Settling Parties "could reasonably conclude that there are serious questions of law and fact that exist that could significantly impact this case if it were further litigated" as to the Settling Defendants. *Rhodes*, 308 F.R.D. at 667. Because plaintiffs continue to litigate against the Non-Settling Defendants, Interim Class Counsel must be circumspect in revealing potential risks in establishing liability, damages, and maintaining a class action through trial.

Interim Class Counsel has conducted a thorough investigation into the facts of this case, and has expended substantial time conducting analyses as to plaintiffs' claims and reviewing extensive documents and public filings in preparation for litigating this action. While plaintiffs believe they would ultimately prevail at trial, a settlement as to the Settling Defendants creates a certainty of some recovery, while eliminating the risk of no recovery should the action proceed to trial. No matter how strongly plaintiffs feel about the case, there is a risk that a jury might accept one or more of the Settling Defendants' damages arguments and award nothing at all or award less than the

$7,000,000 that, if approved, would be available to the Settlement Class under the Settlement. Given the uncertain nature of antitrust class actions, the Settlement is strategically sound, fair and reasonable.

4. Immediate Recovery Outweighs the Possibility of Future Relief as to the Settling Defendants

The law is clear that early settlements are to be encouraged. *In re Remeron End-Payor Antitrust Litig.*, Nos. 02-2007 (FSH), 04-5126 (FSH), 2005 U.S. Dist. LEXIS 27011, at *62 (D.N.J. Sept. 13, 2005) ("Early settlements benefit everyone involved in the process and everything that can be done to encourage such settlements, especially in complex class action cases, should be done."). Considering the questions of law and fact that exist in this action as to the Settling Defendants, "the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; a trial, post-trial motions, and an appeal could reduce the net value of any recovery." *Rhodes*, 308 F.R.D. at 667. The benefit of immediate recovery here cannot be overstated – not only does the Settlement provide for sizeable monetary relief, it also includes cooperation obligations on behalf of the Settling Defendants, which plaintiffs and Interim Class Counsel consider significant. As discussed above, while the certainty of success at trial is unknown, plaintiffs and the Settlement Class can be sure that the additional documentary and testimony evidence they will receive in this action as a result of the Settlement Agreement will be undeniably useful in achieving recoveries from the Non-Settling Defendants.

There should be no question that the proposed settlement is fair and reasonable and that preliminary approval is appropriate here, "where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious-deficiencies, does not improperly

grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval." *Motor Fuel*, 2011 WL 4431090, at *5.

B. The Proposed Settlement Class Should Be Certified

Certification of a settlement class must satisfy the requirements of Rule 23(a), as well as at least one of the provisions of 23(b).[5] As demonstrated below, the proposed Settlement Class meets these requirements.

1. The Requirements of Rule 23(a) Are Satisfied

Certification of the Settlement Class is appropriate here because: (i) the Settlement Class is so numerous that joinder is impractical; (ii) there are questions of law and fact common to the Settlement Class; (iii) plaintiffs' claims are typical of the claims of the Settlement Class; and (iv) named-plaintiffs and their counsel will fairly and adequately protect the interests of the Settlement Class. Fed. R. Civ. P. 23(a); *In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 446 (D. Kan. 2006), *aff'd*, 768 F.3d 1245 (10th Cir. 2014).

a. Numerosity

Numerosity is easily satisfied here because the number and diverse location of putative Settlement Class Members is such that it would be impracticable to join all of those class members in one lawsuit. "[T]here is no set formula for determining if the class is so numerous that it should be certified." *See Urethane*, 237 F.R.D. at 446 (certifying class based on plaintiffs' estimate that the class consisted of "hundreds, if not thousands, of geographically dispersed businesses"); *see also Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir. 1977) (refusing to

[5] "In deciding whether to certify a settlement class, the Court need not inquire whether the case, if tried, would present difficult management problems under Rule 23(b)(3)(D)." *Lengel v. HomeAdvisor, Inc.*, No. 15-2198-KHV, 2017 U.S. Dist. LEXIS 10471, at *10 (D. Kan. Jan. 25, 2017) (citing *Amchem*, 521 U.S. at 620).

establish a threshold number as a prerequisite to a finding of numerosity and certifying a class of 46). Moreover, "[i]n evaluating numerosity, the court may also consider whether the proposed class members are geographically dispersed." *In re Farmers Ins. Co., Inc. FCRA Litig.*, No. CIV-03-158-F, 2006 WL 1042450, at *3 (W.D. Okla. Apr. 13, 2006) (citing *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981)).

While plaintiffs do not know (and need not know) the exact size of the Settlement Class, because of the nature of the trade and commerce involved, plaintiffs believe that there are tens of thousands of members in the Settlement Class, each of whom are geographically dispersed across the entire United States. According to its website, 1-800 has filled more than 30 million orders for 8 million customers. Jodlowski Decl., Ex. 2. In a single day, 1-800 delivers more than 200,000 contact lenses to customers. *Id.* Thus, based on plaintiffs' reasonable estimate, it is more than sufficient to find that joinder of all parties is impracticable under Rule 23(a)(1) as applied in this Circuit. *Urethane*, 237 F.R.D. at 446.

b. Common Questions of Law or Fact

To satisfy the commonality requirement of Rule 23(a)(2), plaintiffs' "claims must depend on a common contention." *See Wal-Mart v. Dukes*, 564 U.S. 338, 350 (2011). "That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. The commonality requirement is not demanding; even "'a single [common] question will do.'" *Id.* at 359; *DG v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010).

The nature of antitrust claims brought under Section 1 of the Sherman Act has led courts to routinely find that commonality exists. *Amchem*, 521 U.S. at 625 (predominance is "a test readily

met in certain cases alleging . . . violations of the antitrust laws"); *Urethane*, 237 F.R.D. at 446-47 (collecting cases); *Urethane*, 768 F.3d at 1254 (collecting cases). This case is no different. Plaintiffs' antitrust claim raises substantial common questions, including: (i) whether defendants entered into search advertising agreements; (ii) whether pursuant to such agreements, defendants did refrain from bidding against each other in certain search advertising auctions; (iii) whether such agreements violated §1 of the Sherman Act; (iv) whether defendants' conduct affected interstate commerce; and (v) whether defendants' conduct injured competition and plaintiffs and class members. Each member has a common interest in proving the existence, scope, effectiveness and impact of the agreements, as well as the appropriate monetary relief to remedy the injury caused by defendants. Commonality is met.

c. Typicality

As the Supreme Court has noted, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). "Provided the claims of Named Plaintiffs and putative class members are based on the same legal or remedial theory, differing fact situations of the putative class members do not defeat typicality." *Devaughn*, 594 F.3d at 1199 (citing *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988)). "[L]ike commonality, typicality exists where . . . all [putative] class members are at risk of being subjected to the same harmful practices, regardless of any class member's individual circumstances." *Devaughn*, 594 F.3d at 1199. Factual differences among some of the proposed class members will "not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and putative class members are based on the same legal or remedial theory." *Adamson*, 855 F.2d at 676.

Plaintiffs' claims arise from the same course of conduct: defendants' agreements to not compete against each other in certain online advertising. Complaint, ¶2. Specifically, the claims of

the Settlement Class are all based on the same legal or remedial theory, which is that they all suffered damages by virtue of the fact that they purchased contact lenses online from 1-800 and the Settling Defendants at prices artificially inflated due to the advertising agreements. By virtue of the antitrust allegations in this action, "[P]laintiffs' claims are typical of those of the [Settlement] class because the claims all depend on proof of the antitrust violation by the defendants, not on the [P]laintiffs' individual positions." *Urethane*, 237 F.R.D. at 447.

d. Adequacy

Adequacy is satisfied under Rule 23(a)(4) if the class representatives do not have interests that are antagonistic to those of the class and their chosen counsel is qualified, experienced, and able to conduct the litigation. *See Rutter*, 314 F.3d at 1187-88. Plaintiffs satisfy the adequacy requirement of Rule 23(a)(4) here because, (i) there are no conflicts of interest between plaintiffs and the Settlement Class as a whole, and (ii) the attorneys prosecuting this case are exceptionally qualified to litigate this matter. Only "fundamental" conflicts that "go to the specific issues in controversy" prevent certification. *Ogden v. Figgins*, 315 F.R.D. 670, 675 (D. Kan. 2016).

Plaintiffs are each adequate representatives of the Settlement Class and should be appointed as class representatives for settlement purposes. Plaintiffs and members of the class share the same interest in maximizing their recovery from the remaining defendants, as they all purchased contact lenses at artificially inflated prices. Thus, plaintiffs' interest in proving liability and damages is entirely aligned with that of the Settlement Class. Indeed, plaintiffs have already obtained a substantial monetary payment and cooperation from two of the defendants.

2. The Requirements of Rule 23(b) Are Satisfied

Once it is determined that the proposed class satisfies Rule 23(a), a class should be certified under Rule 23(b)(3) if "the court finds that the questions of law or fact common to class members

predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 623. "It is not necessary that all of the elements of the claim entail questions of fact and law that are common to the class, nor that the answers to those common questions be dispositive." *CGC Holding*, 773 F.3d at 1087. The potential for individualized damages does not negate that class treatment is superior. *See In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014).

Here, proof of the existence of the unlawful agreements, and their terms and participants, will consist of class-wide, common evidence that will necessarily focus on defendants' conduct, and not the conduct of individual class members. In addition, predominance is demonstrated, as in this case, where the impact of the asserted antitrust violation, as well as the damages arising out of the misconduct, can be shown on a class-wide basis. *Urethane*, 768 F.3d at 1254-56. The heart of plaintiffs' allegations is that defendant violated the antitrust laws, and "[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Amchem Prods.*, 521 U.S. at 625; *In re Crocs, Inc. Sec. Litig.*, No. 07-cv-02351-PAB-KLM, 2013 U.S. Dist. LEXIS 122593, at *35-*36) (D. Colo. Aug. 28, 2013) ("While predominance may be difficult to demonstrate in mass tort cases in which the 'individual stakes are high and disparities among class members great,' it is a 'test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.'").

Finally, as numerous courts have held, a class action is a superior method of adjudicating claims in cases like this one. *Urethane*, 237 F.R.D. at 453. Indeed, courts routinely certify classes in antitrust cases. *Id*. at 446-47 (collecting cases).

VI. CONCLUSION

Based on the foregoing, plaintiffs respectfully request that the Court enter the Preliminary Approval Order, granting Plaintiffs' Motion for Preliminary Approval of Settlement Agreement with Arlington Contact Lens Service, Inc. and National Vision, Inc. and certifying the Settlement Class.

DATED: September 25, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2017, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 25, 2017.

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