

January 31, 2007

Via Electronic Mail

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Re: MDL No. 1785: Case Management Order No. 4 and Plaintiff Fact Sheet Disputed Issues

Dear Counsel:

At the hearing on January 24th, the parties agreed on substantially all of the proposed case management order and plaintiff fact sheet. There are remaining disputes as to one section of the CMO and six questions in the plaintiff fact sheet. I have conferred with Justice Freedman and this letter should resolve those disputed issues.

A. Monthly Deposition Limits (CMO § V.A)

While the parties agree that plaintiffs are limited to twenty total depositions of former and current Bausch & Lomb employees, they disagree on how many of those depositions should be permitted per month. Plaintiffs argue there should be no monthly limit and Bausch & Lomb would prefer to limit the depositions to three per month.

The depositions of former and current employees are limited to three per month for the first two months without express permission of the court or an agreement by the parties to exceed this limit. Such a limit balances the plaintiff's asserted interest in conducting quick depositions to prevent spoliation with the defendant's interest in not being overwhelmed depositions early in the litigation. After the two month period, the limit may be re-evaluated because the parties, particularly Bausch & Lomb, should be able to prepare for more depositions per month as the litigation matures.

B. Family History of Eye Infections (Plaintiff Fact Sheet § II.E)

Plaintiffs argue they should only have to disclose any family history of eye infections for the last two years, particularly given that eye infections are generally acute afflictions that occur quickly. Bausch & Lomb argues plaintiffs should disclose any family history of eye infections for the last five years because that amount of time is not "excessive" since that the information

speaks to the existence of contagious infections in the home as well as household lens-hygiene practices.

Because this case is about eye infections, plaintiffs must disclose family history of eye infections for five years. To avoid confusion, January 1, 2001 is the starting date for disclosure.

C. Use of Other Contact Lens Solutions (Plaintiff Fact Sheet § IV.B)

Defendant argues the plaintiffs should provide information on all contact lens solutions they have ever used. Plaintiffs believe this information should be limited to only the past five years.

It would be difficult for anyone to provide information on every type and brand of contact lens solution they have ever used. Five years is a fairly lengthy history and should be adequate for the defendant to determine whether there is any connection with using those other solutions and the injuries alleged here. Plaintiffs must therefore disclose their history of lens solution use for the past five years, again using January 1, 2001 as the starting date.

D. Plaintiffs' History of Eye Care Treatment (Plaintiff Fact Sheet § VI.C)

Defendant asserts the plaintiffs should disclose the names of any physician, including specialists and primary care physicians, who they have seen for eye care and that the complete medical records held by those physicians should be made available. Plaintiffs assert they should only disclose the names of physicians who have provided eye care in the past ten years and that only medical records for the last ten years held by those physicians should be available.

Given that these cases directly involve plaintiffs' ocular health, it is appropriate to require the plaintiffs to disclose any medical treatment they have received related to their eyes. Additionally, in my experience, doctors usually copy the entire file and probably would not limit the records to only ten years. Plaintiffs must therefore disclose the names of all physicians who have provided eye care treatment and Bausch & Lomb is allowed to collect all medical records held by those physicians.

E. Plaintiffs' General Medical Records (Plaintiff Fact Sheet § VI.D)

Defendant argues that the plaintiffs should provide the identity of all physicians they have seen in the last ten years, regardless of the reason for treatment, and that Bausch & Lomb should receive all of the medical records held by those doctors. Plaintiffs initially argued that the medical records should be limited to the last ten years, but then argued at the status conference that there should be no disclosures on treatment not relating to ocular health.

Because there are conditions not generally related to the eye that could affect one's vision (such as diabetes), it is reasonable to require some disclosure of general medical history. Plaintiffs initially agreed to the ten-year physician identification requirement. Limiting the medical records to only the past ten years poses the same problems as placing a limitation on medical records relating to eye-care treatment. Plaintiffs must therefore disclose the names of all physicians who have provided treatment of any kind beginning January 1, 1996 and Bausch & Lomb may receive all medical records held by those physicians.

It is my understanding that some states have a statutory prohibition against the disclosure of certain medical records. If applicable, plaintiffs will be allowed to object to such disclosures and the court will schedule a hearing to rule on the objection.

F. Plaintiffs' Past Lawsuits, Worker's Compensation Claims, and Social Security Disability Claims (Plaintiff Fact Sheet §§ VII.D; VII.E; and IX.2)

Defendant asserts the plaintiffs should disclose all past lawsuits they have filed, as well as all claims made for worker's compensation and social security disability. Plaintiffs seek to limit disclosure of lawsuits to the past ten years. Plaintiffs also seek to remove the questions relating to worker's compensation and social security disability.

Plaintiffs must disclose any lawsuit, worker's compensation claim, or social security disability claim relating to the plaintiff's eyes or vision. Plaintiffs must also disclose all lawsuits, worker's compensation claims, or social security disability claims made since January 1, 1996, regardless of their subject matter.

G. Plaintiffs' Employment History (Plaintiff Fact Sheet § X)

Defendants want plaintiffs to disclose information about their entire employment history. Plaintiffs argue that disclosure of information relating to employment history should only be required if a specific plaintiff is claiming lost wages.

Plaintiffs must disclose their employment history since January 1, 2001. That time frame is sufficient to give Bausch & Lomb relevant information on plaintiffs' lost wages while posing little burden on the plaintiffs in recalling the information.

Please accept this letter as my ruling on these disputes and incorporate it into the proposed case management order and plaintiff fact sheet.

Sincerely,



David C. Norton
United States District Judge

cc: The Honorable Helen E. Freedman