

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: **PART: 39**

-----X

IN RE: NEW YORK RENU WITH MOISTURELOC INDEX NO.
766000/07
PRODUCT LIABILITY LITIGATION

-----X

60 Centre Street
New York, New York 10007
October 18, 2007

B E F O R E:

THE HONORABLE HELEN FREEDMAN
J U S T I C E

A P P E A R A N C E S:

FOR PLAINTIFFS:

RHEINGOLD, VALET, RHEINGOLD,
SHKOLNIK & McCARTNEY, LLP
New York PSC Liaison
113 East 37th Street
New York, New York 10016
BY: HUNTER J. SHKOLNIK, ESQ.

BURG, SIMPSON, ELDREDGE, HERSH & JARDINE, P.C.
Plaintiffs' Steering Committee
40 Inverness Drive East
Englewood, CO 80112
BY: SETH A. KATZ, ESQ.

WEITZ & LUXENBERG, P.C.
180 Maiden Lane
New York, New York 1003
BY: ROBERT J. GORDON, ESQ.
PAUL J. PENNOCK, ESQ.

Continued...

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

A P P E A R A N C E S (cont'd):

PARKER, WAICHMAN ALONSO, LLP
111 John Street - 14th Floor
New York, New York 10038
BY: JERROLD S. PARKER, ESQ.

RICHARDSON, PATRICK WESTBROOK & BRICKMAN, LLC
1037 Chuck Dawley Boulevard - Bldg A
Post Office Box 1007
Mt. Pleasant, South Carolina 29464
BY: H. BLAIR HAHN, ESQ.

MCGOWAN, HOOD, FELDER & JOHNSON
1405 Calhoun Street
Columbia, South Carolina 29201
BY: JOHN G. FELDER, ESQ.

FOR DEFENDANTS:

NIXON PEABODY, LLP
437 Madison Avenue
New York, New York 10022
BY: JOSEPH J. ORTEGO, ESQ.

O'MELVENY & MYERS, LLP
1625 Eye Street, NW
Washington, D.C. 20006
BY: JOHN H. BEISNER, ESQ.

SHOOK, HARDY & BACON, LLP
2555 Grand Boulevard
Kansas City, Missouri 64106
BY: HARVEY L. KAPLAN, ESQ.
MARIE WOODBURY, ESQ.

Continued...

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

A P P E A R A N C E S (cont'd)

FOR DEFENDANTS:

BECNEL LAW FIRM, LLC
106 W. Seventh Street
P.O. Drawer H
Reserve, Louisiana 70084
BY: DANIEL E. BECNEL, JR.

* * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

In re: Bausch & Lomb Contact)
Lens Solution Products)MDL No: 1785
Liability Litigation)C/A No. 2:06-MN-77777-DCN
)
)
)
)
)
_____)

60 Centre Street
New York, New York 10007
October 18, 2007

B E F O R E:

THE HONORABLE DAVID C. NORTON
J U S T I C E

A P P E A R A N C E S:

(SAME AS NEW YORK CAPTION)

PROCEEDINGS

1
2 JUDGE FREEDMAN: Okay, are we okay?

3 Good morning, everybody, and thank you
4 all for coming. I know some of you came a long
5 way.

6 And the Macy's sale doesn't start until
7 Saturday, but thank you all for coming.

8 We have lawyers on the telephone, as
9 well. We're going to ask you all, those of you
10 on the telephone, to forebear, for the time
11 being, and when we finish with the lawyers in
12 the courtroom, you will have an opportunity to
13 speak. Is that all right with all of you?

14 In addition, let me caution you now,
15 and, again, we'll try to remember to do it
16 later, when you speak, please identify yourself
17 for our court reporter.

18 At this point, this is a joint
19 conference with the MDL and the State
20 coordinating -- New York State coordination in
21 the ReNu with MoistureLoc case.

22 I received a proposed agenda -- we
23 received a proposed agenda from the MDL
24 lawyers; both sides in agreement. We know that
25 the New York State plaintiffs' counsel are
26 objecting to it and we will give you all an

PROCEEDINGS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

opportunity to voice your objections to it, but I think we are going to start with it.

We are going to deal with the privilege issue at some point. I know that's a big concern to the State lawyers. I suspect some of the federal lawyers may be concerned, as well.

MR. PENNOCK: Your Honor, Paul Pennock, for the plaintiffs.

Did you receive the New York agenda, however? We submitted a separate --

JUDGE FREEDMAN: Well, the agenda that I got from you mostly dealt with privilege problems and with -- let's see. Let's make sure I have it. Yes, we have that.

MR. PENNOCK: Okay. I just wanted to make sure the Court had received it. We had --

JUDGE FREEDMAN: And Judge Norton has a copy, as well.

MR. PENNOCK: Pursuant to your CMO, we had provided it to the defendants for their review and comment prior to submitting it. We were not provided, however, with their's prior to their submission of it to your Honor.

MR. CARROLL: Judge, that's -- we

PROCEEDINGS

1
2 submitted an agenda, as well. Mr. Pennock did
3 submit us an agenda. We could not agree on an
4 agenda and I submitted, on behalf of the Bausch
5 & Lomb for New York, the same agenda as the
6 MDL, which I did send to counsel.

7 JUDGE FREEDMAN: Okay, I am just looking
8 for my copy of the State agenda, which I do
9 have.

10 Yours is a scheduling agenda and I
11 understand that there are a number of items on
12 there. We will take them up. I will not
13 guarantee that I will adhere to everything on
14 it, or a lot of things. I reserve the right to
15 change my mind.

16 With that, having said that, why don't
17 we start with the MDL, just for background
18 information.

19 JUDGE NORTON: Before we start, I think
20 one of the motivating factors for a lot of the
21 paperwork that I have gotten copies of in the
22 last week or so is because of what I did. The,
23 joint, quote, unquote, "joint order" with the
24 check box, that was at my direction they did it
25 that way. That was not their direction going
26 behind your back. I told them to make a joint

PROCEEDINGS

1
2 order, we were going to discuss all of it as
3 kind of like an agenda, so it's not an attack
4 from the rear. They did it the way I asked
5 them to do it.

6 And if I caused you all to worry before
7 that, I apologize; okay? But I did that. They
8 didn't do that.

9 MR. BECNEL: Judge, Daniel Becnel. I am
10 on the MDL executive committee. I didn't even
11 know about it. I just want the Court to know
12 about that. As an executive committee member
13 charged with helping run this case, I wasn't
14 even told about it, didn't see it until after
15 it was submitted and that's not right.

16 JUDGE FREEDMAN: You are from?

17 MR. BECNEL: Louisiana. And I am on the
18 MDL executive committee.

19 JUDGE NORTON: Well, we are going to
20 have to worry about that. I am not going to
21 micromanage anything, especially your
22 committee, but I understand you have a
23 complaint.

24 As far as the proposed agenda I have,
25 the first thing on the agenda is a brief
26 overview of the MoistureLoc litigation, number

PROCEEDINGS

1
2 of cases, et cetera, et cetera; is that where
3 we are?

4 MR. ORTEGO: Yes, your Honor.

5 JUDGE FREEDMAN: Mr. Ortego, we have
6 gotten different numbers in different
7 communiques.

8 MR. ORTEGO: Yes, your Honor, I think
9 this week we supplemented the case list to you
10 on how many cases we had in New York. I will
11 do the best I can with the numbers for both,
12 what I think the number of cases are in both
13 the MDL and New York, if that's helpful.

14 My understanding that the number of
15 cases filed to date in the MDL, my
16 understanding, there are 373 plaintiffs filed
17 in the MDL in a matter of 20 captions or
18 lawsuits filed.

19 In New York, my understanding is there
20 is approximately 308 plaintiffs, at last time
21 we counted, in 308 separate lawsuits.

22 Your Honor, for the record, I don't
23 think that number includes any consortium cases
24 And that may be the differential, because
25 counting those up, it does not include the
26 consortium cases. And the cases in New York --

PROCEEDINGS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

JUDGE FREEDMAN: What are consortium cases?

MR. ORTEGO: The spouse's lack of --

JUDGE FREEDMAN: Oh, the loss of consortium. But those are not separate cases, I don't think. In my court, everybody files a separate complaint, but not the loss of consortium -- the loss of consortium is part of that individual's complaint.

MR. ORTEGO: I understand that and we did not count those as individual plaintiffs, even though the spouse would be in there. So, when I gave you the number, we did not count those.

So, in New York there are 308. They come from cases in New York. We haven't been able to confirm, but there are probably 18 plaintiffs from New York from 11 different counties and most of the plaintiffs come from different states and some from other countries, as well, that are filed here in New York.

And where we are, Judge, on some of the discovery, as I understand it, which has been the joint discovery to date, there have been six depositions taking place of Bausch & Lomb

PROCEEDINGS

1
2 personnel. Of those six depositions that were
3 taken, two are incomplete at this point, have
4 not been finished but have been started.

5 JUDGE FREEDMAN: Which ones are those?

6 MR. ORTEGO: The incomplete ones -- I
7 don't know offhand. Is it Lisa Tinsley, maybe?

8 MS. WOODBURY: Yes, your Honor.

9 Marie Woodbury for defendant Bausch &
10 Lomb.

11 And the other one that I believe is
12 incomplete is Kevin Klump.

13 MR. ORTEGO: And that is a former Bausch
14 & Lomb employee, your Honor. That is the
15 individual we discussed earlier about that was
16 a former employee and he had some other issues
17 that are in South Carolina.

18 And, your Honor, there are two other
19 depositions in process, my understanding is,
20 and there are seven depositions scheduled and
21 agreed upon that are scheduled to take place on
22 or before December 9th, and that is the status
23 of the depositions.

24 With regard to discovery and discovery
25 produced, your Honors, both judges, my
26 understanding is that Bausch & Lomb has

PROCEEDINGS

1
2 produced approximately 1.6 million pages in
3 documents. Of that, it was 16 custodians.
4 And, if her Honor recalls - I don't think it
5 was before Judge Norton at that time - there
6 was some priority desired among how the
7 custodian files were to be produced - I think
8 both the MDL plaintiffs and the New York
9 plaintiffs together - and gave us an order in
10 which they want the files produced, and we are
11 following that order.

12 There is no dispute with that, I don't
13 believe. Those are being put together, so we
14 do have a joint agreement for future production
15 of documents.

16 And, your Honor, that, I would say, is
17 probably the status of where we are in both the
18 New York and the MDL with regard to discovery,
19 to the best of my knowledge.

20 MR. PENNOCK: Your Honor, Paul Pennock,
21 for the plaintiffs.

22 I have no dispute with the numbers that
23 Joe just stated. I believe there are 308 cases
24 filed in New York. There are 209 cases, as we
25 understand, in the MDL. What I was unclear on
26 was whether the number that Mr. Ortego stated

PROCEEDINGS

1
2 for the plaintiffs in the MDL included loss of
3 consortium claims.

4 MR. ORTEGO: I believe there is a total
5 of 373 plaintiffs on captions.

6 MR. PENNOCK: Injured plaintiffs?

7 MR. ORTEGO: Yes. Not consortium.

8 MR. PENNOCK: Your Honor, may I
9 approach? I had something that you asked for
10 at the last hearing regarding the listing of
11 the types of cases that exist in New York.

12 JUDGE FREEDMAN: Yes, that would be
13 useful.

14 MR. PENNOCK: The defendants have had
15 this for some time now.

16 JUDGE FREEDMAN: The fusarium and the
17 bacterium cases?

18 MR. PENNOCK: We went through, as your
19 Honor asked, and created what we think is a
20 fairly detailed and accurate listing of the
21 cases to this point.

22 You will note there are about 700 cases
23 represented by the New York PSC and the New
24 York group that are not yet filed.

25 As your Honors are aware, the statute of
26 limitations in these cases do not expire for

PROCEEDINGS

1
2 some time and I think, appropriately, we are
3 engaging in some significant investigation
4 before we file cases, but I would imagine that
5 a large percentage of those 1,031 plaintiffs
6 who we collectively represent will ultimately
7 be filed here in New York. And I think,
8 therefore, that while we only have 308 cases
9 filed right now, a truer reflection of what
10 will ultimately be pending here is closer to a
11 thousand cases.

12 As far as the general status of the
13 case, nothing that Mr. Ortego has said is
14 incorrect.

15 I think that some editorial comment may
16 be appropriate, and that is that we are not
17 terrifically satisfied at the pace at which the
18 case is moving. I think that the order, that
19 we're no doubt going to get to shortly, that
20 was submitted by the defendants and MDL,
21 reflects a rather slow pace.

22 As your Honors --

23 JUDGE FREEDMAN: I think it was a joint
24 order. It was not defendants only.

25 MR. PENNOCK: It was submitted by the
26 MDL plaintiffs and the defendants.

PROCEEDINGS

1
2 In any event, by way of one example that
3 we had on our agenda, the defendants indicated,
4 back in June, that they had actually been
5 through about 4 million -- as we understood it,
6 4 million documents to review them for whether
7 they should be produced, and they indicated to
8 us back then, which I guess it was about four,
9 five months ago, that they figured there were
10 430,000 that they should produce. To this
11 date, we only have 317,000 of those documents.

12 So, you know, I have to say we are a
13 little mystified if by June they had already
14 determined what they themselves thought they
15 should produce. Setting aside the privileged
16 documents and so forth, why do we not have
17 these other 70 or 75,000 documents four or five
18 months later? That is a problem that we think
19 is emblematic of the situation with discovery
20 with the defendants, and a number of discovery
21 issues, as your Honor noted, were mentioned on
22 our agenda but, as I understand it, we will get
23 to at another time.

24 So, in any event, the general status has
25 been stated, but I do think there needs to be,
26 if you will, a little fire lit to get the

PROCEEDINGS

1
2 defendants to do what we think they have been
3 obligated to do under the orders.

4 MS. WOODBURY: Your Honor, may I address
5 Mr. Pennock's comments about the document
6 production?

7 JUDGE FREEDMAN: Sure.

8 MS. WOODBURY: Your Honor, today we have
9 produced, as Mr. Ortego said, about 1.6 million
10 pages of documents. In order to produce those
11 documents, we have to go through a larger set
12 of documents in order to determine from that
13 larger set what's relevant, which documents
14 actually have something to do with MoistureLoc
15 and not some other product that Bausch & Lomb
16 makes, which documents are not privileged. And
17 after we do that review, we are producing
18 regularly. We have made now 25 productions to
19 the plaintiffs. We produce documents on a
20 schedule that's about every other week, so two
21 or more productions a month.

22 We started producing documents in the
23 spring of this year, so in six-month's time we
24 have produced 1.6 million pages of documents.

25 JUDGE FREEDMAN: Which represent about
26 3,000 documents or what?

PROCEEDINGS

1
2 MS. WOODBURY: Your Honor, I would
3 represent to the court that as soon as we can
4 get documents ready to produce, we are
5 producing them.

6 I am not familiar with the numbers that
7 Mr. Pennock is talking about here, but I will
8 tell you that we are producing documents as
9 soon as we can get them ready to go.

10 Partly -- and we are doing this in
11 accordance with the schedule that they gave us
12 setting up the priority for custodian.

13 As you will recall from the pretrial
14 orders that we have and case management orders
15 that we have in effect in both of the cases, we
16 are producing by custodian, which means we look
17 at the documents for the individuals within the
18 company. We are required, under the CMOs, to
19 certify that the custodial production is
20 complete 30 days before the deposition of the
21 witnesses, and so that kind of largely decides
22 the priority of production. But we are
23 producing documents as soon as we can get them
24 ready to produce.

25 JUDGE FREEDMAN: Do you have any sense
26 of how much longer you think it's going to

PROCEEDINGS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

take?

MS. WOODBURY: Well, your Honor, it depends upon the scope of the productions that the plaintiffs ask for.

I will tell you that we collected 52 million pages of documents when we went to the company. Those 52 million will not turn out to be all relevant to this litigation, but we are moving -- we have 50 people working full time, 50 attorneys working full time reviewing documents, so there is an enormous effort that's going into this to review documents and get them ready for production.

It helps us when the plaintiffs did, as Mr. Pennock said, give us a priority list of the custodians, the employees that they feel are most important, most relevant, that they are most interested in. They gave us that list and that helps us decide which documents to focus in on first and that's what we are doing.

MR. PENNOCK: Judge, again, our -- we understand that there are documents they need to continue to look at and review to determine whether they should be produced and so forth. But I was speaking to the group that Mr. Ortego

PROCEEDINGS

1
2 said, back in June, had already been reviewed
3 and I am wondering why we don't have those
4 since they had already determined those should
5 be produced.

6 And by the count, the number that he
7 gave and the count that we now have, we are
8 missing over 100,000 documents. So, that's the
9 issue that I spoke to.

10 The second issue I think sort of
11 implicit in this discussion is the end date for
12 all this. You know, lawyers always work better
13 with cutoffs for whatever reason. We would
14 like to suggest that with the outstanding
15 demands that exist and the list of custodians
16 that exists, that the defendant be ordered to
17 get to the end of this process sooner rather
18 than later.

19 I had a meeting with my colleagues last
20 night and I said we should ask that they be
21 ordered to get to the end tomorrow, but they
22 said that's probably too soon and we talked
23 about some time probably toward the end of this
24 year. It's only in the middle of October.
25 There are two-and-a-half months until the end
26 of the year. 12/31 seems like a reasonable

