

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

CHARLESTON DIVISION

IN RE BAUSCH & LOMB INC.)	Management File No. 2:06-77777 DCN
CONTACT LENS SOLUTION)	
PRODUCTS LIABILITY LITIGATION,)	MDL Docket No. 1785
)	
*****)	
)	
This Order relates To: All Cases)	PRETRIAL ORDER NO. 15
)	(AMENDED)
)	
)	

ORDER ESTABLISHING COMMON BENEFIT FUND

This Order is entered to provide for the fair and equitable sharing among plaintiffs of the cost of services performed and expenses incurred by attorneys acting for MDL administration and common benefit of all plaintiffs in this complex litigation. This Court’s authority in this regard derives from the Supreme Court’s Common benefit doctrine, as established in Trustees v. Greenough, 105 U.S. 527 (1881), and further applied in Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1884); Sprague v. Ticonic National Bank, 307 U.S. 161 (1939); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); and Boeing Co. v. Van Gernert, 444 U.S. 472 (1980). Courts have approved the doctrine’s application in the MDL context in, inter alia, In re MGM Grand Hotel Fire Litigation, 660 F. Supp. 522, 525-29 (D. Nev. 1987), and In re Air Crash Disaster at Florida Everglades on December 29, 1972, 549 F.2d 1006, 1019-21 (5th Cir. 1977). Any disputes arising under this Order that cannot be resolved by agreement of counsel will be resolved by this Court in the exercise of its jurisdiction

under the equitable principles of the common fund/common benefit doctrine. It is hereby **ORDERED**:

A. Common Benefit Fund For Expenses to be Established

An interest-bearing account will be established to receive and disburse funds as provided in this Order. These funds will be held as funds subject to the direction of the Court and are hereinafter referred to as the “Common Benefit Fund.” No party or attorney has any individual right to any of these funds except to the extent of amounts directed to be disbursed to such person by order of the Court. These funds do not constitute the separate property of any party or attorney and are not subject to garnishment or attachment for the debts of any party or attorney except when and as directed to be disbursed to a specific person as provided by court order.

The Court will appoint by subsequent order a qualified certified public accountant (the “CPA”) to establish this account and act as escrow agent, keep detailed records of all deposits and withdrawals and to prepare tax returns and other tax filings. Such subsequent order shall specify the hourly rates to be charged by the CPA and the CPA’s assistants, who shall be utilized where appropriate to control costs. The CPA shall submit quarterly detailed bills to the Court and to Plaintiffs’ Personal Injury Lead Counsel. Upon approval, the CPA’s bills shall be paid from the fund established by the Personal Injury Plaintiffs’ Steering Committee (the “PSC Fund”) and shall be considered a shared cost in accordance with B.2.c below,

1. Assessments for the Common Benefit Expense Fund

a. All personal injury plaintiffs and their attorneys who are subject to this Order as set forth in A.1.c. below, and who have agreed or agree to

settle, compromise dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, with respect to any ReNu with MoistureLoc personal injury claims are subject to a six percent (6%) assessment of the gross monetary recovery. to be withheld by defendant and paid into the Common Benefit Fund by defendant, as provided herein. Four percent (4%) of this assessment is for the payment of attorneys' fees, and two percent (2%) of this assessment is for the payment of expenses.

b. All economic loss plaintiffs, including class action plaintiffs, and their attorneys who are subject to this Order as set forth in A.1.c. below, and who have agreed or agree to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, with respect to any ReNu with MoistureLoc economic loss claims are subject to a four percent (4%) assessment of the gross monetary recovery;' to be withheld by defendant and paid into the Common Benefit Fund by defendant, as provided herein.

c. For all cases in which a settlement was or is entered into, or a judgment was or is paid, beginning April 8, 2008 and going forward, defendant is directed to withhold this assessment from any amounts paid to a plaintiff and her counsel in the following cases:

- (1) any case pending in the MDL and not remanded to state court:

- (2) any state court or unfiled case where the plaintiffs attorney and/or his or her firm has executed an agreement to cooperate with the MDL (Exhibit A hereto) and to pay the assessment; and
- (3) any case in which a member of the MDL PSC has a fee interest.

The Court reserves the right to change this percentage based on the factors set forth in Model Rule of Professional Conduct 1.5 for determining the reasonableness of a fee.

d. If for any reason the assessment is not or has not been withheld, the plaintiff and her attorney are deemed jointly responsible for promptly paying the assessment into the Common Benefit Fund.

e. Prior to defendant's payment of any amount to a plaintiff and her counsel in any filed or unfiled case, plaintiffs and defendant's counsel shall certify that the assessment is being withheld and deposited into the Common Benefit Fund or alternatively, that this Order does not apply to the case. A certification that this Order does not apply to a particular case shall be provided to Plaintiffs' Personal Injury Lead Counsel prior to payment of any amount to a plaintiff and her counsel in any such case. Plaintiffs' Personal injury Lead Counsel shall have five (5) business days to object to the certification in writing to defendant, at which time defendant shall be prohibited from making any payment to the plaintiff or her counsel until the parties resolve the objection or the matter is disposed of by the Court upon motion of any party. Further, the

Court's receipt of this certification shall be a precondition to the dismissal of any MDL plaintiff's case in which a recovery is received.

f. The PSC shall immediately provide Defendant's Liaison Counsel and the Court or its designee with a list of plaintiffs' attorneys and/or firms who have entered into written agreements to pay the assessment and shall provide updates to this list as they occur, but no more often than weekly. Upon request from a plaintiff's attorney, the PSC shall provide a list of such attorney's and/or his or her firm's cases that the PSC deems subject to an assessment under this Order. In the event a plaintiff's attorney objects to the inclusion of a case on the list, Plaintiffs' Personal Injury Lead Counsel shall attempt to resolve the objection with the plaintiff's attorney. If resolution is not achieved, either party may seek disposition of the matter by motion to the Court,

g. In measuring the "gross monetary recovery,"

- (1) Court costs that are to be paid by a defendant shall be excluded,
- (2) The present value of any fixed and certain payments to be made in the future shall be included.
- (3) Nothing in this Order shall be deemed to modify, alter, or change the terms of any fee contracts between plaintiffs' counsel and their individual clients.

2. Non-participation in MDL

Any plaintiffs attorney who has cases in state court and who chooses not to execute a participation agreement with the PSC may seek access from the PSC to MDL

and/or PSC non-work product materials by contacting Plaintiffs' Personal Injury Lead Counsel in writing. The PSC, however, shall have no obligation to allow such attorney access to any MDL materials. Further, nothing in this Order shall limit the PSC's right or ability to seek an equitable contribution against any state court case in which the plaintiff's attorney requested in writing and was provided access to MDL work product.

3. Disbursements from Common Benefit Fund

a. Upon subsequent order of the Court, payments may be made from the Common Benefit Fund to attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client(s), including services provided and expenses incurred in preparation and trial of the bellwether cases. Attorneys eligible thereto are limited to Plaintiffs' Personal Injury Lead Counsel, members of the Personal Injury Plaintiffs' Executive Committee, members of the PSC, Plaintiffs' Federal Liaison Counsel, members of a subcommittee established by the PSC who are called upon to assist in performing PSC responsibilities (e.g., discovery and science committees), Plaintiffs' State Liaison Counsel, and other attorneys performing PSC-approved responsibilities in MDL or state court actions. Such attorneys who maintain actions in state court and obtain rulings that inure to the benefit of all plaintiffs in the MDL shall be permitted to submit for common benefit treatment the time and expenses associated with obtaining such rulings. All such submissions must be timely made and accompanied by contemporaneous records certified to have been timely received. If an attorney whose cases are otherwise exempt from this Order applies for and receives common benefit treatment, all

of the cases in which the attorney and/or his or her law firm are counsel of record are subject to assessment.

b. Payments to non-lawyers will only be allowed for special services performed, and to reimburse for special expenses incurred, for the joint and common benefit of all plaintiffs, which have been specifically authorized by the PSC. Payment may, for example, be made for services and expenses related to obtaining, reviewing, and indexing hard copies or computerized images of documents; conducting depositions; and activities connected with the coordination of federal and state litigation. The Common Benefit Fund will not, however, be used to pay for services and expenses related to a particular case, such as the deposition of a treating physician, excluding common benefit services and expenses relating to the bellwether cases, even if such activity results in some incidental and/or consequential benefit to other plaintiffs, or for an attorney to “learn the case.”

c. Payments will not exceed the fair value of the services performed, plus any court approved multiplier, or the reasonable amount of the expenses incurred and, depending upon the amount of the Common Benefit Fund, may be limited to part of the value of such services and expenses.

d. No amounts will be disbursed without review and approval by the Court or such other mechanism as the Court may deem just and proper under the circumstances, Defendant’s counsel shall provide at least quarterly notice to the Court, or its designee, and Plaintiffs’ Personal Injury Lead Counsel of the names and docket numbers of the cases for which it has withheld an assessment.

Details of any individual settlement agreement, individual settlement amount and individual amounts deposited into escrow shall be confidential and shall not be disclosed to the PSC. Monthly statements from the escrow agent shall be provided to Plaintiffs' Personal Injury Lead Counsel, Defendant's Liaison Counsel, the Court, or the Court's designee, showing, with respect to the funds controlled by the escrow agent, only the aggregate of the monthly deposits, disbursements, interest earned, financial institution charges, if any, and current balance.

e. If the Common Benefit Fund exceeds the amount needed to make all payments of court approved costs, fees, and any Court approved multiplier on any fees, the Court may order a refund to those who have contributed to the Common Benefit Fund. Any such refund will be made in proportion to the amount of the contributions.

4. Incorporation by Reference

The individual attorney agreement attached hereto as Exhibit A is incorporated by reference and has the same effect as if fully set forth in the body of this Order.

B. Common Costs and Submission of Time and Expenses

1. Plaintiffs' Counsel Time and Expense Submissions

Reimbursement for costs and/or fees for services of all plaintiffs' counsel performing functions in accordance with this Order will be set at a time and in a manner established by the Court, after due notice to all counsel. The Court shall receive and consider recommendations from Plaintiffs' Personal Injury Lead Counsel concerning distribution of the Common Benefit Fund. The following standards and

procedures are to be utilized by any counsel who seeks fee and/or expense reimbursement.

a. Time Reporting

- (1) Only time spent on matters common to all claimants in the MDL and that has been authorized by the PSC (“common benefit work”), including common benefit time spent on the bellwether cases, will be considered in determining fees. No time spent on developing or processing individual issues in any case for an individual client will be considered or should be submitted, except as Set forth in A.3.a. above.
- (2) Time and expense submissions must be made on forms authorized by and pursuant to the terms and schedule implemented by Plaintiffs’ Personal Injury Lead Counsel.
- (3) All counsel shall keep a daily record of their time spent in connection with common benefit work on this litigation, indicating with specificity the hours stated in tenth-of-an-hour increments, location and particular activity (e.g., “conducted deposition of John Doe”). Time entries that are not sufficiently detailed may not be considered for common benefit payments.
- (4) Plaintiffs’ Personal Injury Lead Counsel shall summarize all time records for common benefit work by accumulated

total of all time incurred during the particular reporting period and in prior periods. The summary report form may be obtained from Plaintiffs' Personal Injury Lead Counsel by participating firms.

2. Expense Reporting

a. Shared Costs

- (1) Shared Costs are costs that will be paid out of the PSC Fund administered by Plaintiffs' Personal Injury Lead Counsel. Each PSC member shall contribute to the PSC Fund at times and in amounts sufficient to cover plaintiffs' expenses for the administration of the MDL. The timing and amount of each assessment will be determined by Plaintiffs' Personal injury Lead Counsel, and each assessment will be paid within 15 days as instructed by Plaintiffs' Personal Injury Lead Counsel. Failure to pay assessments will be grounds for removal from the PSC.
- (2) Shared Costs are costs incurred for the common benefit of the MDL as a whole. No client-related costs, other than common benefit costs relating to the bellwether cases, shall be considered Shared Costs, unless exceptional circumstances exist and are approved by later order of this Court. All Shared Costs must be approved by Plaintiffs' Personal Injury Lead Counsel prior to payment.

- (3) All costs that meet these requirements and fall under the following categories shall be considered Shared Costs and qualify for submission and payment directly from the PSC Fund: (1) certain court, filing and service costs; (2) deposition and court reporter costs for depositions (excluding those that are client specific); (3) document depository creation, operation, Staffing, equipment and administration; (4) Plaintiffs' Personal Injury Lead Counsel, Plaintiffs' Personal injury Executive Committee, Federal Liaison, and State Court Liaison Counsel administrative mailers (e.g., expenses for equipment, technology, courier services, long distance, telecopier, electronic service, photocopy and printing, secretarial/temporary staff, etc.); (5) PSC administration matters, such as meetings and conference calls; (6) legal and accountant fees; (7) expert witness and consultant fees and expenses; (8) printing, copying, coding, scanning (out-of-house or extraordinary firm cost); (9) research by outside third-party vendors/consultants/attorneys; (10) common witness expenses, including travel; (II) translation costs; (12) bank or financial institution charges; and (13) investigative service.

(4) Plaintiffs' Personal Injury Lead Counsel shall prepare and be responsible for distributing reimbursement procedures and the forms associated therewith. Request for payments from the PSC Fund for common benefit expenses shall include sufficient information to permit Plaintiffs' Personal Injury Lead Counsel and the CPA (if one is appointed) to account properly for costs and to provide adequate detail to the Court.

b. Held Costs

- (1) Held Costs are those that will be carried by each attorney in the MDL and reimbursed as and when determined by the PSC.
- (2) Held Costs are costs incurred for the global benefit of the MDL. Held Costs are those that do not fall into the above Shared Costs categories but are incurred for the benefit of all plaintiffs in general. No client specific costs can be considered Held Costs, other than common benefit costs relating to the bellwether cases.
- (3) Held Cost records shall be submitted to Plaintiffs' Personal Injury Lead Counsel on a quarterly basis for consideration by the PSC and the Court for future reimbursement from the Common Benefit Fund.

c. Travel Limitations. Except in extraordinary circumstances approved by Plaintiffs' Personal Injury Lead Counsel, all travel reimbursements are subject to the following limitations.

- (1) Airfare. Only the price of a coach seat for a reasonable itinerary will be reimbursed. First class airfare will not be reimbursed.
- (2) Hotel. Hotel room charges above the average available room rate of the Hyatt, Hilton, and Marriott hotels in the city in which the stay occurred will be closely scrutinized by the Court and be subject to disallowance or reduction.
- (3) Meals. Meal expenses must be reasonable.
- (4) Cash Expenses. Miscellaneous cash expenses for which receipts generally are not available (e.g., tips, luggage handling, pay telephone, etc.) will be reimbursed up to \$50.00 per trip, as long as the expenses are properly itemized.
- (5) Rental Automobiles. Luxury automobile rentals will not be fully reimbursed, unless only luxury automobiles were available. If luxury automobiles are selected when non-luxury vehicles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the travel reimbursement form, and only the non-luxury

rate may be claimed, unless such larger sized vehicle is needed to accommodate several travelers,

- (6) Mileage. Mileage claims must be documented by stating origination point, destination, total actual miles for each trip, and the rate per mile paid by the attorney's firm. The maximum allowable rate will be the maximum rate allowed by the IRS.

d. Non-Travel Limitations. Except in extraordinary circumstances approved by Plaintiffs' Personal Injury Lead Counsel, all non-travel reimbursements are subject to the following limitations.

- (1) Long Distance and Cellular Telephone. Long distance and cellular telephone charges must be documented. Copies of the telephone bills must be submitted with notations as to which charges relate to the MDL litigation.
- (2) Shipping, Courier, and Delivery Charges. All claimed expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package.
- (3) Postage Charges. A contemporaneous postage log or other supporting documentation must be maintained and submitted. Postage charges are to be reported at actual cost.

- (4) Telefax Charges. Contemporaneous records should be maintained and submitted showing faxes sent and received. The per-fax charge shall not exceed \$1.00 per page.
- (5) In-House Photocopy. A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is \$0.20 per page.
- (6) Secretarial and Clerical Time. Submission of secretarial or clerical time must be pre-approved by Plaintiffs' Personal Injury Lead Counsel. An itemized description of the task and time spent must be submitted for secretarial and clerical time. All overtime must be approved by the Plaintiffs' Personal Injury Lead Counsel before submission.
- (7) Computerized Research (Lexis/Westlaw). Claims for Lexis, Westlaw, and other computerized legal research expenses should be in the exact amount charged to or allocated by the firm for these research services.

e. Procedures to be Established by Plaintiffs' Personal Injury Lead Counsel for Cost and Time Submission.

- (1) Plaintiffs' Personal Injury Lead Counsel shall establish forms and procedures to implement and carry out any time and expense submissions required by the Court and for

reimbursement from the PSC Fund for Shared Costs. Once developed, these forms may be obtained from Plaintiffs' Personal injury Lead Counselor Federal Liaison Counsel. The forms shall be certified by a senior partner in each firm attesting to the accuracy and correctness of the submissions.

- (2) Questions regarding the guidelines or procedures or the completion of any forms should be directed to Plaintiffs' Personal Injury Lead Counsel, the CPA (if one is appointed), or the Court.

AND IT IS SO ORDERED.



DAVID C. NORTON
CHIEF UNITED STATES DISTRICT JUDGE

July 23, 2008
Charleston, South Carolina

CONFIDENTIALITY AND USER AGREEMENT FOR
RENU PLAINTIFFS' MDL WEBSITE

In re: Bausch & Lomb, Inc. Contact Lens Solution Products Liability Litigation,
MDL-1785 (D.S.C.)

I, _____, by signing this Agreement below, agree to be bound by the following confidentiality provisions concerning the password-protected portions of the ReNu Plaintiffs' MDL-1785 Website (the "Website"), which is operated and maintained by the Plaintiffs' Executive Committee (the "Executive Committee").

1. I acknowledge and agree that information contained within the Website shall only be used for the purposes of prosecuting a case pending in the MDL styled, *In re: Bausch & Lomb, Inc. Contact Lens Solution Products Liability Litigation*, MDL-1785 (D.S.C.) (the "ReNu MDL"), and not for any other purpose, including any other litigation or judicial proceedings, or any business, governmental, commercial, or administrative purpose or function, unless I have obtained prior express written authorization from the Executive Committee.

2. I acknowledge and agree that the information contained within the Website contains attorney work product and is highly confidential. Attorney work product shall be defined in the broadest manner possible and includes, but is not limited to, those matters and materials described in Federal Rule of Civil Procedure 26(b)(3).

3. I acknowledge and agree that I have (or my law firm has) filed a ReNu products liability lawsuit in a United States District Court, or that I am working with the Plaintiffs' Steering Committee (the "Steering Committee").

4. I acknowledge and agree that at all times, and notwithstanding any termination of the ReNu litigation, I will hold in strict confidence and not disclose to any third party the attorney work product from the Website without the prior express written authorization of the Executive Committee.

5. I acknowledge and agree that I will take reasonable precautions to ensure that the attorney work product from the Website is not shared with any third parties, including, but not limited to, any defendants, defense counsel, treating physicians, fact witnesses, expert witnesses or consultants, plaintiffs' co-counsel (other than co-counsel approved by the Executive Committee to have access and who have signed this Agreement), the media, or the public, unless I obtain prior written authorization from the Executive Committee.

6. I acknowledge and agree that I shall only permit access to attorney work product from the Website to those of my employees or staff who have a need to know the information for the purposes of this MDL litigation, and that I shall inform them of the

confidential nature of the materials and take all reasonable precautions to ensure they abide by the terms of this Agreement and do not disclose the information to any unauthorized third party.

7. I acknowledge and agree that if I am given a password to access the Website, I will not share my password with anyone, including my staff. I acknowledge and agree that if any of my staff is to have access to the Website, they shall register separately with the Executive Committee.

8. I acknowledge and agree that the Executive Committee can monitor my use of the Website, and that I will cooperate with the Executive Committee in answering any questions they may have to determine whether unauthorized users have used my password to gain access to the Website.

9. I acknowledge and agree that if I become aware of any unauthorized use of the Website, I will immediately report such unauthorized use to the Executive Committee.

10. I acknowledge and agree that I will report to the Executive Committee any and all disclosures of attorney work product from Website to unauthorized parties, whether such disclosure is intended or inadvertent. I further acknowledge and agree that should any proceeding be instituted by any court or governmental body for disclosure of attorney work product from Website, I will immediately report the institution of such proceeding to the Executive Committee.

11. I acknowledge and agree that the work product contained in the Website is and shall be at all times hereafter the property of the Executive Committee.

12. I acknowledge and agree that the Executive Committee may revoke my access to the Website at any time for any reason.

13. I acknowledge and agree that by granting me access to the attorney work product within the Website, the Executive Committee does not intend to waive any work product privilege or protection that may apply to the materials contained therein, and access to the Website is subject to the joint prosecution privilege and any other privilege, statute, order or law that may apply.

14. I acknowledge and agree that I have read and will comply with the Confidentiality Order entered in the MDL on January 24, 2007.

15. I agree to any common benefit holdback or assessment from settlement or judgment proceeds that may be ordered by the Court in MDL-1785.

I acknowledge and agree to the foregoing as a condition precedent to any approval for me to be issued a password and to access the password-protected information contained within the Website.

Dated: _____

Name: _____

Law Firm: _____

Phone Number: _____