

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

In re: Bausch & Lomb Contact Lens Solution Products Liability Litigation	)	MDL No: 1785
	)	
	)	C/A No. 2:06-MN-77777-DCN
	)	
This Order Relates To: All Cases	)	<b>PRETRIAL ORDER NO. 7</b>
	)	
	)	
_____	)	

On December 21, 2006, the Court entered CMO No. 3 with the understanding that the parties would discuss further case management order provisions and provide a proposed supplemental CMO to the Court upon completing those discussions. Having conferred with the parties about the outcomes of their discussions, and having reviewed the parties' separate proposals on areas where they were not able to reach agreement, it is hereby **ORDERED**:

**I. CLASS CERTIFICATION**

**A. Class Certification Discovery**

1. Beginning ten (10) days following the entry of this Order, Defendants may serve up to 25 interrogatories and 25 requests for admission related to class certification issues on each of the named Plaintiffs listed in the Master Class Action Complaint(s). The named Plaintiffs served with such interrogatories and requests for admission shall answer and/or object in the manner described in Rules 33 and 36, respectively, of the Federal Rules of Civil

Procedure.

2. Beginning ten (10) days following the entry of this Order, Defendants may jointly serve on each of the named Plaintiffs listed in the Master Class Action Complaint(s) a single set of requests pursuant to Fed. R. Civ. P. 34. The party served shall respond and/or object in the manner described in Rule 34 in accordance with a schedule that will be negotiated among counsel and submitted for Court approval. No additional document requests may be served upon the named Plaintiffs in the class action cases without leave of Court upon good cause shown.
3. Depositions of any named Plaintiffs in the Master Class Action Complaint may be taken in this proceeding at any time, consistent with the need to complete such depositions before Defendant's briefing on class certification issues is due to be submitted.

**B. Plaintiffs' Reply Memorandum**

Plaintiffs may file a reply memorandum in support of their class certification motion within forty-five (45) days of the filing of any opposition briefs. Plaintiffs shall only identify rebuttal experts and file rebuttal expert reports on good cause shown, and the reply memorandum shall be confined to responding to arguments and expert opinions presented in Defendants' opposition brief. If Plaintiffs file rebuttal expert reports, Defendants shall be entitled to a surreply brief to address such additional reports.

**II. DEADLINE FOR PLAINTIFF FACT SHEETS**

Section VIII(B) of Case Management Order No. 3 is amended as follows: each plaintiff's Fact Sheet shall be due sixty (60) days after approval of the form of the PFS by the Court, or thirty (30) days after such case is filed in – or transferred to – this MDL proceeding, whichever is longer.

**III. DEFENDANT FACT SHEETS**

The parties shall confer about the content of a Defendant Fact Sheet.

**IV. ADDITIONAL FACT DISCOVERY**

No later than one hundred twenty days (120) days after the parties reach agreement on the form of the Plaintiff Fact Sheet, the parties shall meet and confer on additional discovery in the individual cases. The parties agree on the format of the Personal Injury Plaintiff Fact Sheet, attached to this Order as Attachment A.

**V. DISMISSAL OF PLAINTIFFS' CLAIMS FOR FAILURE TO COMPLY WITH DISCOVERY OBLIGATIONS****A. Notice that Claims May Be Dismissed**

Any plaintiff who fails to comply with any discovery obligations imposed by this Order within the time periods set forth herein – including submission of a plaintiff fact sheet – may be subject to having his or her claims, as well as any derivative claim(s), dismissed if good cause is shown. Good cause shall exist where there is a material deficiency in responding to the required discovery, i.e., one that prejudices the Defendant through a failure to provide necessary information, thereby impeding Defendant's access to material and relevant evidence.

**B. Notice of Overdue or Deficient Discovery**

When any Plaintiff has failed to materially comply with his or her obligations under this Order within the timelines established herein, Defendant's Liaison Counsel or their designee shall send a notice of the material deficiency to the Plaintiff's counsel for the individual whose responses are alleged to be defective ("the deficiency letter"). The deficiency letter shall identify the alleged material deficiency, state that the plaintiff will have thirty (30) days to cure the alleged material deficiency, and state that absent the alleged material deficiency being cured within that time (or within any extension of that time as agreed to by the parties), the Defendant may move for dismissal of Plaintiff's claims, including dismissal with prejudice upon an appropriate showing.

**VI. ADDITIONAL RULES APPLICABLE TO DEPOSITIONS OF FACT WITNESSES**

**A. Number of Depositions**

No more than twenty depositions of common fact witnesses currently or formerly employed by Bausch & Lomb shall be taken in this litigation absent agreement of Liaison Counsel. For the first two months of company witness depositions, the depositions of current and former Bausch & Lomb employees are limited to three depositions per month except by permission of the Court or an agreement by the parties to exceed this limit. Such limitation shall include any depositions conducted pursuant to Federal Rule of Civil Procedure 30(b)(6). After the two-month period, the limitation of three depositions per month will be reevaluated by the Court.

**B. Cross-Noticing of Depositions**

Depositions of fact witnesses noticed in these proceedings (other than fact

witnesses whose testimony is only relevant in an Individual Action) may be cross-noticed in any related state court actions by Plaintiffs' Liaison Counsel and/or Defendant's Liaison Counsel, or counsel in such state court actions. It is this Court's intention that such cross-notices shall be designed to the extent practicable to avoid such witnesses being deposed more than once. Accordingly, any depositions taken in these proceedings may be used in any state court action, in accordance with that state's law and rules of evidence.

**C. Conduct of Depositions**

Each side should endeavor to limit the number of attorneys questioning a deponent by conferring in advance of the deposition to allow one attorney to be the primary questioner. Counsel for the noticing party shall give opposing counsel notice of the identity of the examiner(s) twenty-four (24) hours prior to the beginning of each deposition.

With regard to depositions noticed by Plaintiffs, the Plaintiffs' attorney designated to conduct the examination will coordinate with other Plaintiffs' counsel (including those pursuing cases in state court as well as those participating in the MDL proceeding) so as to conduct as thorough and non-duplicative an examination as practicable.

**D. Duration of Examinations**

The parties shall meet and confer with lead counsel in the New York coordinated proceeding in an effort to agree on an appropriate time limit for depositions cross-noticed in both proceedings and report back to the Court before the next Status Conference with

an agreement or with their alternative proposals.

**E. Avoidance of Duplicative Depositions**

Absent agreement of the parties or leave of Court, no witness should be deposed more than once in these proceedings. Supplemental depositions will be permitted only upon motion demonstrating (a) a compelling need for the information sought and (b) compelling reasons why the desired lines of questioning could not have been pursued in the original deposition and why the information cannot be obtained from any persons available for future depositions. If permitted, a supplemental deposition shall be treated as the resumption of the deposition originally noticed. Examination in any supplemental deposition shall not be repetitive of any prior interrogation.

**VII. ADDITIONAL RULES CONCERNING PRIVILEGE ISSUES**

Documents that were created or generated subsequent to April 12, 2006, and which are privileged as attorney communications with outside counsel in this litigation or attorney work product created by outside counsel relating to the litigation of these actions need not be identified in a privilege log under this section.

**AND IT IS SO ORDERED.**



**DAVID C. NORTON**  
**UNITED STATES DISTRICT JUDGE**

**February 9, 2007**  
**Charleston, South Carolina**