

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

3 IN RE: BAUSCH & LOMB, :
4 MDL LITIGATION : 2:06 CV 7777

5
6
7
8
9 Conference held Monday, December 18, 2006, commencing at
10 1:45 p.m., before the Hon. David C. Norton, in Courtroom II,
11 United States Courthouse, 81 Meeting Street, Charleston,
12 South Carolina, 29401.

13
14
15
16
17
18
19
20
21
22 REPORTED BY DEBRA LEE POTOCKI, RMR, RDR, CRR
 P.O. Box 835
23 Charleston, SC 29402
 843/723-2208
24
25

A P P E A R A N C E S

FOR THE PLAINTIFFS:

GEDNEY HOWE, ESQUIRE
P.O. Box 1034
Charleston, SC 29402

WENDY FLEISHMAN, ESQUIRE
780 Third Ave., 48th Floor
New York, NY 10017

MATTHEW B. MORELAND, ESQUIRE
106 West Seventh Street
Reserve, LA 70084

H. BLAIR HAHN, ESQUIRE and JAY WARD, ESQUIRE
P.O. Box 1007
Mt. Pleasant, SC 29464

ERIC QUETGLAS, ESQUIRE
P.O. Box 16606
San Juan, PR 00908

KAREN WENDEL RENWICK, ESQUIRE
2500 City Center Square
Kansas City, MO 64196

MITCHELL M. BREIT, ESQUIRE
1540 Broadway, 37th Floor
New York, NY 10036

DANIEL R. KARON, ESQUIRE
55 Public Square, Suite 1500
Cleveland, OH 44113

KRISHNA B. NARINE, ESQUIRE
7839 Montgomery Ave., 3rd Floor
Elkins Park, PA 19027

DONNA F. SOLEN, ESQUIRE
1225 19th Street, NW, Suite 500
Washington, DC 20036

STEPHANIE AMIN-GIWNER, ESQUIRE
212 East 39th Street
New York, NY 10016

1 JESSE A. KIRCHNER, ESQUIRE
15 Mid-Atlantic Wharf, Suite 101
2 Charleston, SC 29401

3 JUSTIN I. WOODS, ESQUIRE

4 R. WAYNE WOLFE, ESQUIRE

5 ISAAC DIEL, ESQUIRE

6 JOHN FELDER, ESQUIRE

7

8

9 FOR THE DEFENDANTS:

10 MICHAEL T. COLE, ESQUIRE and ELI POLIAKOFF, ESQUIRE
151 Meeting Street
11 Charleston, SC 29401

12 JOHN BEISNER, ESQUIRE and JESSICA MILLER, ESQUIRE
1625 Eye Street, NW
13 Washington, DC 20006

14 HARVEY KAPLAN, ESQUIRE and MARIE WOODBURY, ESQUIRE
2555 Grand Boulevard
15 Kansas City, MO 64108

16

17

18

19

20

21

22

23

24

25

1 THE COURT: I see everybody has been hard at work,
2 and I appreciate all the work that you've put into it.
3 Everybody has been working hard to get the case management
4 order. Mr. Howe has been very working very hard getting the
5 article about this case in the Post and Courier, so at least
6 his talents are being well used, I can see.

7 This is new contact information, because my secretary, who
8 has been Nancy, who has been with the Federal Government for
9 36 years, quit, and so you've run her off. She's really
10 retiring, so she didn't quit, so Lisa Richberg is being
11 transferred from my docket clerk to my secretary, and Catina
12 Murray, who is down here, is now the docket clerk, so she'll
13 be the contact person. So if you want to take these and pass
14 these out, so you'll have the cast of characters once again.

15 I have met with the liaison counsel prior to this in order
16 to go over certain things in the case management order. I've
17 taken a look at the case management order, which got to me
18 about 10:30 or so this morning, so I had hearings this
19 morning, and so I have gone over the detail.

20 I've got a couple of questions or a couple of things that
21 y'all might want to think about, which I'm going to send to
22 the liaison counsel for the rest of the week, number one.

23 Number two, I don't know whether liaison counsel has told
24 you, but I've been in touch with Justice Helen Freedman, who
25 is the MDL judge in the State of New York, and looks like to

1 me from the list that I have, most of the State Court cases
2 are pending in State Court of New York, and I think is about
3 35 or so up there, all of them being represented by Luxenburg
4 and Weitz, I think is the plaintiffs' law firm. And so I sent
5 her a copy of this hearing notice, I sent her a copy of
6 everything we've done so far. I will send her a copy of the
7 case management order when I sign it; keep her apprised of
8 what's going on here.

9 She has told me that she is either -- she didn't know
10 whether she was going to keep this case or whether she is
11 going to -- whether she is -- I guess she's the person who
12 takes a look at these cases and maybe reassigns them to one
13 judge who is going to take care of all the State Court cases,
14 but I wanted to let you all know that. It's also my
15 understanding that the elections are over and everybody is now
16 okay with whoever is on the steering committee on both sides,
17 is that correct?

18 MR. HAHN: That's correct, Your Honor.

19 THE COURT: Does anybody want to bring up anything
20 before I go into some observations on the case management
21 order? All right.

22 I'm looking at the case management order, bottom of page
23 two, admission of counsel. And in the celebration of the
24 holiday season and the federal largess, even though we've got
25 a terrible trade deficit and budget deficit, I think I ought

1 to put something in there about the payment of the \$250 per
2 lawyer for pro hac is waived, so the clerk doesn't start
3 sending you bills.

4 I had some questions with the liaison counsel, because in
5 the order sometimes it refers to defendant, and sometimes it
6 refers to each defendant, and sometimes it refers to
7 defendant's, apostrophe S, and sometimes refers to
8 defendants', S apostrophe. And it's my understanding that
9 there are some other people who have been invited to join in
10 the litigation here, and so I guess we ought to be consistent
11 and use plural in the CMO, until somebody makes it singular.

12 As far as on page three at the top of the page, pending a
13 new discovery, it looks like to me that there should be added
14 at the end of that paragraph, where it says that disclosure
15 and discovery obligations are stayed, and no further discovery
16 shall be initiated until agreement of the parties or by
17 further order of the Court. Because without that, it just
18 stops. From what I understand, we don't want it to stop, we
19 want it to go.

20 It's also, as far as regularly scheduled conferences, I
21 talked to the liaison counsel, and I think that we came up
22 with -- we ought to schedule one every six weeks, status
23 conference. And that liaison counsel is going to mail me a
24 proposed schedule.

25 Our next hearing, from what I understand, the parties want

1 the next hearing on January 24th, which is a Wednesday, at
2 10:00 a.m. And at that one I understand we are going to
3 address the final issues of controversy outlined in this
4 letter of December 18, and really reach the final case
5 management order. Is that correct?

6 MR. HOWE: Correct.

7 THE COURT: What I'll need from y'all then is a final
8 CMO, plus a final letter like this about what I have to decide
9 by noon on the 22nd, which gives me a couple days to go over
10 it, and gives you a final couple days to work on it. Also, as
11 far as telephone conferences and status conferences, paragraph
12 III.B., whenever y'all want a conference on anything, I'd like
13 to have an agenda or an issue, because I make enough bad
14 decisions when I know what's going on; when I don't know
15 what's going on, I really make some lousy decisions, so if
16 y'all can tell me what the issues are.

17 And in the last sentence, in that the Court may initiate
18 conference calls on procedural and scheduling matters, I don't
19 know whether I have to give everybody two days notice or not.
20 I don't know how much notice y'all want on that kind of thing.
21 That's just my observation.

22 In paragraph V, page five, paragraph V.B., class
23 certification argument, in the interest of having a lifetime
24 position, I'd rather replace the word shall with the word may.
25 I can't imagine not having an argument, oral argument, since I

1 schedule oral argument on everything, but I don't want to tie
2 myself down.

3 As far as the discovery dispute resolution in paragraph
4 VI.B., like five lines down, and we'll accept letter briefs
5 not exceeding five pages from the parties, I'd like them two
6 business days in advance. And that's one -- so again, some
7 notice and some time to think about where y'all are and what
8 the controversy actually is.

9 And I think, from what I understand, is y'all can consider
10 this, I'm going to go through and see if there are any other
11 technical things like this in the rest of the order, and I'm
12 going to fax them to you or send them to you or e-mail them to
13 you, and perhaps by the end of the week we can get this whole
14 thing taken care of and get it out by -- Friday is not good
15 enough, because in the interest of a lifetime position, since
16 this is the Federal Government, we close for business Thursday
17 at noon and we open back up Wednesday. This is how your
18 taxpayer money is spent. The chief judge has already set
19 these things. I don't go against him. So as far as
20 scheduling goes, perhaps by next Wednesday, unless you can get
21 it by noon on Thursday, okay? Either one is fine with me;
22 I'll be here.

23 MR. HOWE: We're going to make a push for Thursday.

24 THE COURT: That's fine. So I'll keep Nick around
25 until we hear from you. Now, as far as I understand, there's

1 a controversy in the letter of the confidentiality order. The
2 confidentiality order, which is on our web site, was a result
3 of six months, if not a year's negotiation between the
4 plaintiffs' bar, the defense bar, the U.S. Attorney's office,
5 Public Defender's office, and I know some of the people on --
6 one of the persons on there was Ken Suggs, who is just being
7 past president of ATLA. So that's what our general rule is,
8 that if y'all agree to that, we just sign it automatically.
9 And that's something that we'll address maybe on the 24th.

10 But that's the history of this protective order; it's not
11 something that came down fully formed out of my head; the
12 Court specifically, the whole Court, got lawyers together and
13 got them to hammer that out. And if you knew the lawyers on
14 that committee as well as I know the lawyers on that
15 committee, I would have thought it was impossible, but it was
16 possible, and we've been using it ever since. That's just up
17 to you.

18 This case is different, it may need something fine tuned,
19 so if you need to fine tune the order, you can't agree to use
20 the Court's order, there's something that you need in this
21 litigation, I'll be receptive to that, but that's the general
22 background of the order.

23 Now, anything else that we need to address here?

24 MR. HAHN: Your Honor, Blair Hahn from the
25 plaintiffs. A few things, most are as well as housekeeping.

1 As to the confidentiality, the plaintiffs are happy to use the
2 Court's order, and we're waiting for defendants to give us any
3 additions or changes they may have to that order.

4 We have, for the Court's consideration, a second pretrial
5 order that will allow a direct filing in this Court, where the
6 defendants agreed to waive venue, just to streamline people
7 with the MDL, but I'll hand this up and we'll file it
8 electronically for the Court.

9 THE COURT: Give it to me. I'll go ahead and sign
10 that.

11 Yes, sir?

12 MR. HAHN: Just to make the Court aware, one issue
13 that we will be addressing as well that's not in the letter of
14 December 18th to the Court on the issues that are open, is
15 we're going to be discussing the possibility of a tolling
16 agreement with defendants, so that will be something that
17 we'll be bringing to the Court.

18 MR. COLE: That's correct, we asked Mr. Hahn today;
19 he'll send us a written proposal to look at.

20 THE COURT: I mean, y'all either agree on that or
21 disagree on that, and I don't think there's any way that I can
22 force you to do it.

23 MR. COLE: I think you're right.

24 THE COURT: It takes two to tango and takes two to
25 toll.

1 MR. HAHN: Yes, sir, Your Honor. We have scheduled a
2 meeting in New York on the afternoon of the 11th of January,
3 for us to hopefully resolve any issues, just so the Court's
4 aware that we are moving forward. And we have also met today
5 prior to the hearing and we're working well together.

6 One final issue that I have is we have received a number
7 of requests from around the country to participate in these
8 hearings by telephone, and we would just look for some
9 direction from the Court as to how to do that.

10 THE COURT: I don't have any problem with that, if we
11 have the technical capability of having a bunch of lawyers
12 on -- I think there's certain -- I don't know how many people
13 we can put in, in one --

14 MR. HAHN: If the Court would allow it, we can
15 provide a conference number that the Court would just dial
16 into, and we'd need just a speaker phone in here, and there
17 would be just one line out, and we'll provide the rest of the
18 technology.

19 THE COURT: I don't have any problem with that. I
20 don't mind in status conferences and hearings like this, but
21 as far as the substantive argument, like a motion for summary
22 judgment or something that really is a big deal, I'd rather
23 have people here so I can look them in the eye.

24 MR. HAHN: Yes, sir.

25 THE COURT: As opposed to some disembodied voice

1 coming from somewhere out west or something like that, or east
2 or down south.

3 MR. HAHN: We'd be just listening primarily, Your
4 Honor.

5 THE COURT: All right. But if you want my permission
6 for that, that is fine with me.

7 MR. HAHN: All right, we'll deal with the clerk.

8 THE COURT: Some people are here at their expense and
9 coming out of their pockets, and so if you can get on the
10 telephone, and I also understand some people from California,
11 and 10:00 o'clock is a little early, but just have another cup
12 of coffee and do it from home, especially if you're on the
13 conference call.

14 MR. HAHN: Thank you, Judge. We'll work with your
15 clerk to arrange that. I believe that's everything I have.

16 THE COURT: Mr. Cole?

17 MR. COLE: I think that's all that we have, Your
18 Honor.

19 THE COURT: Okay. So what I need from y'all is some
20 dates for our six-weeks status conferences? And of course --
21 and I don't want -- if, in fact, a status conference comes up
22 and we don't need it, let me know ahead of time and we'll just
23 take care of it. So I think we're better off doing one ahead
24 of time. Again, we want to stay ahead of the State Court
25 cases, too, and show them we're really doing something.

1 MR. COLE: I believe you said you'd like for the rest
2 of this year.

3 THE COURT: Rest of 2007.

4 MR. HAHN: We'll get that to you this week, Your
5 Honor.

6 THE COURT: Anything else?

7 MR. HAHN: No, sir.

8

9 (Court adjourned.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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

REPORTER'S CERTIFICATION

I, Debra L. Potocki, RMR, RDR, CRR, Official Court Reporter for the United States District Court for the District of South Carolina, hereby certify that the foregoing is a true and correct transcript of the stenographically recorded above proceedings.

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR