

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

IN RE: BAUSCHE & LOMB )  
MDL LITIGATION )

2:06-77777

Charleston,  
South Carolina  
October 4, 2006



TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE DAVID C. NORTON,  
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical shorthand,  
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1 THE COURT: I want to welcome y'all to the District  
2 Court of South Carolina. And I want to let y'all know that  
3 the person who knows the least about these cases is me. All  
4 right? So I guess we are on a learning curve together.

5 Before we get started, I want to hand out a sheet  
6 with contact information that has my secretary, Nancy's name,  
7 and she's always in charge, and Nick Green is my law clerk  
8 who will be in charge of this case. And then you've met Lisa  
9 and Gail.

10 So if you need any contact with any of them, I've  
11 got their phone numbers and their e-mail addresses. And you  
12 will notice I don't have e-mail addresses for me because if I  
13 give a lawyer my e-mail address, I'll get an e-mail; a faxed  
14 copy; a FedEx, and if it's a local lawyer, a hand delivery,  
15 and then a file copy and a courtesy copy. So rather than get  
16 six, I'll just take one, all right?

17 So if there are not enough, we'll get some more.  
18 And of course, all this is assuming that whoever's motions to  
19 not bring it down here are not granted, okay?

20 And so I think they got everybody's name and address  
21 and card or everything like that. And so I don't know who is  
22 going to speak for the plaintiffs today.

23 I think I figured it out that Mr. Cole, I think, is  
24 going to speak for the defendants.

25 MR. COLE: Yes, sir, Your Honor.

1 THE COURT: And I'll be glad to, I don't know, are  
2 you going to be defendant's liason counsel, I guess?

3 MR. COLE: With the Court's approval, I am, Your  
4 Honor.

5 THE COURT: Anybody else want to take it instead of  
6 Mr. Cole? Sounds like it's pretty well narrowed down. We'll  
7 elect you by acclimation.

8 MR. COLE: Your Honor, while I'm up, and then I  
9 don't have to get back up, this is Harvey Kaplan.

10 THE COURT: Mr. Kaplan, nice to meet you.

11 MR. COLE: Marie Woodbury.

12 MS. WOODBURY: Good morning, Your Honor.

13 MR. COLE: John Beisner, with O'Melveny & Myers, and  
14 Jessica Miller. You know Jane Davis.

15 And they are sort of the group of lawyers who will  
16 be representing Bausche & Lomb.

17 And to make it easier, I just listed everyone's name  
18 on a letter to you, which I will hand it up to you, so you  
19 would have everyone's name. And I have given, circulated  
20 this.

21 THE COURT: Okay. Thanks.

22 Is anybody -- oh, a volunteer.

23 Yes, ma'am?

24 MS. FLEISHMAN: Good morning, Your Honor. My name is  
25 Wendy Fleishman from Lief Cabraser. And I represent the

1 plaintiffs, together with my colleagues.

2 And I think we would all like to introduce ourselves  
3 to the Court, if that's permissible.

4 THE COURT: That's great.

5 MS. FLEISHMAN: If we could go around the room and  
6 introduce ourselves, so Your Honor has a name and a face.

7 THE COURT: At my age I need -- what I need is a  
8 Polaroid or a cell phone, I guess I can do it nowadays.

9 MS. FLEISHMAN: I think the Polaroids work better,  
10 Your Honor.

11 Start on this side.

12 MR. BALL: I'm Gordon Ball from Ball & Scott in  
13 Knoxville. And we just recently filed directly in the MDL on  
14 behalf of 11 states in the District of Columbia.

15 THE COURT: Okay. Welcome.

16 MR. FELDER: Your Honor, Johnny Felder. I'm along  
17 with Mr. Ball with the plaintiffs.

18 MR. MCGOWAN: I'm Chad McGowan from Rock Hill.

19 MR. WALTERS: Fred Walters, with the Schneider  
20 plaintiffs, Western District of Missouri.

21 THE COURT: Okay. Welcome. And good for the  
22 Cardinals last night, right?

23 MR. WALTER: That's true, Your Honor.

24 MS. RENWICK: Karen Renwick, also on the Schneider  
25 case, and with Mr. Walters from Kansas City, Missouri.

1 MR. HARVEY: Your Honor, I'm Todd Harvey from the  
2 firm of Whatley Drake & Kallas in Birmingham, Alabama, and we  
3 represent the plaintiffs in the MDL.

4 MR. BRIGHT: Mitchell Bright, also from Whatley Drake  
5 & Kallas.

6 MR. KATZ: Good morning, Your Honor. Seth Katz from  
7 Katz, Look & Moison in Denver.

8 MR. BECNEL: Daniel Becnel, Your Honor, from Reserve,  
9 Louisiana, right out of New Orleans.

10 MR. QUETGLAS: Eric Quetglas from the District of  
11 Puerto Rico. Thank you.

12 MR. MUDD: Good morning, Your Honor, John Mudd from  
13 the District of Puerto Rico.

14 MR. TURNER: Good morning, Your Honor, Brian Turner,  
15 Birmingham, Alabama.

16 THE COURT: Welcome.

17 MS. OKOU: Good morning, Your Honor. Niki Okou from  
18 San Francisco.

19 MR. WOOD: Kirk Wood, Your Honor, Birmingham,  
20 Alabama.

21 MR. ROGERS: Tom Rogers.

22 MR. MARCUM: Christian Marcum, Richardson Patrick.

23 THE COURT: Okay. Welcome.

24 Okay. From the reading up that I've done and -- oh,  
25 yeah, all you guys. That may be a Freudian slip.

1 MR. HAHN: Blair Hahn, Your Honor, with Richardson  
2 Patrick here in Charleston.

3 MR. BALDUCCI: Tim Balducci from Mississippi.

4 MR. KARM: Dan Karm from Cleveland, Ohio, with those  
5 fellows over there.

6 MS. HARNETT: Melissa Harnett from Mitchell,  
7 Silberberg & Knupp. We represent a California class.

8 THE COURT: Welcome.

9 MR. KELLER: My name is Jeffrey Keller from San  
10 Francisco.

11 THE COURT: Welcome everybody.

12 MS. FLEISHMAN: The plaintiffs have organized, to  
13 the extent that we would ask the Court, with the Court's  
14 permission, that Mr. Howe would be appointed as plaintiff's  
15 liason counsel, so as the point person here in Charleston for  
16 the plaintiffs.

17 THE COURT: Do I have to?

18 MS. FLEISHMAN: No, Your Honor.

19 THE COURT: Okay.

20 MS. FLEISHMAN: And we have also -- we've also -- we  
21 would like to talk, speak to the Court in terms of an  
22 organizational structure.

23 We have a proposed organizational structure, and  
24 then we have had some discussions about, sort of a leadership  
25 committee, and then a PSC, a plaintiffs' steering committee.

1 And we would like to make presentations to the Court, either  
2 in chambers or however Your Honor wants, if we can present  
3 resumes to the Court, however the Court wants to approach  
4 that.

5 THE COURT: Okay. Yes, sir?

6 MR. BECNEL: May it please the Court?

7 I stand in opposition to that. And I would like to  
8 address the Court dealing with those issues, Your Honor.

9 MR. BALL: Gordon Ball from Knoxville. We have not  
10 had a chance to see that, and we were not here at the meeting  
11 yesterday. So --

12 THE COURT: Okay.

13 MR. BALL: -- I can't say I'm opposed to it; I can't  
14 say I'm for it. But I would, I don't know, I would think  
15 that there would need to be an economic class and a personal  
16 injury side of the case. So I would suggest that we be  
17 allowed to maybe have a day or two to figure all this out.

18 THE COURT: I was figuring that I would give you  
19 30 days.

20 MR. BALL: Thirty days would be good.

21 THE COURT: No lawyer has ever complained to be  
22 given too much time.

23 All right. And while everybody is here, you are  
24 welcome to use this courtroom. I've got a hearing room next  
25 door that's open, if you want a caucus, or whatever you want

1 to do. You know, if you want to present me with proposed  
2 steering committees and divide it up, that's fine with me,  
3 I'll take a look at it. If there is going to be a dispute  
4 about it, then we'll have a hearing at that time, and I'll  
5 get a slate from each side. That seems to be the easiest way  
6 to do it is for y'all to agree. And I understand that can  
7 happen sometimes and that sometimes doesn't happen.

8            Luckily enough, I only have that problem on one  
9 side, because we only have one defendant right now. Okay?  
10 So I'm not having all those lawyers fight, too.

11            Is that proposal acceptable to everybody?

12            MR. BALL: It is for us.

13            MR. MUDD: If Your Honor please, and Your Honor, John  
14 Mudd.

15            In principal, I agree with the proposals. My  
16 problem is, and I think other people here, is that I'm  
17 leaving tomorrow. So any meetings would be, if you are  
18 suggesting that we can use the facilities here, any meetings,  
19 that we have them today sometime after this hearing.

20            THE COURT: At least as they say, the Chinese  
21 saying, a journey of a thousand miles starts with the first  
22 step. The first step would be to meet today.

23            MR. BALL: Excuse me. I didn't mean to interrupt  
24 you. If we have -- Gordon Ball again. If we have 30 days,  
25 surely we can find some central location within the next ten

1 or 15 days and meet and hammer this out.

2 THE COURT: That's fine with me, or do you want to  
3 start today? Any problems starting today?

4 MR. BALL: I'm not adverse to starting, Judge.

5 MR. WALTERS: Fred Walters. I agree. We have time  
6 to communicate by a conference call or set up meetings, and  
7 30 days is an adequate time, I think, to get that done.

8 THE COURT: Mr. Becnel?

9 MR. BECNEL: May I address the Court?

10 THE COURT: Sure.

11 MR. BECNEL: Your Honor, I filed the MDL papers to  
12 start this MDL, although there is a lot of cases in state  
13 court.

14 I'll just show the Court lawyers that had filed  
15 federal cases. And if you look at it, there is one, two,  
16 three on the first page; um, three on the second page; two on  
17 the next page and then some people who have written in who  
18 got in this litigation once the MDL was filed. And once the  
19 MDL papers -- most of the people that were involved in this,  
20 and have probably 95 percent of all the cases in the country,  
21 are not here.

22 The reason they are not here is because of their  
23 concern that people without cases who jump in to MDLs at the  
24 end when all of the experts have already been retained, um,  
25 where things have already gone forward, um, have -- and have

1       been working together both in state and in Federal Court --  
2       and, for example, if you look at the orders that we have in  
3       one of my cases, we have the preservation order, and a case  
4       management order, and we were moving right along.

5               I've had the opportunity to deal with Shook Hardy  
6       for, going on God knows how long, who have been involved with  
7       settling the tobacco case with them, the *Sulzer Orthopedics*  
8       case, the *Baycol* case, and so on and so forth; the same thing  
9       with Mr. Beisner.

10              The lawyers are not here because they are scared.  
11       They are scared of what this court may do with their cases  
12       and their fees. Some of the lawyers here that met last  
13       night -- and I was last night meeting with his partner and a  
14       federal magistrate on the guidant MDL in settlement  
15       negotiations all day. So I could not make it, and I didn't  
16       get here until midnight.

17              I've submitted something to the Court showing, you  
18       know -- since I think I did the first civil MDL when Gerald  
19       Ford was president. So I have been in the most of the major  
20       cases around the country; whether they are plane crashes;  
21       ship collisions; whether they involve drugs; um, devices;  
22       products.

23              So I think by the absence of all of these lawyers  
24       with 95 percent of the cases, this should not be an MDL with  
25       no cases. It just doesn't make sense.

1           And I think this court has to make lawyers around  
2 the country feel welcome; feel that they are not coming to  
3 South Carolina and going to wind up having to give up six and  
4 eight and nine percent fees on cases that they've already got  
5 their experts; they've already got their doctors; they've  
6 already done a lot. And that is the concern.

7           And I just thought I should express this to you, um,  
8 because the only way an MDL works is if you have complete  
9 cooperation between state and federal. The only way it  
10 works -- and we are -- we see that time and time again.

11           And I'll give you an example of those, the *Zyprexa*  
12 litigation, which is a recent \$800, \$900 million. The state  
13 guys have already been paid, got their money, and they got  
14 into the case after the MDL was appointed; after they had  
15 gone forward, and people in the MDL still don't have their  
16 money and still don't have their fees. And their clients  
17 don't have their remuneration.

18           So I think this has been the first time in the  
19 history of MDLs that I've seen -- and I have been doing this  
20 for 38 years -- that I've seen a complete absence of lawyers  
21 come into an MDL where we all are in agreement before.

22           And when the argument was made to the MDL panel --  
23 um, I kind of was a spokesman for the group -- and said,  
24 Look, listen to all these fine lawyers. Nobody prefers one  
25 place over the other. Um, you know, and people made

