

Sub# 13

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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IN RE: NEW YORK RENU WITH MOISTURELOC	:	Index No. 766,000 /2007
PRODUCT LIABILITY LITIGATION	:	
	:	<b>CASE MANAGEMENT</b>
	:	<b>ORDER NO. 9</b>
----- X	:	
THIS DOCUMENT APPLIES TO ALL CASES	:	
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**CASE MANAGEMENT ORDER**

IT IS HEREBY ORDERED THAT the following Pretrial Order shall govern all proceedings in this matter:

**I. COORDINATION WITH OTHER LITIGATION**

**A. Coordination to the Extent Practical**

Plaintiffs and defendants in this litigation shall work to coordinate to the extent practicable depositions and document discovery with the MDL proceeding involving ReNu® with MoistureLoc® so long as there is no prejudice to the rights and ability of the New York plaintiffs to fully and timely prosecute their cases in New York.

**B. Coordination by Plaintiffs' Counsel**

All discovery directed to defendants on behalf of New York plaintiffs shall be undertaken by, or under the direction of, the PSC on behalf of all plaintiffs with cases in these coordinated proceedings. Any discovery not limited to a specific New York plaintiff shall be signed by a PSC member.

**FILED**  
AUG 31 2007  
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NEW YORK

## **II. SERVICE OF DOCUMENTS AND FILING PROCEDURES**

### **A. Discovery Requests and Responses**

Discovery requests and responses will not be filed with the Court, except when specifically ordered by the Court or to the extent that they are presented in connection with a motion.

## **III. STATUS CONFERENCES**

### **A. Regularly Scheduled Conferences**

The Court intends to schedule and hold regular status conferences. Counsel for each side shall meet and confer in advance of each status conference and submit to the Court, at least forty-eight (48) hours prior to each scheduled conference, a joint agenda and status conference report listing all matters and motions to be considered by the Court at the status conference. In the event that Counsel cannot agree upon a joint agenda, each side shall submit its agenda items to the Court, with copies to opposing counsel, at least forty-eight (48) hours prior to each scheduled conference.

## **IV. GENERAL DISCOVERY RULES**

### **A. Applicability of Rules**

Except as otherwise provided in this Order, the New York Civil Practice Law Rules (the “CPLR”) and the Uniform Rules for New York State Trial Courts shall generally apply in this proceeding.

### **B. Discovery Dispute Resolution**

To avoid unnecessary litigation concerning discovery disputes, counsel should confer before contacting the Court on discovery issues. The Court will meet periodically with Plaintiffs’ Liaison

Counsel and Defendants' Liaison Counsel and any members of the Plaintiffs' Steering Committee or Defendants' Steering Committee who are needed for any issues likely to be discussed to address any unresolved discovery disputes and will accept letter briefs not exceeding five pages from the parties at least two business days in advance of such meetings.

**C. Document Depository**

The Plaintiffs' Steering Committee ("PSC") shall bear the cost of and administer its own document depository. The PSC shall make the documents produced by defendants available to plaintiffs in any other related litigation, subject to an appropriate cost-sharing provision. This provision shall not create an obligation upon the PSC to provide its work product to parties or counsel in ReNu with MoistureLoc litigation. This production shall not preclude any party from asserting in any action that such documents are inadmissible at trial. Nor shall this provision be construed to supersede or amend any state's law, including, but not limited to, New York's laws governing evidence, or any state court order pertaining to such documents.

**D. Identification of Documents**

1. **Numbering System.** Consistent with CMO 7, defendants shall use a consistent system for identifying, by unique number or symbol, each document produced or referred to during the course of litigation. Defendants shall give each page of any document they produce a unique number, using a consistent numbering system. All reasonable efforts should be made to avoid having the same page assigned more than one identifying number except when there is a need to account for different copies of the same

document or page (for example, because of special notations being placed on the document).

2. **Documents Produced by Non-Parties.** In the event that documents produced by persons or entities who are not parties to this action are not, when produced, identified by a unique numbering system, the parties will coordinate so that the numbering of those documents can be done in a consistent manner.

**V. RULES APPLICABLE TO WRITTEN FACT DISCOVERY**

**A. Master Written Discovery by Plaintiffs**

The PSC may serve Requests for Production, Interrogatories and Requests for Admission on Bausch & Lomb. No requests for production, interrogatories, or requests for admission may be propounded on the defendant other than the discovery propounded by the PSC. The use of interrogatories in this proceeding shall be governed by Rule 3130. Should the PSC desire to serve in excess of 50 interrogatories the PSC shall first seek guidance from the Court.

The party served shall answer and/or object to the interrogatories and requests for admission in the manner described in Rules 3133 and 3123, respectively, of the New York Civil Practice Law and Rules.

**B. Document Production**

Following the entry of this Order, the parties shall seek to reach an agreement regarding the document production process for the defendant's responses to plaintiffs' document demands. In their conference on this issue, the parties shall consider the extent to which the document requests

responded to by defendants in related cases satisfy the needs of the parties to this proceeding.

**C. Extension of Discovery Deadlines**

Nothing in this Order shall be interpreted to restrict the ability of the parties to stipulate to an extension of discovery deadlines in a particular case or to move for an extension of discovery deadlines in a particular case based on a showing of good cause.

**VI. RULES APPLICABLE TO DEPOSITIONS**

**A. General**

The scheduling and conduct of depositions, including resolution of any disputes arising during depositions, shall be in accordance with the New York Civil Practice Law Rules, the Uniform Rules for New York State Trial Courts, and the Local Rules of this Court. Counsel are expected to cooperate with, and be courteous to, each other and deponents. Any deposition in this proceeding may be witnessed by any notary, and reviewed and executed by the witness. Depositions may be videotaped if properly noticed. The parties hereby waive filing and sealing of the record as to all depositions in these proceedings. The parties hereby reserve all deposition-related objections, except as to the form of questions, until the time of trial.

**B. Scheduling of Depositions**

1. Plaintiffs' Liaison Counsel will be responsible for informing counsel on Plaintiffs' Steering Committee of the scheduling of any depositions in this proceeding that are not related to a specific plaintiff's claim.
2. All depositions of persons currently employed by Bausch & Lomb shall be taken in a place mutually agreed to by Liaison Counsel. All depositions of

other witnesses shall be taken at such other locations as shall be agreed upon by the witness and Liaison Counsel.

3. At least thirty (30) days prior to the deposition of persons currently or formerly employed by Bausch & Lomb, Bausch & Lomb shall provide Plaintiffs' Steering Committee with a written certification that it has completed production of that witness's custodial files.
4. Once a deposition has been mutually scheduled by Liaison Counsel, it shall not be taken off the calendar, rescheduled, or relocated to a different city, except upon agreement between Liaison Counsel and counsel for the witness, or by leave of Court for good cause.

#### **C. Cross-Noticing of Depositions**

Depositions of fact witnesses noticed in these proceedings may be cross-noticed in the related MDL proceeding or in any related state court actions by Plaintiffs' Liaison Counsel and/or Defendants' 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 the MDL proceeding or any other state court action, in accordance with the applicable law and rules of evidence. Any deposition taken in the MDL proceeding may also be used in this proceeding, consistent with New York's laws and rules of evidence.

#### **D. 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. Nothing herein shall prohibit non-duplicative questions by additional questioners.

**E. Avoidance of Duplicative Depositions**

Absent agreement of the parties or leave of Court, provided that counsel is noticed or cross-noticed of a deposition in the time and manner set forth in CMO 5, no witness should be deposed more than once in these proceedings. No witness who is deposed in the MDL proceeding shall be deposed in these proceedings absent agreement of Defendants' Liaison Counsel or express permission of the court as long as defendant complies with the certification requirement in Section VI.B.3, supra. 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.

**F. Attendance**

Unless otherwise agreed to by the parties, depositions may be attended only by the parties, the parties' counsel (including in-house counsel), the deponent, the deponent's attorney, the parties' expert witnesses, representatives of the parties' insurers, court reporters, videographers, and members and/or employees of the law firms of counsel of record. Upon application to the Court, and for good cause shown, the Court may permit attendance by a person who does not fall within any of the categories set forth in the previous sentence. Unnecessary attendance by counsel is discouraged and may not be compensated in any fee application to the Court. While a deponent is being examined about any stamped confidential document or the confidential information contained therein, persons to whom disclosure is not authorized under the Confidentiality Order shall be excluded.

### **G. Stenographic Recording**

A certified court reporter shall stenographically record all deposition proceedings and testimony. The Court reporter shall administer the oath or affirmation to the deponent.

### **H. Videotaping**

Videotaping of depositions shall be permitted upon written notice to the witness's counsel at least forty-eight (48) hours in advance of the deposition. Even when a deposition is videotaped, the stenographic record shall be the official record of the deposition.

### **I. Deposition Disputes**

During depositions, disputes that arise that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require a rescheduling of the deposition, may be presented to the Court by telephone. The presentation of the issue and the Court's ruling will be recorded as part of the deposition.

## **VII. RULES CONCERNING PRIVILEGE ISSUES**

### **A. Generally**

A party who, relying on any privilege or the work product doctrine, does not produce all documents that would have been produced but for the claim of privilege or work-product, must state that it is invoking a privilege. A party who invokes a privilege must specify which privilege or doctrine it is invoking. The party invoking the privilege has the obligation and burden to defend the assertion of privileged if challenged.

**B. Attorney-Client, Work Product and Other Privileges**

A party who invokes the attorney-client, work product or other privilege also must provide to the opposing party within 45 days of producing a privilege log containing the following information for each document not produced, to the extent providing this information will not destroy the privilege:

1. the name(s) of the person(s) who created and received the document or a copy of it and their affiliation (if any) with the producing party;
2. the date on which the document was created and/or received; and
3. a description of the nature of the document sufficient to enable other parties to assess the applicability of the privilege or protection.

**C. Recent Documents**

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.

**D. Inadvertent Production**

Inadvertent production of any document or information will not be deemed to waive a later claim to its confidential and/or privileged nature or preclude the supplying party from designating said document or information as confidential and/or privileged at a later date. Upon notice from the producing party that a document or information has been inadvertently produced, the receiving party shall (i) take reasonable steps to notify the supplying party that such material has been produced; (ii)

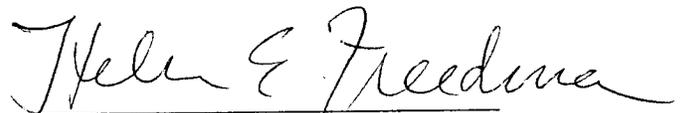
promptly endeavor to procure all copies of such material from any persons known to have possession of such material; and (iii) return all such copies to the supplying party.

**VIII. GENERAL APPLICABILITY OF ORDERS**

This Order applies to all pending cases and to each subsequently filed case that becomes part of the coordinated proceeding. Each subsequent Order entered herein shall also apply to all pending cases and to each subsequently filed case unless said Order provides otherwise.

**IX. COMMUNICATION AMONG COUNSEL**

This Court recognizes that cooperation by and among plaintiffs' counsel and by and among defendants' counsel is essential for the orderly and expeditious conduct of this litigation. The communication of information among and between plaintiffs' counsel and among and between defendants' counsel shall not be deemed a waiver of attorney client privilege or the protection afforded attorney's work product, and cooperative efforts contemplated above shall not in any way be used against plaintiffs by any defendant or against any defendant by any plaintiff. Nothing contained in this paragraph shall be construed to limit the rights of any party or counsel to assert the attorney-client or joint defense privilege or the attorney work-product doctrine.



Helen E. Freedman, J.S.C.  
New York Supreme Court Judge

August 31, 2007

**FILED**

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