

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

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: Index No. 766,000/2007  
IN RE: NEW YORK RENU WITH MOISTURELOC :  
PRODUCT LIABILITY LITIGATION :  
: :  
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THIS DOCUMENT APPLIES TO ALL CASES  
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IN THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

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: MDL No.: 1785  
IN RE: BAUSCH & LOMB CONTACT LENS :  
SOLUTION PRODUCT LIABILITY LITIGATION :  
: C/A No. 2:06-MN-7777-DCN  
: :  
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THIS DOCUMENT APPLIES TO ALL CASES  
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**MEMORANDUM OPINION AND ORDER ON REDACTION OF OTHER  
PRODUCT INFORMATION ON GROUNDS OF IRRELEVANCE**

**DANIEL J. CAPRA, SPECIAL MASTER:**

In this litigation, Defendant Bausch & Lomb has unilaterally redacted portions of thousands of documents produced in discovery, on the ground that those portions relate to product lines not at issue in this case — specifically, surgical products and pharmaceuticals — and that therefore those redacted portions are irrelevant to this matter. Plaintiffs contend that Defendant has no right to redact unilaterally, on grounds of irrelevance, any of the documents it produces. Alternatively, in a letter to Justice Freedman dated September 21, 2007, Plaintiffs suggest a procedure “whereby the plaintiffs can audit the documents that were redacted” and then bring specific disputes to the Special Master. Another alternative, discussed in the telephone conference on January 10 and in the case law, is *in camera* review by the Special Master of any redaction of information that Plaintiffs contend may be subject to disclosure.

I have carefully considered the case law and the contentions of the parties. I have taken into account Defendant's concern that information about surgical products or pharmaceuticals, if irrelevant in this matter, might be used improperly by competitors if disclosed to Plaintiffs. I have weighed this concern against Plaintiffs' argument that Defendant should not be permitted to decide unilaterally what is relevant and what is not — especially given the broad standard of discoverability under Federal and New York law, under which doubts about relevance are called in favor of production. *See, e.g., Williams v. Sprint/United Mgmt. Co.*, 2007 U.S. Dist. LEXIS 14469, at \*25 (“Defendant, as the party redacting sections of an otherwise discoverable document on the basis of irrelevancy, has the burden to show why these redactions were proper.”). Most importantly I have considered the relative costs and benefits of both an audit procedure and a process of *in camera* review of thousands of documents to determine whether Defendant has redacted as irrelevant any information that is actually discoverable.

In light of all these considerations, I conclude that in the first instance Defendant may not delete any portion of a produced document on grounds of irrelevance. Defendant's concern about disclosure to competitors should be addressed not by redaction in the first instance, but rather by implementing a procedure requiring Plaintiffs to notify Defendant of any intent to disclose a document containing information about surgical products or pharmaceuticals to a person who is employed or retained by one of Defendant's competitors. Defendant will at that time have the opportunity to petition the Special Master and seek redaction of proprietary information about surgical products or pharmaceuticals, under the terms set forth in the Order below. If this notice and opportunity to be heard procedure turns out to be as cumbersome as a blanket *in camera* review of all documents would be, then the Special Master will consider an alternative, such as the audit procedure suggested by Plaintiffs.

What follows is the rationale for my decision.

1. The case law is not uniform on the subject of redaction of produced documents on grounds of irrelevance. Defendant is certainly correct that there are a number of reported decisions in which the producing party was allowed to redact assertedly irrelevant information unilaterally, with any disputes to be submitted to the court for *in camera* review. But in each of the cases cited by defendant, the number of redacted documents was or appeared to be relatively small. For example, in *Calcados Samello v. Intershoe, Inc.*, 78 A.D.2d 796, 433 N.Y.S.2d 3 (1<sup>st</sup> Dept. 1980), the court allowed unilateral redactions on grounds of irrelevance, subject to *in camera* review. But the discovery dispute involved redaction of four documents. In the other cases cited in Defendant's letter of January 14, 2008, the courts did not specify the exact number of documents, but a close reading of each of those three cases indicates that the quantity of redacted documents is substantially less than the thousands of documents redacted in this matter.

2. The case that is most on point with the instant matter is Judge Pitman's decision in *A.I.A. Holdings, S.A. v. Lehman Bros.*, 2000 U.S. Dist. LEXIS 8116, at \*8-\*9 (S.D.N.Y. 2000). Defendant sought unilateral redaction of possibly thousands of bank transactions from produced documents on grounds of irrelevance, and proposed that any disputes would be subject to *in camera* review. Judge Pitman concluded as follows:

In addition, considerations of efficiency and equitable allocation of resources militate against permitting the redaction of bank statements. \* \* \* I have little doubt that, in the aggregate, plaintiffs' bank statements reflect tens of thousands or, perhaps, hundreds of thousands of transactions. To permit the parties to redact individual transactions as irrelevant, subject to judicial review, raises a substantial possibility that I will be compelled to spend an inordinate amount of time reviewing bank records to resolve discovery disputes concerning the relevance or particular transactions. Given my need to divide my time as equitably as possible among all the matters assigned to me, it is essential that this discovery dispute be resolved in a manner that efficiently reconciles the plaintiffs' right to be protected from the disclosure of irrelevant and embarrassing information, the defendants' right to discovery of all relevant, non-privileged information and the rights of other litigants to an equitable share of my attention. Production of unredacted copies of the bank statements, subject to a confidentiality order, is clearly the solution that best balances these competing interests.

It is true that Judge Pitman was concerned with equitable treatment of other matters assigned to him, whereas the Special Master has no such conflict. But it is also true that the parties contemplate that the Special Master will review *in camera* a large number of redactions and non-disclosures where the claim is privilege and work product, and the addition of thousands of redactions on grounds of relevance is sure to add to the costs for the parties and will delay resolution of the privilege claims. In any case, the fundamental point is that it is appropriate to opt for efficiency so long as there is a way to protect Defendant's legitimate interests — which in this matter means that Defendant should not have to disclose its information on surgical products or pharmaceuticals to competitors if that information is irrelevant to this action. As in *AIA*, this balance — between efficiency and protection of Defendant's legitimate interest — can best be effectuated by production of unredacted documents on the condition that they are subject to a protective order where necessary under the circumstances.

The cost of *in camera* review of thousands of unilateral redactions is especially unjustified in light of the broad standards of discoverability under both Federal and New York law — under which an *in camera* review is likely to find that a fair number of the redactions must be lifted in any case because the redacted information could lead to admissible evidence.

3. I understand the apparent anomaly of a defendant having the right to refuse to disclose a document that is entirely irrelevant, but yet not having the right to redact completely irrelevant portions of a document subject to production. But there are three answers to this anomaly. First, if the defendant must produce the document anyway, then the expenses of document production are already undertaken; there is no cost to be saved by redacting irrelevant portions of a document that must be produced. Second, redaction of even irrelevant portions of a document is likely to make the document as a whole difficult for the receiving party to manage or even understand. *See, e.g., Seafirst Corp. v. Jenkins*, 644 F.Supp. 1160, 1165 (D.Wash. 1986) (noting that “disclosure of some possibly irrelevant material will cause no harm” whereas “partial disclosure may tend to distort the tenor of the reports”). Third, redaction of portions of a produced document raises the specter of expensive and time-consuming *in camera* review.

4. As to plaintiffs' suggestion of an audit: it is possible that an auditing procedure could be less costly than unilateral redaction and *in camera* review of thousands of documents. But given the number of redactions in this case, I conclude that it is more efficient, and yet fair, to order all redactions on grounds of irrelevance to be lifted, subject to the assurance that Defendant can later seek protection from disclosure to competitors of irrelevant information about surgical products or pharmaceuticals. If the disclosed yet irrelevant material cannot be reasonably protected by providing notice and an opportunity to be heard when the other product information is going to be disclosed to a person who is employed or retained by one of Defendant's competitors, then the audit procedure will be revisited — as it is a more efficient winnowing process than is *in camera* review of thousands of redactions in the first instance.

## Order

1. Defendant may not redact information from documents it produces on the ground that the information is irrelevant.

2. Defendant may mark a document it produces "Contains Other Product Information" if any portion of the document relates to surgical products or pharmaceuticals.

3. Within 10 days of the date of this Order, Defendant must submit to Plaintiffs and to the Special Master a list of entities that the Defendant claims are competitors with respect to surgical products or pharmaceuticals.

4. If Plaintiffs intend to disclose any document that has been marked "Contains Other Product Information" to any person employed or retained by one or more of the entities set forth on the list provided by Defendant pursuant to paragraph 3, *supra*, then Plaintiffs must notify Defendant's counsel of such intent by email, with copy to the Special Master. The notice need not specify the name of the person to whom the document is intended to be shown.

5. Defendant may, within 15 days of receipt of any such notice of intent, move before the Special Master for a protective order seeking redaction of information concerning surgical products or pharmaceuticals. A protective order may be granted if the Special Master determines 1) that the person to whom the document is to be disclosed is employed or retained by an entity that competes with Defendant on the other product line that is referenced in the document; and 2) that the information in the document about surgical products or pharmaceuticals is irrelevant to this matter and not subject to discovery.

6. Plaintiffs may not disclose any document that has been marked "Contains Other Product Information" to any person employed or retained by one of entities set forth on the list provided by Defendant pursuant to paragraph 3, *supra*, until the 15 day period for moving for a protective order has expired, or the Special Master has ruled on Defendant's motion, whichever comes later.

7. Within 30 days of the date of this Order, Defendant must produce, in unredacted form, the documents that it has previously produced with redactions on grounds of irrelevance.

SO ORDERED:



Daniel J. Capra  
Special Master

Dated: New York, New York  
March 3, 2008