

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

UNIVERSITY OF MASSACHUSETTS)
MEDICAL SCHOOL and CARMEL)
LABORATORIES, LLC,)
)
Plaintiffs,)
) C.A. No. 17-868-JFB-SRF
v.)
)
L'ORÉAL S.A. and L'ORÉAL USA, INC.,)
)
Defendants.)

**DEFENDANT L'ORÉAL USA, INC.'S REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF L'ORÉAL USA, INC.'S BRIEF IN SUPPORT OF L'ORÉAL USA, INC.'S
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

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Dated: August 23, 2017

Pursuant to Rule 201 of the Federal Rules of Evidence, defendant L'Oréal USA, Inc. respectfully requests that the Court take judicial notice of the documents listed below and attached hereto.

Exhibit A: Response to Final Office Action Dated October 19, 2001 Pursuant to 37 C.F.R. 1.116(A) in U.S. Patent Application No. 09/672,348, Mailed to the United States Patent and Trademark Office ("USPTO") on February 11, 2002.

Exhibit B: Declaration Under 37 C.F.R. § 1.132 by James G. Dobson, Jr., Ph.D. and Michael F. Ethier, Mailed to the USPTO on February 13, 2002.

"Rule 201(b), Federal Rules of Evidence permits a district court to take judicial notice of facts that are 'not subject to reasonable dispute in that [they are] . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1331 (3d Cir. 2002) (citing Fed. R. Evid. 201(b)).

"[A] district court must take judicial notice 'if requested by a party and supplied with the necessary information.'" *Id.* (citing Fed. R. Evid. 201(d)). "Public records" are proper subjects of judicial notice. *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999). This includes "publicly-available records filed with the USPTO." *Foster v. Pitney Bowes Corp.*, No. 11-7303, 2013 WL 487196, at *1 n.4 (E.D. Pa. Feb. 8, 2013); *see also Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 705 n.5 (3d Cir. 2004) (taking judicial notice of USPTO notice of allowance); *CANVS Corp. v. United States*, 118 Fed. Cl. 587, 590 n.3 (2014) ("The court may take judicial notice of PTAB [Patent and Trial Appeal Board] filings.").

The Court should take judicial notice of Exhibits A and B because they are public records from the USPTO with verifiable authenticity. *See* Fed. R. Evid. 201(b). Exhibit A is offered to

show that Plaintiffs made statements to the USPTO stating that an adenosine concentration of 0.1%, which is $3.8 \times 10^{-3}M$, and an adenosine concentration that is one-third this value is higher a maximum concentration of $10^{-4} M$ adenosine. Exhibit B is offered to show that during the prosecution of U.S. Patent Application No. 09/672,348, inventors, James G. Dobson, Jr., Ph.D. and Michael F. Ethier, submitted a declaration to the USPTO stating that an adenosine concentration of one third of 0.1% ($1.27 \times 10^{-3}M$) is higher than a concentration of adenosine of $10^{-4} M$ or lower.

Pursuant to Rule 201 of the Federal Rules of Evidence, defendant L'Oréal USA, Inc. respectfully requests that the Court take judicial notice of Exhibit C to the Declaration of Katherine Murray ("Murray Decl."), filed concurrently herewith, which is a true and correct copy of Abella, M. L., *Evaluation of Anti-Wrinkle Efficacy of Adenosine-Containing Products Using the FOITS Technique*, International Journal of Cosmetic Science 28, 447-51 (2006) ("Abella") with verifiable authenticity. Plaintiffs cite *Abella* in their Complaint (*see* D.I. 1, ¶¶ 26-27 (citing D.I. 1-6 at 5)), which is offered to show that *Abella* states that "subjects were given two of three blinded products – (C) cream with 0.1% adenosine, (A) dissolvable film with 1% adenosine or (B) placebo cream (without adenosine)." (Murray Decl., Ex. C at p. 448.)

For the foregoing reasons, L'Oréal USA respectfully requests that the Court take judicial notice of Exhibits A and B attached hereto, and Murray Decl., Ex. C, filed concurrently herewith.

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