

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

UNIVERSITY OF MASSACHUSETTS and	)	
CARMEL LABORATORIES LLC,	)	
	)	
Plaintiffs,	)	
	)	C.A. No. 17-868-CFC-SRF
v.	)	
	)	<b>REDACTED VERSION</b>
L'ORÉAL USA, INC.,	)	
	)	
Defendant.	)	

**L'ORÉAL USA, INC.'S MARCH 20, 2020 OPPOSITION LETTER TO  
PLAINTIFFS' DISCOVERY DISPUTE LETTER**

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Dated: March 20, 2020

Dear Judge Fallon:

Defendant L'Oréal USA, Inc. ("L'Oréal USA") writes in response to the letter filed by Plaintiffs University of Massachusetts and Carmel Laboratories, LLC (together, "Plaintiffs") on March 19, 2020. Plaintiffs' complaints are either unfounded, or were not the subject of any prior meet and confer discussions. As such, Plaintiffs' requested relief should be denied.

**1. L'Oréal USA's Production Pursuant to Scheduling Order, Paragraph 6 (D.I. 46)<sup>1</sup>**

L'Oréal USA has produced marketing, technical, financial and testing documents in compliance with Paragraph 6 for all properly accused products<sup>2</sup> that it has been able to locate following diligent searches. This includes documents for the products that Plaintiffs identified on February 12, 2020, and for which L'Oréal USA provided Bates numbers. (*See* D.I. 89, Ex. A.) Had Plaintiffs taken the time to review L'Oréal USA's document production, they would have discovered as much. There is nothing to compel here.

**Technical Documents:** Plaintiffs contend that they are missing a formulation/ingredient list for one product: Lancome Renergie Eclat Multi-Lift. (D.I. 103, Ex. A.) L'Oréal USA produced this information to Plaintiffs in February. (*See* Exs. A, B.)

**Financial Documents:** L'Oréal USA has produced financial data for every accused product in this case, including improperly accused products. Plaintiffs' sole complaint is that they are missing financial information for five products for 2011-2012. As explained in L'Oréal USA's February 13, 2020 letter brief to the Court, and in several subsequent discussions with Plaintiffs, L'Oréal USA has been unable to locate this data because its financial databases for certain divisions begin with 2013. L'Oréal USA is working with its IT department to recreate this data for Plaintiffs, and will continue to keep Plaintiffs apprised of these efforts.

**Product Packaging and Marketing Materials:**<sup>3</sup> L'Oréal USA has produced packaging for every properly accused product that it has been able to locate. Indeed, these documents were produced starting in December 2019, and L'Oréal USA provided the Bates ranges for these documents in its last submission to the Court. (*See* D.I. 89, Ex. A at 2.) It is unclear why Plaintiffs continue to complain about documents that have been produced. (*See, e.g.*, Ex. C (packaging for Lancome Visionnaire Advanced Skin Corrector produced Dec. 6, 2019, and

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<sup>1</sup> Plaintiffs detail the information they contend is missing in a chart attached as Exhibit A to their letter brief. Attached hereto for the Court's convenience as Exhibit A is that same chart with an additional column explaining the status of the document production for those products.

<sup>2</sup> Following L'Oréal USA's submission to the Court on February 13, 2020, Plaintiffs agreed to withdraw several improperly accused products. Although Plaintiffs represented that they "have no intention of accusing products that post-date the [asserted] patent's [sic] expiration" (D.I. 87, Ex. G at 7), they continue to include some of these products in their chart. (D.I. 103, Ex. A.)

<sup>3</sup> It is unclear why Plaintiffs cite various Requests for Production when discussing the production of marketing materials. As Plaintiffs are aware and have not disputed, in October 2019, the parties reached an agreement regarding the scope of marketing materials to be produced in this case. (*See* D.I. 89 at 3-4.) That production is complete.

identified to Plaintiffs by Bates numbers); Ex. D (marketing material for Absolue Revitalizing products produced Feb. 10, 2020.)

**Testing Documents:** As a preliminary matter, the issues Plaintiffs complain about relating to testing documents were never raised during the parties' meet and confer discussions. Indeed, the first time Plaintiffs ever identified products for which they believe they are missing testing documents was yesterday, in their submission to the Court. (D.I. 103, Ex. A.) A preliminary review of the products identified by Plaintiffs confirms that their chart is inaccurate. It is also not accurate that Plaintiffs are unable to match the testing documents to the accused products without L'Oréal USA identifying Bates numbers for the 20,000 pages of testing documents it produced. Starting in November 2019, L'Oréal USA produced technical documents identifying the formula numbers for each accused product. Those formula numbers also appear on L'Oréal USA's testing documents, thus allowing Plaintiffs to match the testing documents to the accused products. For instance, the first page of the officialization document for Kiehl's Powerful Wrinkle Reducing Cream with SPF 30 identifies the formula number for that product as 685562 31. (*See* Ex. E.) That formula number also appears on that product's testing documents, which, contrary to Plaintiffs' representation, were produced. (*See* Ex. F.) The same is true for several other products identified for the first time in Plaintiffs' chart. (*See, e.g.,* Ex. G (L'Oréal Paris Youth Code Texture Perfector Serum Concentrate); Ex. H (Vichy Idealia Day Cream); Ex. I (L'Oréal Paris RevitaLift Triple Power Eye Treatment). Plaintiffs cannot demand broad discovery from L'Oréal USA and then complain that L'Oréal USA did not produce the documents simply because Plaintiffs have not taken the time to review them. L'Oréal USA has produced all testing documents for every properly accused product that it has been able to locate following a reasonably diligent search.

## 2. Plaintiffs' Rule 30(b)(6) Deposition Notice

Plaintiffs' demand that L'Oréal USA produce a single witness to testify on the twelve broad topics identified in Plaintiffs' February 21, 2020 Rule 30(b)(6) deposition notice (the "Notice") by April 3, 2020 should be denied.

As a preliminary matter, the Notice is overly broad. As L'Oréal USA explained to Plaintiffs on March 12, 2020, the topics in the Notice seek testimony covering 13 brands, each of which operate independently, 4 financial divisions, and research and innovation departments which are located in a different state. Accordingly, L'Oréal USA explained that this one deposition could require upwards of 15 witnesses. Notwithstanding this, Plaintiffs were unwilling to narrow the scope of the topics and demanded that L'Oréal USA produce as few witnesses as possible. In an effort to move the case forward, L'Oréal USA agreed to consider narrowing the number of witnesses for this deposition, so long as they could be properly educated. L'Oréal USA explained, however, that it would take time to educate any witness on so many topics, as they would need to meet with employees from numerous brands and divisions.

On March 17, 2020, L'Oréal USA provided the name of a 30(b)(6) witness to Plaintiffs. However, given the current global health crisis, L'Oréal USA informed Plaintiffs that it was "unable at this time to commit to a deposition day," and noted that, if Plaintiffs "insist on

proceeding with a [] deposition . . . we will need to seek guidance from the Court as to timing.”<sup>4</sup> (*Id.*) L’Oréal USA did not, as Plaintiffs contend, “refuse[] to go forward with scheduling any depositions.” (D.I. 103 at 3.) Rather, L’Oréal USA explained that Plaintiffs’ arbitrary deadline of April 3, 2020 to complete this deposition was unworkable, especially given Plaintiffs’ demand that L’Oréal USA educate one witness rather than produce the witnesses who were actually involved with the document collection process. In addition, given the current health risks and travel restrictions in place, it is unclear when L’Oréal USA’s counsel will be able to meet with the witness to prepare for the deposition. Given that this deposition covers document collection issues and Plaintiffs are asking a witness to identify and categorize documents by Bates number (*see* Ex. J at Topic No. 42), L’Oréal USA’s counsel needs to be able to meet with the deponent in person to go through the documents, and to conduct follow-up interviews with the L’Oréal USA employees who were involved in the document collection process. Presently, the attorneys likely to work with the witness and represent her at the deposition are in Los Angeles and subject to a “Stay at Home” order that is likely to last at least until April 19, 2020.

Moreover, while Plaintiffs have suggested that the deposition occur via videoconference, the nature of the topics to be covered at this deposition render this extremely difficult, and will unfairly prejudice L’Oréal USA, as it is simply not feasible to inspect documents through a videoconference, especially when the deponent and her counsel will be in different locations. In addition, given the topics at issue, attorney-client privilege issues are likely to arise. L’Oréal USA’s witness should be able to discuss those issues with counsel in person, not on a separate videoconference during the deposition. Finally, it is unclear at this time whether L’Oréal USA’s witness would even be allowed to travel to a location for a videoconference.

Plaintiffs cannot manufacture an urgent need for a document collection deposition in an attempt to force L’Oréal USA to give up its right to effective counsel. L’Oréal USA remains ready to proceed with the deposition as soon as its counsel and deponent are able to travel.

### **3. Plaintiffs’ Requests for Production**

**Documents Related to Adenosine Penetration Testing (Request Nos. 8, 25, and 50):** L’Oréal USA has already produced its non-privileged documents in response to Request Nos. 8, 25, and 50, including adenosine penetration and accused products testing, and there is thus nothing to compel. For the first time in their March 19 letter to the Court, Plaintiffs took the position that these Requests *separately* require documents post-dating this litigation including any potential testing conducted by experts in connection with future expert reports.<sup>5</sup> The parties have not met and conferred on this latter issue, and it is not properly before the Court. Regardless, Plaintiffs’ attempt to obtain advanced disclosure of any potential work-product testing conducted in connection with expert discovery should be rejected. This request contravenes the Scheduling Order, which separately provides for expert reports and disclosures,

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<sup>4</sup> L’Oréal USA also suggested alternative measures—*e.g.*, conducting the deposition through written questions or interrogatories, per Rules 31 and 33. (D.I. 103, Ex. D at 1.) Given the topics at issue, L’Oréal USA maintains that such options are viable. (*Id.*)

<sup>5</sup> Contrary to Plaintiffs’ assertions, such testing has no connection with the Court’s February 18 Order regarding document production pursuant to Paragraph 6 of the Scheduling Order.

and is contrary to Plaintiffs' own positions in this case.<sup>6</sup> (D.I. 69.) There is nothing to compel, and Plaintiffs' attempt to circumvent the Court's orders and the meet and confer process should be rejected.

**Damages Reports Produced in the *Liqwd, Inc. v. L'Oréal USA* Action (Request No. 49):** Plaintiffs argue that, because L'Oréal USA "has failed to produce a single comparable license agreement to Plaintiffs," the damages expert reports and testimony L'Oréal USA relied on in *Liqwd* are necessary "to gain any insight whatsoever into [L'Oréal USA]'s licensing practices and policies." (D.I. 103 at 4.) This logic underscores the irrelevance of Plaintiffs' request. Given that L'Oréal USA does not license its technology, L'Oréal USA did not produce any third-party license agreements in *Liqwd*. Rather, L'Oréal USA produced only license agreements with L'Oréal S.A., its parent company, regarding the three hair-care brands at issue in that case, none of which are involved in this case. Here, L'Oréal USA has likewise produced the license agreements with L'Oréal S.A. that cover the brands at issue. The expert reports exchanged in *Liqwd* also contain confidential information pertaining to the plaintiffs in that matter, which are not relevant here.

**Documents Produced to Any Government Agency Regarding the Accused Products (Request No. 65):** Plaintiffs broadly seek "any representations [L'Oréal USA] made about the marketing or testing of the Accused Products." (D.I. 103 at 4.) The Request is in no way cabined—it encompasses documents made to *any* government agency concerning *any* matter involving the accused products. This could implicate documents concerning claims of product liability and other issues having nothing to do with this case. L'Oréal USA has produced the underlying marketing and testing data for the accused products. As such, any documents responsive to Request No. 65 that would be relevant to this case would be duplicative and cumulative of documents that have already been produced. Indeed, when L'Oréal USA explained this during the parties' meet and confer, Plaintiffs confirmed that they were seeking duplicative information.

For the foregoing reasons, L'Oréal USA respectfully requests that Plaintiffs' requested relief be denied.

Respectfully,

/s/ Frederick L. Cottrell, III

Frederick L. Cottrell, III (#2555)

cc: Counsel of Record (via CM/ECF and E-Mail)

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<sup>6</sup> Unlike Plaintiffs, who made the strategic decision to rely on testing as the sole basis for their infringement contentions and thus, to disclose such testing during fact discovery, L'Oréal USA served comprehensive invalidity contentions whose sufficiency was not challenged. And, as Plaintiffs have previously acknowledged, contentions do not require the disclosure of specific evidence. (*See, e.g.*, D.I. 69, Plaintiffs' December 5, 2019 letter.)