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April 21, 2020

VIA CM/ECF

The Honorable Sherry R. Fallon
District Court of Delaware
J. Caleb Boggs Federal Building
Wilmington, DE 19801-3567

**Re: *University of Massachusetts and Carmel Laboratories, LLC v. L'Oréal USA, Inc.*,
C.A. No. 17-868-CFC-SRF**

Dear Judge Fallon:

Defendant L'Oréal USA, Inc. ("L'Oréal USA") writes to address the issues discussed during the parties' March 26, 2020 teleconference, as outlined in the parties' Motion to Resolve Discovery Dispute (D.I. 118), pursuant to the Court's order (D.I. 118).

1. Plaintiffs' Request for the Production of Further Marketing Documents

While Plaintiffs requested briefing regarding their Request for Production Nos. 31, 40, 41, 42, 44, 45, 51, 62, 66, and 67 (D.I. 118 at 1), the parties did not address these specific requests during the March 26, 2020 teleconference. Rather, the parties discussed Plaintiffs' general request for additional marketing documents. After L'Oréal USA explained that it had completed its production of marketing materials pursuant to both Paragraph 6 of the Scheduling Order, and the parties' October 2019 agreement, the Court denied Plaintiffs' request, holding that:

[W]e have a scheduling order that puts into place certain requirements on production of different categories of documents. In addition to that, the parties appear to have reached an agreement in October of 2019 regarding the production of such materials and L'Oréal has represented that it has produced all documents subject to that agreement.

This dispute is rather a speculative one in some respects in that the plaintiffs want, are seeking a very general and broad order that allows them to basically go on a fishing expedition with respect to, quote unquote, "all documents" in order to sort out what it is they feel they don't have but can't really articulate to the Court what's missing.

(Ex. A at 39:1-14 (Mar. 26 Hearing Tr.)) The Court ordered that the parties engage in further meet-and-confer discussions, directing that, "if the plaintiffs believe that there is something that is missing, they need to articulate it in the best fashion that they can to the defendants so the defendants can look for it or say we don't have it, or if you look in Bates numbers blank through

blank, you'll find that we already produced it." (*Id.* at 40:2-6.)

During a meet and confer on April 14, 2020, Plaintiffs clarified that they were seeking launch books for the accused products. L'Oréal USA explained that it had produced launch books for many of the accused products already, and requested that Plaintiffs provide a list of products for which they contend launch books are missing. Plaintiffs provided L'Oréal USA with that list on April 15, 2020. (Ex. B at 1-2 (April 15 T. Lusztig Email to Counsel).) L'Oréal USA is investigating Plaintiffs' request and will produce any additional launch books that exist for the products specified in Plaintiffs' April 15th email that it is able to locate.

2. Plaintiffs' Request for the Production of Further Testing Materials

As discussed repeatedly with Plaintiffs and during the March 26, 2020 conference, L'Oréal USA has already produced the testing documents for every properly accused product it has been able to locate after a reasonable search, and, in previous correspondence on this issue, specifically identified the Bates ranges of those testing documents for many of the products about which Plaintiffs continue to complain. (*See, e.g.*, Ex. C at 2 (April 7 S. Polatoglu Email to Counsel).)

Regarding L'Oréal USA's production of adenosine-related basic research documents, L'Oréal USA has produced such documents from its central report repository. During a meet and confer on April 14, Plaintiffs identified their particular interest in documents underlying a 2006 publication by M.L. Abella in the peer-reviewed *International Journal of Cosmetic Science* (Ex. D).¹ L'Oréal USA explained that its general search for adenosine-related documents would have captured the available documents relating to that study, as demonstrated by the summaries of and references to that study in documents already produced. Plaintiffs were unable to articulate a reason why the methodology and results laid out in the publication itself were insufficient for them to understand the study, or why additional documents would not be cumulative over that study. Nonetheless, L'Oréal USA agreed to make reasonable efforts to identify additional documents that may be relevant to this study.

3. Plaintiffs' Request for the Production of Documents Regarding the FTC Investigation into the Accused Products

The Court denied Plaintiffs' request for documents responsive to Plaintiffs' Request for Production No. 65 during the March 26, 2020 conference, which broadly sought documents concerning "any representations [L'Oréal USA] made about the marketing or testing of the Accused Products." (D.I. 103 at 4.) The Court held that this Request was cumulative, as it sought the "cumulative production of documents that have already been produced by L'Oréal with regard to testing and marketing of products." (Ex. A at 78:1-4 (Mar. 26 Hearing Tr.)) The Court further held that this Request sought irrelevant information, and was not proportional to

¹ Unlike the insufficient testing documents produced by Plaintiffs (*see* D.I. 121), this publicly available article that was subject to a peer-review process provides information regarding the experiments reported therein, including the rationale for the experiments, a detailed discussion on the subjects and methods involved in the experiment, detailed information regarding the results (including graphs of the data), and a discussion of those results.

The Honorable Sherry R. Fallon

April 21, 2020

Page 3

the needs of the case. Indeed, the Court found that Plaintiffs were essentially requesting “a general blanket approval of a request for all documents from all interactions with all government entities or agencies”—*i.e.*, a license to conduct a “fishing expedition.” (*Id.* at 78:8.)

The Court provided that, “to the extent that plaintiffs are aware of a federal investigation and have a reasonable belief that the document production from L’Oréal does not address documents that were produced in connection with that federal investigation in which plaintiffs can make a showing are relevant and reasonably proportional to the needs of the case,” Plaintiffs could renew their request for a narrowed subset of documents sought by this Request. But Plaintiffs have not met this burden. (*Id.* at 78:9-17.) Plaintiffs have not meaningfully narrowed their request, as they continue to seek documents regarding FTC investigations into every Accused Product. (D.I. 118 at 1.) Moreover, even if Plaintiffs had narrowed their request to seek only documents pertaining to an investigation of a single product or line of products—the L’Oréal USA Paris Youth Code products—they cannot demonstrate that such a request is non-cumulative. L’Oréal USA has already produced the underlying marketing materials for those products, as well as the testing documents that support the marketing claims made therein. Forcing L’Oréal USA to search for communications relating to an investigation that does not relate to the claims made in this litigation, and that was resolved nearly six years ago, is not proportionate to the needs of the case.

4. The Parties’ Stipulation Regarding the Teresian Carmelites

The parties have been meeting and conferring regarding a stipulation that addresses information, if any, regarding the Teresian Carmelites that is admissible in this case. During a meet and confer on April 20, 2020, the parties reached an impasse on this issue and were unable to agree to a stipulation. As such, L’Oréal USA will serve discovery on this issue per the Court’s March 26, 2020 Order.

5. The Case Schedule

Despite Plaintiffs’ representation to the Court that they “are going to be more than reasonable to accommodate any type of discovery extension or other manner to accommodate the challenges that [the health crisis] is going to impose on all of us” (Ex. A at 82:17-20 (Mar. 26 Hearing Tr.)), Plaintiffs have refused to work with L’Oréal USA on necessary extensions of the case schedule.

Respectfully,

/s/ Frederick L. Cottrell, III

Frederick L. Cottrell, III (#2555)

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