

EXHIBIT “A”

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

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UNIVERSITY OF MASSACHUSETTS : CIVIL ACTION
and CARMEL LABORATORIES, :
LLC, :
Plaintiffs, :
vs. :
L'ORÉAL USA, INC., :
Defendant. : NO. 17-868-CFC-SRF

- - -

Wilmington, Delaware
Thursday, March 26, 2020
11:19 o'clock, a.m.
***Telephone conference

- - -

BEFORE: HONORABLE SHERRY F. FALLON, U.S.D.C.J.

- - -

APPEARANCES:

FARNAN LLP
BY: MICHAEL J. FARNAN, ESQ.

-and-

Valerie J. Gunning
Official Court Reporter

1 APPEARANCES (Continued):

2 SUSMAN GODFREY L.L.P.
 3 BY: BEATRICE C. FRANKLIN, ESQ. and
 4 TAMAR LUSZTIG, ESQ.
 (New York, New York)

5 -and-

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7 SUSMAN GODFREY L.L.P.
 8 BY: JUSTIN A. NELSON, ESQ.
 (Houston, Texas)

9 Counsel for Plaintiffs

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11 RICHARDS, LAYTON & FINGER, P.A.
 12 BY: FREDERICK L. COTTRELL, III, ESQ. and
 13 KATHERINE L. MOWERY, ESQ.

14 -and-

15 PAUL HASTINGS LLP
 16 BY: KATHERINE F. MURRAY, ESQ.,
 17 ISAAC S. ASHKENAZI, ESQ. and
 18 SERLI POLATOGLU, ESQ.
 (New York, New York)

19 Counsel for Defendants

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1 All right, then. Who is on the line for
 2 L'Oréal?

3 MS. MOWERY: Good morning, Your Honor. This is
 4 Kate Mowery from Richards, Layton & Finger for L'Oréal USA.
 5 On the line with me today is Fred Cottrell from
 6 my office and then Isaac Askenazi, Kathy Murray and Serli
 7 Polatoglu, all from Paul Hastings.

8 THE COURT: All right. Very well.
 9 Is there anyone else on the line who has not yet
 10 identified themselves?

11 All right. Hearing none, we'll proceed forward.
 12 I was just wondering if any client
 13 representatives were participating on this call as well. If
 14 either side is aware of any, please bring that to my
 15 attention so that all appearances can be noted on the
 16 transcript.

17 As you know, I've read the material and I'm
 18 ready to proceed. Let me first say, however, that I hope
 19 everyone is doing well and adapting as best as you can to
 20 the environment that we're living in these days. I can
 21 assure you that the Court is doing its very best to adjust
 22 as well. If there are little bumps in the road as we go
 23 along with everybody joined remotely on this call, then just
 24 please bring them to my attention and we will try to work
 25 through this very smoothly so that we have a clear

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1 P R O C E E D I N G S

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3 (The telephone conference commenced at 11:19
 4 a.m.)

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6 THE COURT: All right. Good afternoon,
 7 everyone, or good morning. Magistrate Judge Sherry Fallon.
 8 Before we proceed, I know that my law clerk, Ms.
 9 Polito, is on the line. Do we have our court stenographer,
 10 I believe it is Ms. Gunning, on the line?

11 MS. GUNNING: Yes, Judge Fallon. I am on the
 12 line.

13 THE COURT: Thank you very much.
 14 I will now start with appearances of counsel for
 15 the plaintiffs, the University of Massachusetts and Carmel
 16 Laboratories.

17 MR. FARNAN: Good morning, Your Honor. It's
 18 Michael Farnan for the plaintiffs and with me on the line
 19 are Justin Nelson, Tamar Lusztig and Beatrice Franklin from
 20 Susman Godfrey.

21 THE COURT: All right. Thank you. Bear with me
 22 for a moment. There's a little bit of a delay when we're

5

1 transcript and record of our proceeding.

2 Having read the submissions, what I would like
 3 to do is change it up a bit. As you know, I usually start
 4 with the first chronologically filed submission and then go
 5 in that order. However, because it appears to me that
 6 L'Oréal's issues vis-a-vis the plaintiffs might lend
 7 themselves to a more expeditious resolution, I think I'd
 8 like to start with L'Oréal's issues first. So whoever was
 9 prepared to address that for L'Oréal, please identify
 10 yourselves for the record, and for my benefit and for Ms.
 11 Gunning's benefit, any time new counsel starts speaking on
 12 the record, please announce your name. That would be
 13 helpful. So thank you.

14 MS. MURRAY: Thank you, Your Honor. This is
 15 Kathy Murray on behalf of L'Oréal. I will address the issue
 16 regarding our submission, which was DI 104. And as Your
 17 Honor noted, it's really just one limited issue on several
 18 requests for production that focus on this entity called
 19 Teresian Carmelites.

20 The first amended complaint identifies or lists
 21 the Teresian Carmelites as a party even though they are not
 22 a named party. Based upon allegations in the first amended



1 license on the asserted patent.

2 The first time that we sent out the discovery,
3 there were no responses back other than plaintiffs saying
4 they were willing to meet and confer on the responses.

5 We then had a meet and confer. Plaintiffs
6 served supplemental responses basically saying they weren't
7 going to provide information because they would agree not to
8 introduce any evidence relating specifically to the
9 financial condition of Teresian Carmelites at trial.

10 We then following the close of document
11 production and seeing what documents they got for basic
12 housekeeping sent over a stipulation asking them to confirm
13 that there will not be any mention of Teresian Carmelites.
14 This entity does not or never did make any products either
15 before or after plaintiffs were going to pursue lost
16 profits. It really has no relevance to the case as we see
17 and as plaintiffs seem to agree.

18 Unfortunately, during the meet and confer they
19 did express that they had some edits to a stipulation that
20 they would send over. We were happy to receive those edits.
21 We never did. And when we see the submission that they just
22 provided to the Court in DI 106, they are now saying that
23 they want to provide information at trial about the parties
24 and that they don't want to sign a stipulation preventing
25 them from discussing Teresian Carmelites.

1 and resist a stipulated set of facts as to the scope of what
2 you're going to do with the Teresian Carmelites. You have
3 to make a decision.

4 So what is that decision?

5 MS. FRANKLIN: Good morning Your Honor. This is
6 Beatrice Franklin from Susman Godfrey on behalf of
7 plaintiff.

8 Your Honor, I will start by saying that
9 plaintiffs have produced a great deal of position about core
10 and Carmelites. I think it's telling that L'Oréal hasn't
11 pointed to any deficiencies in our production and hasn't
12 discussed any specific request for production. We've
13 produced communications regarding Teresian Carmelites. We
14 produced communications regarding Teresian Carmelites. We
15 produced documents involving, you know, board meetings,
16 financial plan for investors, Teresian Carmelites.

17 What we objected to as we made clear in the
18 stipulation in our objections and responses to requests for
19 production that I believe we submitted four months ago, we
20 stipulated we would not introduce any financial condition
21 about Teresian Carmelites or about any alleged harm to
22 Teresian Carmelites, financial health from L'Oréal's alleged
23 infringement. We did this in response to specific RFPs that
24 we thought were overly broad that sought relevant
25 information regarding Teresian Carmelites' mortgages, loans,

1 We don't see how Teresian Carmelites is relevant
2 to the case, but if now plaintiffs believe they are, then we
3 have a right to discovery on this entity. We don't want to
4 be sandbagged at trial with plaintiffs providing some kind
5 of narrative on this entity and us not having had the
6 opportunity to get this discovery.

7 So our position is basically pretty simple.
8 Either they agree not to reference this entity, which
9 plaintiffs seem to suggest has no relevance, or they give us
10 the discovery that we've asked for so that we can have an
11 opportunity to challenge whatever narrative they plan to
12 present regarding Teresian Carmelites at trial.

13 THE COURT: All right. Thank you.

14 Let me hear from plaintiffs, and if plaintiffs
15 would address the fact that I understand that there may be a
16 concern about no one wants to -- you know, all lawyers have
17 this hesitancy in general to concede too much or be afraid
18 that they are going to concede too much in a stipulation,
19 but decisions have to be made. Either you are not going to
20 pursue something, or if you are going to pursue it, then at
21 the very least you produce the discovery that is relevant to
22 the portion you intend to pursue either through summary

1 operation of the monastery.

2 One RFP that simply seeks all documents
3 regarding Teresian Carmelites, which is contrary to what
4 counsel said, and they are not a party to this case. They
5 are not a licensee on the patent and they do not create the
6 products at issue.

7 So rather than agree to the incredibly broad
8 stipulation which would preclude us from mentioning the
9 Teresian Carmelites at all, or introducing evidence,
10 argument, comment, reference to or testimony at any stage of
11 the litigation regarding any witnesses related to Teresian
12 Carmelites, we believe that our previous stipulation not to
13 discuss the financial health or financial harm to Teresian
14 Carmelites and the stipulation that we made in our recently
15 served initial disclosures, not to discuss any lost profits,
16 that should be sufficient because that goes to the -- that
17 essentially makes irrelevant any of the requests that
18 L'Oréal is currently pursuing.

19 The reason we don't want to sign this overly
20 broad stipulation is that there's going to be basic
21 narrative information potentially at trial about the
22 Teresian Carmelites because they're the entity that is

1 we're not seeking a profits model, I can imagine that
2 essentially at trial a year from now we might want to
3 introduce some kind of narrative background, and we believe
4 that we've produced more than enough documents to make that
5 kind of information get fairly introduced.

6 What we object to is the overly broad discovery
7 that L'Oréal is seeking, which, again, L'Oréal has never
8 made any argument for why it is relevant, why any document
9 related to this monastery is relevant to this case, why any
10 document related to Mr. Wyrzykowski's decision to cease
11 Monastic life is relevant to this case, and without that
12 showing of relevance, relevancy, I don't believe L'Oréal has
13 met its burden to be entitled to this discovery.

14 THE COURT: All right. You have not exactly
15 addressed my question, but let me hear very briefly from the
16 defendant on this, just very briefly, because I can assure
17 everyone that I'm prepared to make a bench ruling on this.

18 MS. MURRAY: Thank you, Your Honor. It's Kathy
19 Murray.

20 Just to confirm, we're not willing to submit a
21 stipulation or even provide a red line. They just now said
22 that down the road they may provide a narrative regarding
23 the Teresian Carmelites and the monastery at trial. We have
24 not received the documents relating to that narrative. We
25 ask that they need to pick a line and either sign the

1 stipulation or produce documents.

2 THE COURT: Very well. Having read the briefs
3 and having heard the argument of counsel, here is my
4 ruling.

5 Within one week of today, the parties shall
6 either agree to a stipulation that addresses what
7 information, if any, regarding the Teresian Carmelite is in
8 or out with reference to plaintiff's representations on the
9 record that they do not intend to rely on large profits in
10 their damages calculations and that they do not intend to
11 pursue claims in the first amended complaint relating to the
12 Teresian Carmelites financial condition.

13 To the extent there is anything left over that
14 the plaintiffs do intend to pursue, they shall incorporate
15 that into the stipulation after first meeting and conferring
16 with the defendants on that and shall produce it.

17 If the parties cannot come to terms on a
18 stipulation within one week of today, that's on or before
19 April 2nd, then I will direct that defendants shall serve a
20 narrowly tailored request for production on the plaintiffs
21 that takes into account plaintiff's representations as I've
22 just stated on the record and focuses on any information

1 The plaintiffs shall provide a response to that
2 narrowly tailored request for production within two weeks
3 after being served with it, and that is how this issue,
4 disputed issue will be addressed today. As everyone is
5 aware, my rulings are pursuant to Rule 72(a) of the Federal
6 Rules of Civil Procedure.

7 Any party who wishes to take an objection to the
8 district judge may do so within the time limit set under
9 that rule and the district judge will review my orders to
10 determine if they are clearly erroneous or contrary to law
11 and that will carry through with respect to any ruling I
12 make from the bench today.

13 So that is my ruling with respect to L'Oréal's
14 issue.

15 Are we ready now to turn to the plaintiff's
16 issues?

17 MS. FRANKLIN: Yes, Your Honor.

18 THE COURT: All right. Who will address the
19 plaintiff's issues? And, by the way, I thought the
20 defendant's response with a specific category was very
21 helpful. So if we could address plaintiff's issues category
22 by category, you're not necessarily bound by the way
23 defendants have categorized them, but for what it's worth, I
24 thought it was quite helpful.

25 MS. FRANKLIN: Certainly, Your Honor. This is

1 Beatrice Franklin again from Susman Godfrey on behalf of the
2 plaintiffs.

3 Your Honor, we're concerned about numerous
4 apparent deficiencies in L'Oréal's production, and I can
5 take these category by category.

6 THE COURT: Well, excuse me. That's what I want
7 you to do. We are not going to go through this in a blanket
8 all encompassing one. This is two, this is this. We're
9 going to go point/counterpoint with respect to the first
10 category, make your arguments on behalf of the plaintiffs
11 and then I will hear from L'Oréal on that. We'll resolve
12 that category. Let's go on to Category 2 after that. Make
13 your arguments with respect to Category 2 or however you
14 want to describe it. I will hear from L'Oréal and I will
15 make a ruling.

16 That's the only organized and logical way that I
17 can do this given the circumstances of the remote
18 connections and the documents that we're all working with.
19 That would be helpful.

20 MS. FRANKLIN: Sure. Your Honor, I will say
21 that at the outset, I think that all of the deficiencies tie
22 into our requests for a 30(b)(6) deposition on L'Oréal's

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