



April 21, 2020

VIA E-FILING

The Honorable Sherry R. Fallon
J. Caleb Boggs Federal Building
844 N. King Street
Wilmington, DE 19801-3568

FILED UNDER SEAL

RE: *University of Massachusetts Medical School, et al. v. L'Oréal S.A., et al.*
(C.A. No. 17-cv-868-CFC-SRF)

Dear Magistrate Judge Fallon:

We write to provide an update on the issues that were raised during the March 26, 2020 conference, and renew certain requests that the Court previously denied without prejudice.

1. Defendant's Production of Marketing, Sales, and Business Documents

This Court previously ordered Defendant to produce “all outstanding technical and financial information for each of the Accused Products, including officialization documents, formulation lists, product packaging, marketing materials, and product testing materials on or before February 28, 2020.” Nonetheless, at the March teleconference, the Court denied Plaintiffs’ request for the production of further marketing and business materials from Defendant without prejudice to Plaintiffs articulating a more specific request, including because of Defendant’s representation that the parties had agreed that Defendant would substantially limit its production. After the hearing, Plaintiffs reviewed the correspondence reflecting this purported agreement, which Defendant mischaracterized. In October, the parties agreed that Defendant would make a “targeted” production in response to Plaintiffs’ RFP No. 31, that “would include” (not be limited to) “product packaging and launch materials.” *See* Ex. 1. The parties made no such agreement with respect to Plaintiffs’ other requests for marketing, sales, and business documents. *See, e.g.*, D.I. 120 at Ex. 6 RFP No. 40, 41, 42, and 66. Nor did the parties agree Plaintiffs would be precluded from requesting anything further. On the parties’ recent calls, Defendant represented that its production is limited to a unilaterally-selected “sampling” of packaging and launch materials, and that Plaintiffs waived their right to further discoverable materials by agreeing Defendant’s production could be “targeted” with respect to RFP No. 31. After Plaintiffs pointed out they had not even received “launch materials” for a large number of Accused Products, *see* Ex. 2, Defendant agreed to search for and produce missing launch materials.

Pursuant to the Court’s order, Plaintiffs specifically requested documents reflecting Defendant’s strategic business plans for the Accused Products, such as product differentiation, sales projections and forecasts, and product timelines. *See* March 26, 2020 Hr. Tr. at 39:8-24. Defendant’s document retention policies—which Plaintiffs only received last month—indicate that it creates such documents. These documents provide the business justification for nascent and/or in development products. *See, e.g.* Ex. 3 at 5 (██████████); Ex. 4 at 5 (██████████). Save some generic, limited statements in the launch materials, *see, e.g.*, Ex. 6 (launch book for Lancôme), Defendant has not produced such documents. *See also* Ex. 9 at 11 (██████████).

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Plaintiffs raised these documents with Defendant on their April 14, 2020 call. Defendant would not confirm whether it is willing to search for and produce these documents. When Plaintiffs raised the issue again, asking for a status update on the parties' April 20, 2020 call, Defendant claimed this was a "new" issue, and refused to discuss it further. Defendant's position is incorrect on both fronts. *See* Ex 2; D.I. 103 at 2 (requesting, for example, "strategic business plans, and forecasts regarding customer demand for the Accused Products").

Plaintiffs request the Court order Defendant produce business strategy documents related to the Accused Products, including documents reflecting product differentiation, sales projections and forecasts, and product timelines. These documents go directly to the benefits of the Accused Products and adenosine, as well as damages for any *Georgia-Pacific* analysis.

2. Defendant's Production of Testing Materials

The parties have met and conferred about this issue, and Defendant represented that, despite public statements on its websites that certain Accused Products are supported by clinical testing, which does not appear to have been produced, it has not been able to locate any further clinical testing. Similarly, Defendant represented that it has not conducted adenosine penetration testing. Accordingly, Plaintiffs do not currently seek relief on these issues, without prejudice to renewing its requests should new information come to light.

One narrow category of testing documents remains, which relates to testing conducted by a former L'Oréal S.A. employee, M.L. Abella. Defendant cites this testing on its own website as demonstrating that adenosine enhances the condition of skin, the claimed object of the asserted patents. *See* D.I. 120 at Ex. 1. [REDACTED]

[REDACTED] *See* Ex. 7. Plaintiffs identified Abella in their initial disclosures, but Defendant has not searched Abella's files for documents related to her adenosine research, although its document retention policies indicate it maintains such documents. *See* D.I. 120 at Ex. 7 at 1-2. Defendant appears to argue that documents summarizing or generally referring to Abella's research, such as her brief public article, should suffice, but Plaintiffs are entitled to see the complete research that Defendant relies on to support its statements about the skin-enhancing properties of adenosine.

3. Defendant's Production of Communications With and About the FTC Investigation

At the last hearing, this Court denied without prejudice Plaintiffs' request regarding government investigations into the accused products, and asked Plaintiffs to narrow the request. Plaintiffs have now done so, limiting the request to communications related to one particular investigation. Yet Defendant is still refusing to produce these highly relevant documents.

Around 2014, the FTC alleged that Defendant misled the public with respect to its claims about the anti-aging aspects of its products. That investigation appears to have concluded with an order that Defendant support such public anti-aging claims with "competent and reliable scientific evidence." *See* D.I. 103 Ex. J. Plaintiffs' request is limited to Defendant's internal and external communications about that specific FTC investigation. Communications about this investigation are not cumulative—no such documents have been produced—and they are highly relevant, as they relate to Defendant's representations about the anti-aging properties of the Accused Products, including whether that effect is achieved through adenosine or through yet unidentified non-infringing alternatives. Indeed, it is difficult to think of more relevant documents than what the

Defendant said about the Accused Products in an investigation into their anti-aging benefits—the very benefit offered by the inclusion of adenosine in the Accused Products. The information Defendant relied on to support its claims—and must continue to rely on under the FTC Order—goes to the heart of Plaintiffs’ case.

4. Defendant’s Request for Documents Regarding the Teresian Carmelites

Plaintiffs sent Defendant an edited stipulation a few days after the last teleconference, making it clear precisely which narrow issues related to the Teresian Carmelites Plaintiffs believe are relevant: the founding of Carmel Labs, including that it was founded to support the Teresian Carmelites, which is a monastery, and communications between Defendant and Carmel Labs (which mention the Teresian Carmelites). Plaintiffs have produced all relevant documents into those subjects. *See* Ex. 5. These representations make clear that Defendant’s broad requests—which seek, for example, all documents related to a witness’ decision to “cease monastic life,” and related to the Teresian Carmelites’ financial condition—are overbroad and irrelevant. Defendant refused to sign a stipulation containing language in which both parties agreed these issues are irrelevant, but to date has never served the narrow, revised requests the Court ordered, nor is it clear what more those requests would ask for, given Plaintiffs’ representations.

5. The Case Schedule

Plaintiffs are approaching the three-year anniversary of filing suit. Defendant has been angling to delay this case since discovery began, when the Court denied its request for an extended schedule and ordered a reasonable, 18-month schedule. Since that time, Defendant has engaged in a pattern of repeated delay, failing to produce documents on the Court-ordered schedule, refusing to accommodate Plaintiffs’ repeated requests to meet and confer or file joint letters requesting Court intervention on ripe discovery disputes, and changing its position repeatedly. *See* Ex. 8.

Now Defendant wants to be rewarded for that bad behavior with a delayed trial. *See* Hon. Colm F. Connolly summary judgment rule (parties will “lose their trial date” and “no new trial date will be given” until dispositive motions are decided if the dispositive motion deadline is extended). Plaintiffs remain ready and willing to work through any genuine concrete scheduling issues that arise, but Defendant has not raised any. The fact that the parties are now approaching the end of fact discovery with a lot of work left to do is not a reason for delay—it is a reason for the parties to work together cooperatively and quickly to get the work done. If specific issues arise, Plaintiffs explained to Defendant that there is likely room in the current schedule for an additional two weeks of targeted depositions without moving the deadline for dispositive motions or the trial date. But to date, Defendant has not raised any such concrete issues, instead seeking a blanket extension for no particular purpose. Although Defendant now claims its request is necessitated by a purported delay in Plaintiffs providing Defendant with infringement testing materials, Plaintiffs provided Defendant with the same materials they relied on for their infringement contentions in December, Defendant let the issue lie for months, and only now, when it is trying to justify a substantial delay, does it cry prejudice. This Court’s General Order makes clear that all deadlines remain in force. Plaintiffs just prevailed at the *Markman* hearing, and want to press forward with the case under the Court’s existing deadlines. While Plaintiffs will remain flexible on particular needs, it would be unfair and prejudicial to Plaintiffs to delay the trial at this point—particularly where Plaintiffs have been pushing Defendant for months to produce discovery.

Respectfully submitted,

/s/ Brian E. Farnan

Brian E. Farnan

cc: Counsel of Record (Via E-Mail)