

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 than here.

2 They are looking for an absence of documents.

3 They are not going to be in the Olaplex case. What we're

4 going to have is damages expert reports that largely have to

5 be redacted because it's really a lot of Olaplex's lost

6 profit information, and that is what the Olaplex case is

7 based on, their lost profits, not L'Oréal's.

8 What we have produced in this case are the

9 intracompany transfer agreements between L'Oréal USA and

10 L'Oréal SA for the brands that are involved in this

11 particular case.

12 Now, we don't believe those are comparable

13 because they're intracompany agreements, but we have

14 produced them. To avoid a dispute, we went ahead and gave

15 them those. There's not going to be any intelligence that

16 they are going to gain from the Olaplex expert reports

17 relating to Olaplex's lost profits theory, and it's not like

18 we provided a whole treasure-trove of agreements and

19 policies in that case that we have not given here.

20 So what they are basically asking us to do is go

21 through these multiple expert reports and deposition

22 testimony, redact all the information that is confidential

23 to Olaplex which under the protective order we cannot

24 provide to the other side because they want to get a sneak

25 peak of what's going to happen during the expert damage

1 needs to be redacted. We don't think that the materials are

2 going to be so voluminous that the burden of redacting them

3 outweighs the benefit of development of -- -

4 THE COURT: All right. Having -- go ahead.

5 MS. MURRAY: I was going to say, Your Honor, if

6 they have access to the trial transcripts which would have

7 the testimony they need, I don't see why they would need to

8 have reports at the deposition. They said they have access

9 to unredacted trial transcripts.

10 THE COURT: All right. Having read the

11 materials and heard oral argument on this and on that last

12 point, what I was going to say is the plaintiffs certainly

13 have access to anything that's publicly available on the

14 Court docket for the Olaplex and L'Oréal case, but this

15 request is denied.

16 In the Court's view, damages analyses are fact

17 and case specific even when you have the same defendant

18 involved in recent patent litigation. You can't put a

19 one-size-fits-all analysis just because in one case

20 defendants took a position. That's not to say that you

21 can't access what's publicly available and, you know,

22 utilize it if you are going to utilize it in

23 cross-examination of certain representatives of a party or

24 that party's experts. But in the Court's view, the

25 plaintiffs' articulated reason, which is to, quote unquote

1 phase of the case. It doesn't seem relevant and it's a lot

2 of work for L'Oréal to do for them to see that they are

3 going to get exactly the same information. We don't have

4 licensing policies or practices or comparable agreements.

5 THE COURT: All right. Any rebuttal, Ms.

6 Franklin?

7 MS. FRANKLIN: Yes, Your Honor. So we're not

8 looking for the Olaplex expert materials simply to get a

9 view into L'Oréal's licensing policies. We're trying to get

10 a view into what the reasonable royalty calculation would

11 look like and what position L'Oréal would take. Obviously,

12 L'Oréal's expert took a position on what that position would

13 be in the Olaplex case. Again, since I'm reviewing the

14 trial transcripts, which I will note were not redacted, the

15 expert relied on, as I said, profit metrics, forecasts,

16 things like that.

17 It's hard for us to see how these can't possibly

18 be relevant because as the IP Bridge case makes clear, it's

19 the same defendant. Even if it's different technology, they

20 would presumably take a consistent position or at least

21 somewhat of a consistent position, consistent enough that

22 the materials would be relevant in licensing negotiations or

1 "gain any insight whatsoever into L'Oréal's licensing

2 practices and policies" does not fulfill the standard for

3 relevance and proportionality to sustain its request under

4 Rule 26, and on that basis, it is denied.

5 What is the next issue, Ms. Franklin?

6 MS. FRANKLIN: Next, and I'm sure Your Honor

7 will be happy to hear, the last issue is our request for

8 production of any communication with the FTC or any agency

9 regarding the accused products. And the investigation in

10 particular that we have in mind is one that we know about

11 based on public materials, which was an FTC investigation

12 into L'Oréal's use code product lines. That's a product

13 line that contains adenosine for some of its products.

14 Many of its products are accused products in

15 this case. As we understand it, the FTC investigated

16 whether certain claims L'Oréal was making about the

17 products, anti-aging efficacy, was investigating whether or

18 not those claims are substantiated.

19 There was a consent order entered in the case,

20 which we attached as an exhibit to our letter, and among

21 other things, we understand from the consent order it seems

22 that the FTC was focused on public statements about the

1 with the FTC or any other agency in a similar investigation
2 would be highly relevant to our claims because it involved
3 the, both the public claims that L'Oréal makes about the
4 accused products and its own internal understanding about
5 how those products work.

6 L'Oréal says that it's not going to provide that
7 information because it would be duplicative of the marketing
8 and testing materials we already have.

9 We understand that in any government
10 investigation, there would be at least some communications
11 that are distinct from the public --

12 THE COURT: Ms. Franklin, go ahead. Say that
13 again.

14 MS. FRANKLIN: Sorry. Our understanding is that
15 in any government investigation there would be, you know, at
16 the very least communication with the agency about the
17 marketing materials and testing materials that we may
18 already have.

19 We're not asking for the production of any
20 marketing materials that L'Oréal has already produced, but
21 we would certainly like to see what L'Oréal said about those
22 marketing materials or about the product testing to the FTC,
23 and similarly, we'd like to see what L'Oréal has said about
24 its products to any other agency, again, because this is
25 relevant to L'Oréal's own understanding about how the

1 accused products work.

2 I will also note the fact that adenosine is
3 specifically intended to have an anti-aging benefit. With
4 respect to the FTC investigation into use code,
5 communications that L'Oréal made about what adenosine does
6 or doesn't do would be very relevant to our claim.

7 THE COURT: All right. I will hear from L'Oréal
8 on this.

9 MS. MURRAY: Yes, Your Honor. It's Kathy Murray
10 again.

11 So this request seeks all documents produced in
12 any litigation or government investigation for any of the
13 over 150 accused products in this case.

14 Ms. Franklin just noted that what they are
15 looking for are public statements made about the products or
16 the testing of the products. They have received the public
17 statements made about the products and the testing of the
18 products. If we look at the use code, for example, there
19 are six use code products in this case. We have produced
20 testing for all of them. We have produced marketing
21 materials for all of them.

22 So now they want to know all of our

1 packaging litigation involving one of the cosmetic products,
2 we now have to dig our files for every single piece of
3 paper.

4 If they really want to see the public statements
5 made about these products and the testing of the product,
6 they need to look at what was produced to them. This is a
7 huge fishing expedition. The amount of burden that would be
8 involved in having to locate litigation files and
9 communications with any agency about these products, I mean,
10 it's enormous and it's not proportional to the needs of the
11 case. They have the documents that they need on this.

12 MS. FRANKLIN: May I respond, Your Honor?

13 THE COURT: You may.

14 MS. FRANKLIN: So we're not seeking public
15 documents. Most of the documents with respect to the use
16 code investigation by the FTC are not public. Publications
17 to the agency as far as we can tell are not public. The
18 consent order is public, which we were able to find, but
19 publications directed between L'Oréal and FTC are not.

20 If they are public, you know, again, we see no
21 reason why -- I'm sorry. What I what's going to say, the
22 materials that are public, if L'Oréal has produced them to
23 us already, we're not seeking additional product, but we are
24 seeking documents that we can't get from the public record,
25 documents that, again, have not argued that these documents

1 would be irrelevant because they make claims about whether
2 or not the accused products have anti-aging effects.

3 Our request seeks only documents produced in
4 litigation to any government entity or agency. We're not
5 looking for, you know, documents that are produced in
6 litigation with random individuals who may have some sort of
7 product liability claim against L'Oréal.

8 And, again, if L'Oréal raised this on some of
9 the meet and confers, that L'Oréal was willing to identify
10 specific investigations or government litigations that they
11 were willing to produce documents for, we could have had a
12 that conversation. But again, despite the fact that we
13 specifically identified a federal investigation into
14 products that are accused in our case, L'Oréal refused to
15 even consider producing documents for that investigation or
16 any other.

17 Once again, they simply stonewalled us at every
18 turn, and so we believe that we are entitled certainly to
19 the FTC, to the documents, and if there are any similar
20 documents, similar investigations that we have not been able
21 to learn about from the public record, we'd like to learn
22 about those and receive documents on those as well.

1 First of all, it's cumulative. Requests
 2 cumulative production of documents that have already been
 3 produced by L'Oréal with regard to testing and marketing of
 4 products.
 5 I find the request for all documents from all
 6 government entities or agencies overbroad and not relevant
 7 or proportional to the needs of the case under Rule 26. It
 8 is a fishing expedition in the Court's view. However,
 9 having said that, to the extent that plaintiffs are aware of
 10 a federal investigation and have a reasonable belief that
 11 the document production from L'Oréal does not address
 12 documents that were produced in connection with that federal
 13 investigation in which the plaintiffs can make a showing are
 14 relevant and reasonably proportional to the needs of the
 15 case, then the plaintiffs can pursue the conversation with
 16 L'Oréal for specific documents specific to that
 17 investigation and L'Oréal can confer with the plaintiffs on,
 18 you know, whether there's anything to produce, or whether it
 19 resists production, or whatever the response of L'Oréal is.
 20 But I'm not going to order a general blanket approval of a
 21 request for all documents from all interactions with all
 22 government entities or agencies. That's simply overbroad
 23 and not relevant or proportional to the needs of the case.
 24 So that is my ruling without prejudice.
 25 Are there any further issues that the Court

1 Judge Noreika. I can't recall if I've seen anything come
 2 out of judge Connolly's chambers, but certainly, you should
 3 contact his chambers directly with that request.
 4 MR. ASHKENAZI: Will do, Your Honor. Thank you
 5 very much.
 6 The second thing, and, again, I recognize this
 7 isn't currently ripe before Your Honor, but I just would
 8 like to raise something now and maybe seek a little bit of
 9 guidance.
 10 We all know what's happening, as you just
 11 mentioned, with the current health crisis, and a number of
 12 us are subject to stay-in-place orders. We had to begin the
 13 case with a very aggressive case schedule. I will call it
 14 ambitious maybe, but right now as counsel for plaintiffs has
 15 mentioned multiple times, we have fact discovery scheduled
 16 to close on May 22nd, expert reports go on on June the 5th
 17 and completed by August and then we have trial scheduled for
 18 February, so a little over ten months from now. And I do
 19 think that given everything that has happened, especially
 20 with the fact that we need to conduct these expert
 21 depositions -- sorry, these fact depositions, and I will
 22 tell you, we've been having difficulties communicating with
 23 our experts, that we're probably not going to be able to
 24 stick to the current case schedule.
 25 Now, we have not had a chance to approach the

1 needs to address on behalf of the plaintiffs?
 2 MS. FRANKLIN: Nothing further from plaintiffs,
 3 Your Honor.
 4 THE COURT: On behalf --
 5 MR. ASHKENAZI: Your Honor, yes.
 6 THE COURT: Go ahead.
 7 MR. ASHKENAZI: I apologize.
 8 THE COURT: Go ahead.
 9 MR. ASHKENAZI: This is Isaac Ashkenazi.
 10 Two things. I know these aren't part of the
 11 briefing, but I would like to quickly mention. I know
 12 Your Honor has already given us close to two hours of her
 13 time.
 14 The first is we have a Markman hearing kindly
 15 scheduled for Monday, April 6th. We understand obviously
 16 the impact of the health crisis is having on everybody and
 17 we just wanted to know if you had any guidance on how Judge
 18 Connolly wants to proceed with Markman or if you thought we
 19 should best reach out to his chambers.
 20 THE COURT: I think it's best that you reach out
 21 to his chambers. As you know, we're a small court. All of
 22 the district judges are certainly doing their very, very

1 other side with this and, most importantly, because we just
 2 don't know whether it's going to abate. If it abates a week
 3 from now, then the extension may be much smaller and we're
 4 not looking for anything other than a minimal extension so
 5 we can get past these issues.
 6 So, you know, and I'd also like to just add one
 7 more thing to put things into perspective is, this case is
 8 about a patent that was filed in 1998. The accused products
 9 have been on the market for many years, in some cases over a
 10 decade, and as the plaintiffs have said, they are not
 11 seeking lost profit damages, only reasonable royalty. So a
 12 modest extension wouldn't be -- to the case schedule
 13 wouldn't be harmful or prejudice at all to plaintiffs.
 14 With all of that said, recognizing that we have
 15 not had the chance to raise this with the other side, do you
 16 think that maybe us scheduling a conference sometime in
 17 mid-April would be helpful to us just to see where things
 18 stand with the crisis and see how we could deal with the
 19 schedule to make the minimal extension, if any.
 20 MR. NELSON: Your Honor, this is --
 21 THE COURT: Let me hear from whoever else wants
 22 to speak. I will hear from the plaintiffs, but who is



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