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May 5, 2020

VIA CM/ECF

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

PUBLIC REDACTED VERSION

**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") by letter motion hereby requests an 11-day extension, until May 19, 2020, to file Objections to one of the rulings issued by the Court during the April 24, 2020 discovery teleconference. (*See* Ex. A, 126:12-23.) *See* Standing Order for Objections Filed Under Fed. R. Civ. P. 72 (D. Del.) ¶ 6 ("[A]pplications for extension of time to file or respond to objections shall be reviewed by the Magistrate Judge."). L'Oréal USA has asked Plaintiffs to agree to this extension, but they are unwilling to do so.

During the April 24, 2020 discovery teleconference, the Court addressed Plaintiffs' renewed request for documents relating to an FTC investigation involving some of the accused products. The Court granted Plaintiffs' request "to compel the production of documents responsive to requests for production number 65," which the Court viewed as "limited to the single 2014 FTC investigation cited by the plaintiff in their letter brief, including the internal and external communications regarding the specific FTC investigation."¹ (*Id.* at 113:1-8.) The Court ordered that L'Oréal USA produce these documents by May 8, 2020, but "le[ft] it to the parties to meet and confer if L'Oréal is unable to meet that deadline due to global circumstance or national health emergency circumstances beyond its control." (*Id.* at 113:8-14.) The Court also stated that it was not ordering the production of privileged documents. (*Id.* at 113:15-24.)

Pursuant to the Court's instructions, L'Oréal USA reached out to Plaintiffs to discuss the logistical complications related to the production of any responsive documents (which are in the possession of L'Oréal USA's counsel at that time, Debevoise and Plimpton LLP) during the current shelter-at-home orders. L'Oréal USA explained that the current shelter-at-home orders would make it impossible to produce the documents by May 8, 2020. Further, notwithstanding the limitation of the Request to the ██████████ FTC investigation ██████████ the ██████████ also makes it impossible to complete a review of any documents by L'Oréal USA's current counsel for production by May 8th. The Court's ruling may also raise privilege questions that L'Oréal USA would seek to clarify with the Court during

¹ While Plaintiffs asserted that they were "limiting" their (previously denied without prejudice) Request for Production No. 65 (the "Request") to a single FTC investigation, they did not, in actuality, narrow the Request at all, as the FTC investigation in question is the only investigation that was ever implicated by the Request.

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the upcoming May 18, 2020 discovery teleconference, including the timing for the production of a privilege log, [REDACTED]

[REDACTED] As the discussion with this Court may obviate the need to file Objections, L'Oréal USA requests an extension, until May 19, 2020, to file any such Objections.

Counsel for L'Oréal USA continues to assess the matter, and has shared much information with opposing counsel on the issue. What counsel for L'Oréal USA can say at this time is that it is informed and believes there may be an opportunity to access through L'Oréal USA's former counsel external communications with the FTC regarding the FTC's investigation. L'Oréal USA is willing to produce this correspondence once reviewed, if it can be obtained subject to the protective order. (D.I. 48.) There is also believed to be [REDACTED]

[REDACTED] that should be able to be accessed by L'Oréal USA's former counsel and transmitted to L'Oréal USA's current counsel for review. We do not presently know the precise volume of these documents, or when they can be received by L'Oréal USA's current counsel for potential review and production. However, we would be in a position to advise the Court of this by the conference on May 18th.

We understand counsel for Plaintiffs to be interested in [REDACTED] [REDACTED] irrespective of the burden of production on L'Oréal USA's current counsel,² [REDACTED] We would be prepared to represent the magnitude of this review at the time of the conference on May 18th as well, so the Court could assist the parties in answering the question of the timing of the completion of that review and the production of any privilege log related thereto.

As such, L'Oréal USA respectfully requests an 11-day extension, until May 19, 2020, to file Objections to one of the rulings issued by the Court during the April 24, 2020 discovery teleconference, and respectfully requests that the Court rule on L'Oréal USA's request prior to the current deadline to file Objections, May 8, 2020.

Respectfully,

/s/ Frederick L. Cottrell, III

Frederick L. Cottrell, III (#2555)

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

² Counsel for L'Oréal USA noted the potential "burden to L'Oréal to have to go look for [documents relating to] a six year old investigation" during the April 24th discovery teleconference, which has since been determined to be significant. (See Ex. A at 111:22-112:11.)

EXHIBIT A

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

3 UNIVERSITY OF MASSACHUSETTS)
4 MEDICAL SCHOOL and CARMEL)
5 LABORATORIES, LLC,)
6 Plaintiffs,) C.A. No.17-868-CFC-SRF
7 v.)
8 L'OREAL S.A. and L'OREAL)
9 USA, INC.,)
10 Defendants.)

11 Friday, April 24, 2020
12 11:00 a.m.

13 844 King Street
14 Wilmington, Delaware

15 BEFORE: THE HONORABLE SHERRY R. FALLON
16 United States District Court Judge

17 APPEARANCES:

18 FARNAN LLP
19 BY: BRIAN FARNAN, ESQ.

20 -and-

21 SUSMAN GODFREY, LLP
22 BY: JUSTIN A. NELSON, ESQ.
23 BY: TAMAR LUSZTIG, ESQ.
24 BY: BEATRICE FRANKLIN, ESQ.

Counsel for the Plaintiffs

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1 THE COURT: Good morning,
2 everyone. It's Magistrate Judge Sherry Fallon.
3 I'm prepared to address the discovery dispute in
4 U Mass versus L'Oreal. Let me find out who is
5 on the call. First, do we have our court
6 stenographer, Ms. Gunning?

7 COURT REPORTER: Yes. This is
8 Stacy Ingram from Hawkins, Your Honor.

9 THE COURT: Oh, sorry, Stacy. I
10 was informed it might be Val Gunning. Thank you
11 for being available this morning. Is my law
12 clerk, Ms. Polito, on the line?

13 LAW CLERK: Yes, Judge, I'm on the
14 line.

15 THE COURT: All right. Thank you.
16 And let's start with appearances of counsel for
17 the University of Massachusetts, et al. Who is
18 on the line starting with Delaware counsel?

19 MR. FARNAN: Good morning, Your
20 Honor. Brian Farnan on behalf of the plaintiff
21 and with me is Justin Nelson, Tamar Lusztig and
22 Beatrice Franklin, all from Susman Godfrey.

23 THE COURT: All right. And who is
24 on the line for L'Oreal?

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1 APPEARANCES CONTINUED:

2 RICHARDS, LAYTON & FINGER, P.A.
3 BY: KATHERINE MOWERY, ESQ.
4 BY: FRED COTTRELL, ESQ.

5 -and-

6 PAUL HASTINGS,
7 BY: ISAAC ASHKENAZI, ESQ.

8 -and-

9 BROWNE GEORGE ROSS, LLP
10 BY: KATHERINE MURRAY, ESQ.

11 Counsel for the Defendants
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1 MS. MOWERY: Good morning, Your
2 Honor. This is Kate Mowery from Richards,
3 Layton & Finger on the line for L'Oreal USA. I
4 have Fred Cottrell on the line as well from my
5 office and then Isaac Ashkenazi from Paul
6 Hastings and Katherine Murray from Browne George
7 Ross.

8 MS. MURRAY: Good morning, Your
9 Honor.

10 THE COURT: Good morning,
11 everyone. Just making my notes here. I'll just
12 remind everyone, you're probably familiar with
13 this from the last time we did the call, but
14 please announce your name before you start
15 speaking. Since there is a slight delay since
16 we're all remotely connected, please speak
17 slowly so that the court stenographer can make
18 an accurate record of our proceedings today and
19 if you're not speaking, keep your phone on mute
20 so there aren't any outside or extraneous noises
21 interrupting or obscuring the audio on those who
22 are speaking. If you're going to cite to any
23 particular exhibits, the filings that I received
24 for this dispute were rather lengthy, just give

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1 you're still looking until it gets to the point
2 where you've done everything you can to find the
3 underlying research, the document from the
4 research conducted by Abella and you cannot find
5 anything more.

6 MR. ASHKENAZI: Your Honor, I
7 think that does make sense. I just want to
8 point out that, you know, it's not as if we
9 haven't given -- produced any document on
10 Abella. If there's a document that they said
11 we've included in our website, I believe one of
12 the exhibits we were discussing earlier today
13 referenced the study that was to do with Abella.
14 It's not as if we haven't produced anything,
15 they're just asking for more. We will do that.
16 I believe, Your, Honor a status report that we
17 could provide to them in two weeks and we will
18 endeavor to do as much as we can and get it done
19 as fast as we can to get them the information.

20 THE COURT: All right. Then in
21 that respect, the request is granted and I'll
22 instruct L'Oreal to proceed as we've done.

23 MR. ASHKENAZI: Your Honor, if I
24 can, just on that point, the request that -- the
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1 order, just so we're clear on the request, it's
2 to find additional documents that may be
3 relevant to the study regarding the Abella
4 study?

5 THE COURT: The study or the
6 actual research conducted by Abella.

7 MR. ASHKENAZI: Okay. Thank you
8 very much.

9 THE COURT: All right. Did I get
10 that right, Ms. Lusztig?

11 MS. LUSZTIG: Yes, Your Honor.

12 THE COURT: All right. The next
13 issue is this FTC investigation. Again, I was
14 concerned about it being overbroad with respect
15 to agency investigations that were requested by
16 plaintiffs at the last hearing. I understand
17 that now plaintiff has made an effort to correct
18 the concern that the Court had previously. Let
19 me hear from plaintiffs on what has been done in
20 that respect and then I'll hear from L'Oreal.

21 MR. NELSON: Yes, Your Honor.
22 This is Justin Nelson. We, as Your Honor
23 instructed, went back and took guidance from
24 Your Honor and narrowed the request from all
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1 governmental investigations to one particular
2 FTC investigation that included alleged
3 misstatements on the L'Oreal Paris line and the
4 Lancome Gentifique line that related to these
5 anti-aging claims. And as part of the
6 settlement agreement for any now statement that
7 they make publicly they have to have a
8 scientific basis for that. And obviously we
9 want to explore whether in telling the FTC or in
10 their internal communications about this
11 investigation or about their claims for it,
12 whether they're relying on adenosine to support
13 anti-aging properties of their lotions. And so
14 that is what we have specifically narrowed it
15 down to. We don't think it's cumulative.
16 Obviously it's relevant to the importance of the
17 invention, the importance of the products. And
18 they've not done anything with that and said
19 they're not going to do it and said it's
20 cumulative. I think it's actually well
21 proffered.

22 THE COURT: L'Oreal, response?

23 MS. MURRAY: This is Kathy Murray,
24 Your Honor. So based on our meet and confers
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1 what they're looking for is what L'Oreal said
2 about these products. And that is what we've
3 given them. We've given them the marketing for
4 these products, we've given them the underlying
5 testing that supported those claims. So it's a
6 burden to L'Oreal to have to go look for a six
7 year old investigation relating to claims made
8 about the products and representations made
9 about the products and the underlying science
10 behind the products when all those underlying
11 products have already been produced in the case.

12 MR. NELSON: Response, Your Honor?

13 THE COURT: Go ahead.

14 MR. NELSON: Obviously that goes
15 to some of the other underlying issue -- what
16 they say specifically about the FTC
17 investigation and the misleading claim that's
18 alleged by the FTC and what supports those
19 claims is not cumulative of what would be
20 produced except for what's in that investigation
21 or communications about that investigation.

22 THE COURT: All right. Anything
23 further, Ms. Murray?

24 MS. MURRAY: No, Your Honor.
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