



June 18, 2020

VIA E-FILING

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

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

Dear Magistrate Judge Fallon,

Despite Your Honor's repeated urging at the May 18, 2020 conference that the parties work together to resolve outstanding discovery disputes, little has changed in L'Oréal's approach to discovery in this case, forcing Plaintiffs to move yet again for a request to order L'Oréal to fulfill its discovery obligations. After fulfilling the bare minimum of Your Honor's order to produce hit counts related to the search terms "adenosine" and "75156", L'Oréal has refused to meaningfully work towards a resolution of this issue, and instead has simply refused to produce almost anything at all. And after two of L'Oréal's 30(b)(6) witnesses revealed that L'Oréal has failed to produce financial information it should have produced months ago as part of its obligations under Paragraph 6(d) of the Scheduling Order and in response to Plaintiffs' discovery requests, L'Oréal has failed to confirm whether it will fulfill its discovery obligations.

Because L'Oréal has made clear that it will produce little without an order from the court compelling it to do so, Plaintiffs respectfully request that the Court order the relief requested below.

**Documents Responsive to the Term "Adenosine" and "75156" as Ordered by the Court at the May 18, 2020 Conference and Requested by RFPs 27, 32, 40, 41, 42, 53, 59, and 66.**

At the last conference, the Court ordered L'Oréal to run "adenosine" and "75156" as standalone terms in the MILOR database and for the parties to "[h]ave a further meet and confer and see, depending on what the number of hits are, if there's a way to further refine it and to put the dispute to rest with regard to further production of documents . . . ." May 18, 2020 Hearing Tr. at 50:13-16. Despite this directive, L'Oréal has refused to meaningfully entertain production of documents hitting on "adenosine" or "75156" (the internal product code for adenosine).

In response to that Order, L'Oréal provided the ordered hit counts and produced a total of two documents hitting on the "75156" term. Even while producing, it denied they had "any relevance to the claims or defenses in this case." **Exhibit A**. This is plainly wrong. One document compares adenosine to other anti-wrinkle ingredients. The other is a 2005 testing document evaluating the anti-wrinkle effect of adenosine. Both documents are plainly relevant to the issues in dispute, and their late production raises serious questions about what else is missing.

L'Oréal provided the hit counts ordered by the Court on May 21, 2020: 50,293 hits for "adenosine" and 858 hits for "75156". L'Oréal later confirmed that none of those documents had been reviewed for responsiveness by L'Oréal. **Exhibit A**. Plaintiffs explained that—given adenosine's central role in this case—it was surprising that L'Oréal had not reviewed any of these documents for responsiveness and Plaintiffs called for the documents to be produced.

919N MARKET STREET, 12TH FLOOR, WILMINGTON, DE 19801

Nevertheless, in keeping with the Court's desire to reach an agreement that would put the dispute to rest, Plaintiffs suggested a compromise position whereby L'Oréal would produce a random sampling of 1,000 documents from the "adenosine" set (every 50<sup>th</sup> document) so that the parties could work together to determine a set of mutually agreeable limitations on the term "adenosine" that would hone in on the most relevant documents. **Exhibit A.** L'Oréal refused. Plaintiffs also proposed that L'Oréal identify the scope and categories that L'Oréal was withholding—an especially easy task for the 856 of 858 documents that hit on the "75156" term. Once again, L'Oréal refused. **Exhibit A.**

Finally, Plaintiffs proposed limiters on the term "adenosine" for L'Oréal to consider, despite the fact that Plaintiffs believe the vast majority of the documents in the "adenosine" set—if not all—would be responsive to their requests. **Exhibit B.** Again, L'Oréal refused—not only on the specific modifiers but on any attempt at all to run modifiers. In short, L'Oréal has refused to produce documents hitting on "adenosine," refused to provide a random sampling of documents hitting on "adenosine" so the parties could work towards a set of agreed modifiers, refused to propose modifiers itself, refused to explain its view of responsiveness on the "75156" documents, and otherwise refused to do anything to work towards producing responsive documents.

L'Oréal has three excuses—all unavailing. First, L'Oréal argues that it is too late. This position ignores that Plaintiffs have been seeking this information literally since the first day of discovery. This Court has held multiple hearings on this very issue, trying to encourage compromise, and indeed ordered the parties to confer for further production. Second, L'Oréal argues burden. But even assuming all documents are produced, the volume of documents is still less than many patent cases—especially one with the number of accused products. And a proper search should have been run long ago. Third, with respect to the modifiers to the "adenosine" search terms specifically, L'Oréal maintains that there are too many modifiers. But Plaintiffs are trying to capture the accused products plus modifiers on adenosine likely to lead to highly relevant information since L'Oréal will not produce the full set under its own view of relevancy.

Finally, L'Oréal has made it abundantly clear that it will not produce any more documents absent express court order. Plaintiffs have sought compromise after compromise. Documents hitting on either "adenosine" or its product code "75156" should have been produced long ago. Because Plaintiffs believe that documents hitting on these terms are likely to be relevant—and because L'Oréal has done nothing to create a more focused set of documents or to explain its view of responsiveness—Plaintiffs request that the Court order L'Oréal to produce all non-privileged documents hitting on these two terms. In the alternative, Plaintiffs request that L'Oréal produce documents pursuant to the limiters Plaintiffs proposed, documents hitting on "75156", as well as documents hitting on "adenosine" before 2012 (which will capture early development documents and includes the timeframe Plaintiffs sold a competing product). **Exhibit B.**

### **Outstanding Information Regarding Domestic Sales of Accused Products Requested by RFPs 38, 39, and 48 and required by Paragraph 6 of the Scheduling Order.**

Pursuant to Paragraph 6(d) of the Scheduling Order in this action, L'Oréal was required to produce with its Invalidity Contentions "[d]ocuments sufficient to show the sales, revenue, cost, and profits for [the] Accused Instrumentalities". Dkt. # 46. Likewise, in response to the above-cited RFPs L'Oréal agreed to produce documents reflecting the sales, revenue, cost, and profit information for the Accused Products. **Exhibit C** (excerpts of Defendants' R&Os). Despite L'Oréal's obligations to produce this information months ago, Plaintiffs learned last week at the

deposition of Diego Balo—L’Oréal’s designated 30(b)(6) witness on financial issues—that L’Oréal has not produced all of the relevant domestic sales, revenue, cost, and profit information it maintains in the ordinary course of business.<sup>1</sup>

L’Oréal has produced spreadsheets showing various financial information. For example, the Luxury Products USA division accounts for many of the best-selling Accused Products at issue in this action, L’Oréal has produced only figures for “consolidated net sales”, “cost of sales”, “gross margin”, “advertising & promotion expenses”, “marketing margin”, and “operating profit” by year and by product. **Exhibit F**. But as explained in the declaration of Julie Davis attached to this motion, *see* Decl. of J. Davis ¶3 (**Exhibit H**), L’Oréal’s method for calculating consolidated net sales includes deductions that are generally not included in standard net sales calculations. This matters, because it means that the “consolidated net sales” figures reflected in L’Oréal’s spreadsheets do not conform with what is generally accepted as net sales and likely undercounts revenue.

Fortunately, there is an easy solution. A standard net sales figure can be calculated by subtracting from gross sales the returns, allowances, and discounts that are generally used to calculate a net sales figure. Mr. Balo made clear at his deposition that L’Oréal keeps, in the ordinary course, detailed records showing L’Oréal’s gross sales figures by product, along with the deductions that L’Oréal makes from its gross sales figures to calculate its consolidated net sales figures. **Exhibit D** (D. Balo Dep. Tr. 38:7-46:24). With this information, Plaintiffs could calculate a standard net sales figure that is more in-line with common practice. *See* Decl. of J. Davis ¶5. And another L’Oréal witness has confirmed that this information can be had at the push of a button. **Exhibit G** (E. Arnera Dep. Tr. 47:10-25).

Similarly, Mr. Balo testified that the “Cost of Sales” entries in L’Oréal’s spreadsheets are calculated by summing up other specific cost items that are not reflected in the spreadsheets L’Oréal has produced. **Exhibit D** (D. Balo Dep. Tr. 50:1-5). And Mr. Balo also testified that L’Oréal maintains Profit and Loss information including detail on gross sales, deductions, and net sales by product. **Exhibit D** (D. Balo Dep. Tr. 54:16-55:12). As Ms. Davis explains in her declaration, this data would assist her in evaluating the profitability of the Accused Products. *See* Decl. of J. Davis ¶6.

This data could, and should, have been produced pursuant to L’Oréal’s Paragraph 6(d) obligations, or in response to the many discovery requests it corresponds with. In any event, Plaintiffs request that the Court order L’Oréal to produce data showing each of the deductions, allowances, returns, and discounts it uses to calculate domestic consolidated net sales figures for each of the Accused Products, in the form this information is kept in the ordinary course of business. Plaintiffs note that, after the parties filed their joint motion, L’Oréal agreed to produce domestic gross sales information and noted that it was considering the remainder of Plaintiffs’ request on this issue, though L’Oréal has not committed to producing the additional information.

---

<sup>1</sup> This issue should not have risen to Court intervention. This information is plainly relevant. Given its importance now to the damages report, Plaintiffs raise it as one of the three issues to which it was limited. On issue after issue, however, L’Oréal has refused to comply with many discovery obligations. It refuses to put answers about litigation holds in its interrogatory responses, refuses to provide any more information about its non-adenosine searches, and refuses to answer properly-issued interrogatories on the ground that it is too close to the end of discovery. Plaintiffs are also continuing to meet and confer on other open issues.

**Documents Regarding Foreign Sales of Products Containing Adenosine that Are Developed, Tested, and/or Manufactured in the United States Requested by RFPs 38, 39, and 48 and required by Paragraph 6 of the Scheduling Order.**

At the June 12, 2020 deposition of Angelike Galdi—L'Oréal's 30(b)(6) witness on topics regarding the testing of the Accused Products and products containing adenosine—L'Oréal revealed, for the first time, that it manufactures, tests, and develops products containing adenosine in the United States for final sale outside of the United States. **Exhibit E.** (A. Galdi Dep. Tr. 301:12-304:15). Moreover, Mr. Balo testified that the financial spreadsheets produced relate only to third-party “non-group” sales, not “group” sales to other L'Oréal entities. Financial information regarding such products is directly relevant to Plaintiffs' damages in this case, and thus should have been produced pursuant to L'Oréal's production required by Paragraph 6(d) of the Scheduling Order, and in response to the above-cited Requests for Production. *See* J. Davis Decl. ¶9.

Accordingly, Plaintiffs request that the Court order L'Oréal to produce the same domestic financial information it has been or will be ordered to produce for any products containing adenosine that L'Oréal developed, tested, or manufactured in the United States for sale abroad. Plaintiffs request that this information apply to products that have the same formula number, even if they are manufactured, tested, developed, or sold within the United States under one product name but later sold abroad under a different product name. Plaintiffs also request that L'Oréal produce documents sufficient to show the details of any sale between L'Oréal USA and any other L'Oréal entity a transaction referred to by Mr. Balo at his deposition as a “group” sale. **Exhibit D** (D. Balo Dep. Tr. 63:4-6). This request includes profit or revenue information from other L'Oréal entities on any resale of the product to non-affiliated buyers. This information is needed to calculate an appropriate base for Ms. Davis's damages calculation for products developed, tested, manufactured, or sold within the United States for sale abroad. *See* J. Davis Decl. at ¶9.<sup>2</sup>

Moreover, Dr. Galdi testified that as many as 50% of L'Oréal products contain adenosine. **Exhibit E.** This testimony confirms Plaintiffs fears that L'Oréal has not revealed other products containing adenosine despite Plaintiffs' diligent efforts to obtain such information from the beginning of discovery. Whether intentional or not, L'Oréal's cramped view of relevance has prevented Plaintiffs from exploring the scope of L'Oréal's infringement. L'Oréal should update Interrogatory 3 to include all products containing adenosine and produce sufficient information in response to the Plaintiffs' requests for production regarding its use of adenosine in any product.<sup>3</sup>

---

<sup>2</sup> Although L'Oréal claims that the parties have not met and conferred on this issue, Plaintiffs raised this issue in advance of the parties' June 12 meet and confer, where L'Oréal stated that it would investigate further but agreed that the parties had met and conferred on the issue. After the parties filed their joint motion, Plaintiffs again offered to further meet and confer on this issue if L'Oréal desired, but L'Oréal never replied.

<sup>3</sup> Immediately upon finding out about this manufacture and testing in the United States and one week before the close of depositions, Plaintiffs issued a 30(b)(6) notice regarding L'Oréal's manufacturing, testing, and sales of products meant for ultimate international sale. L'Oréal has refused to provide a witness.

Respectfully submitted,

/s/ Brian E. Farnan

Brian E. Farnan

cc: Counsel of Record (Via E-Mail)