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June 18, 2020

VIA CM/ECF

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

PUBLIC 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") seeks an order remedying issues that arose during the June 10, 2020 deposition of Dennis Wyrzykowski. (D.I. 207.) Specifically, L'Oréal USA requests that: (1) the Court overrule counsel's objection that—despite counsel's own designation of Mr. Wyrzykowski as a Rule 30(b)(6) deponent (*cf.* Ex. A at 1-2)[1]—Mr. Wyrzykowski's testimony was elicited solely pursuant to Rule 30(b)(1), and not Rule 30(b)(6); (2) Mr. Wyrzykowski be ordered to appear for one more full day of deposition prior to June 30, 2020; and (3) the Court overrule counsel's privilege objections to questions posed to Mr. Wyrzykowski regarding the details of statements he made in letters to L'Oréal in 2015 and 2016 about product testing allegedly conducted.

Mr. Wyrzykowski is the founder and President of Plaintiff Carmel Laboratories ("Carmel Labs"). He also negotiated the license agreement between Carmel Labs and Plaintiff University of Massachusetts ("UMass") that covered the asserted patents. L'Oréal USA noticed Mr. Wyrzykowski's deposition pursuant to Rule 30(b)(1) on May 4, 2020. (Ex. B.) On May 18, 2020, Plaintiffs designated Mr. Wyrzykowski as the witness responsible for 19 of L'Oréal USA's Rule 30(b)(6) deposition topics. (Ex. A at 2.) Plaintiffs provided a single date for Mr. Wyrzykowski's deposition, insisting no alternative date would be provided. (*See generally* Ex. C.) L'Oréal USA offered other dates in advance of its discovery cut-off date, but not until L'Oréal USA would agree to let the deposition proceed after the discovery cut-off dates, when all other depositions of Plaintiffs' witnesses were complete, did Plaintiffs offer an alternative date for Mr. Wyrzykowski—Wednesday, June 10th at 10:00 a.m. EST. (Ex. D at 1.) Then, the night of June 8th, Plaintiffs insisted they had a "hard stop of 6pm ET," and thus suggested the deposition begin at 9:00 a.m. EST (6:00 a.m. PST). (Ex. E.) Plaintiffs had done the same thing with UMass' Rule 30(b)(6) designee, Dr. James McNamara, requiring his deposition begin at 8:30 a.m. EST (5:30 a.m. PST) with a hard stop at 5:30 p.m. EST. (Ex. F at 1.)

On May 26, 2020, Plaintiffs retracted a dozen topics on which Mr. Wyrzykowski was originally designated, leaving him to handle only seven topics, just two of which he would cover on his own (rather than in conjunction with other Rule 30(b)(6) witnesses). (Ex. A at 1.) The

[1] All references to "Rules" herein refer to the Federal Rules of Civil Procedure.

topics formerly assigned to Mr. Wyrzykowski were shifted to Dr. McNamara and Carmel Labs' new designee, Mr. Paul Menard, whose depositions were proceeding just one day and nine days later, respectively. However, these witnesses were not capable of handling the topics originally assigned to Mr. Wyrzykowski, and in many instances indicated that Mr. Wyrzykowski would be the appropriate witness to testify on such matters. (*See, e.g.*, Ex. G at 60:15-25, 61:5-15, 70:17-71:8, 89:18-90:2, 121:10-122:6, 203:10-14, 207:14-23, 233:9-19, 302:1-8 (Mr. Menard, who left Carmel Labs in 2014, testifying repeatedly that he did not have information relating to topics on which he was designated, and that Mr. Wyrzykowski would be the person with the sought-after information).)[2]

L'Oréal USA understood that Mr. Wyrzykowski would be made available for deposition in both his personal capacity and pursuant to Rule 30(b)(6) on the same date, as is customary. L'Oréal USA communicated as much to Plaintiffs, and Plaintiffs did not contest this assertion. (*See* Ex. E (addressing the witness' "criticality").) Despite this, at the start of Mr. Wyrzykowski's deposition—without previously raising this issue or meeting and conferring on this issue—Plaintiffs' counsel asserted that he was being presented "in his individual capacity only." (Ex. I at 12:19-24.) Counsel continued to interpose this objection to questions regarding the topics upon which Mr. Wyrzykowski was designated. (*See, e.g.*, *id.* at 134:17-135:8; 266:9-267:8.) The effect of this objection is unclear. (*See id.* at 186:25-187:22; 195:24-196:12 (Mr. Wyrzykowski confirming that he was testifying as a corporate designee).)[3] In any event, any

[2] Plaintiffs also produced ***nearly a thousand pages*** of key documents just days before the beginning of fact depositions. Specifically, Plaintiffs produced hundreds of pages of licensing agreements the night of Friday, May 22nd—effectively 2 business days before the deposition of Dr. James McNamara, the UMass' Rule 30(b)(6) witness for all licensing topics. Then, the night before Dr. McNamara's deposition, UMass produced even more key policies and licensing agreements, including a license agreement ***covering the asserted patents in this case***, well after Plaintiffs represented that their production had been completed. Furthermore, Plaintiffs have still failed to produce additional license agreements its deponents have identified as relevant to this case and which are called for by L'Oréal USA's Request for Production Nos. 73, 80, and 113, as well as Paragraph 4(f), (g), and (h) of the Scheduling Order. (*See* Ex. H at 89:18-91:25; D.I. 46 ¶ 4.) Because Plaintiffs have promised to do so, L'Oréal USA does not move to compel here. (Ex. I at 2.) Plaintiffs also noticed the deposition of Mr. Thomas Sarakatsannis, the General Counsel and Chief Ethics Officer of L'Oréal USA. L'Oréal USA explained during meet-and-confer discussions that Plaintiffs cannot show that they are entitled to such an apex deposition—let alone a deposition of the head lawyer of L'Oréal USA—particularly as L'Oréal USA is producing Roy Diaz on the topics Plaintiffs insist on exploring with Mr. Sarakatsannis. Plaintiffs have since re-noticed Mr. Sarakatsannis' deposition for a date after Mr. Diaz's deposition, and have stated that they will re-evaluate the need to take Mr. Sarakatsannis' deposition after Mr. Diaz's deposition is completed. L'Oréal USA maintains that any deposition of Mr. Sarakatsannis would be improper, and reserves all rights on this issue. (*Id.* at 5.)

[3] Mr. Wyrzykowski's admission that he was testifying as a corporate designee notwithstanding, L'Oréal USA cannot be sure if the basis of counsel's objection that this deposition was proceeding solely pursuant to Rule 30(b)(1) is an attempt for Mr. Wyrzykowski to state that he is more knowledgeable about his designated topics in his 30(b)(6) capacity. To prevent any ambiguity on this front, the Court should overrule counsel's objections.

statement Mr. Wyrzykowski made during his deposition constitutes a party admission. *See generally* Fed. R. Evid. 801(d)(2). As such, L'Oréal USA respectfully requests that this Court overrule counsel's objection that Mr. Wyrzykowski's June 10th deposition proceeded solely pursuant to Rule 30(b)(1), and not Rule 30(b)(6).

L'Oréal USA also requests that Mr. Wyrzykowski be ordered to appear for one more full day of deposition prior to June 30, 2020, to cover areas for which he was designated and not inquired or instructed not to answer (particularly in light of the issues described in footnote 5 below). Although Plaintiffs appear to agree with this request (Ex. I at 1), a Court order is needed to provide clarity on the propriety of Plaintiffs' Rule 30(b)(1) versus Rule 30(b)(6) objection. L'Oréal USA is reluctant to proceed without such clarity, as it fears Plaintiffs, in this second deposition, will object and instruct the witness not to answer based on the contention that a particular question now cannot be answered by Mr. Wyrzykowski in his personal capacity because he will be testifying pursuant to Rule 30(b)(6).

There were several instances where Plaintiffs' counsel instructed Mr. Wyrzykowski not to answer a question,[4] but the most egregious example was when counsel refused to permit Mr. Wyrzykowski to testify about statements he made in correspondence to L'Oréal in 2015 and 2016 regarding pre-litigation product testing.[5] Counsel instructed the witness not to answer any questions related to this topic on privilege grounds. (*See* Ex. J at 245:19-247:22; 252:3-255:4.) If Mr. Wyrzykowski only knew information related to this subject because his counsel performed the tests and told him the details, those communications might have been privileged. *See, e.g., Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1426 n.12 (3d Cir. 1991) (partial disclosure of privileged materials waives the privilege "only as to those communications actually disclosed, unless a partial waiver would be unfair to the party's adversary"; "[i]f partial waiver does disadvantage the disclosing party's adversary by, for

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[4] There were ***39 instructions*** not to answer in total, including some on spurious grounds. (*See, e.g.*, Ex. J at 149:21-152:3 (instructing witness not to answer why he shaved his beard two weeks ago on privilege grounds). *See also id.* at 75:6-80:12; 87:10-23; 111:17-113:21 (instructing witness not to testify as to what documents he reviewed or who he spoke with in preparation for his deposition as a Rule 30(b)(6) designee); *cf.* (Ex. K at 116:4-21 (Plaintiffs' counsel confirming that the documents a deponent reviewed in preparation of his deposition is not privileged information).) *See also Promos Techs., Inc. v. Freescale Semiconductor, Inc.*, 2007 WL 4480636, at *1 (D. Del. Dec. 20, 2007) ("Defendant has cited *Sporck v. Piel*, 759 F.2d 312, 316 (3d Cir. 1985), as support for counsel's work product privilege assertion. The *Sporck* case facts are clearly distinguishable from the facts here, specifically with regard to the questions asked, information sought and the fact that the deponent **was a 30(b)(6) witness**, not a party.") (emphasis added). L'Oréal USA does not seek an order on each of these, hoping that guidance from the Court will make for a smoother second deposition and allow for the testimony needed to be provided.

[5] At 1:41 a.m. EST this morning, Plaintiffs' counsel sent L'Oréal USA an email asserting that the parties did not previously meet and confer about Mr. Wyrzykowksi's testimony regarding statements he made in correspondence to L'Oréal in 2015 and 2016 regarding pre-litigation product testing. This is mistaken. L'Oréal USA detailed its position on this issue to Plaintiffs in email correspondence prior to the parties' June 12, 2020 meet and confer. (Ex. I at 8.)

example, allowing the disclosing party to present a one-sided story to the court, then privilege will be waived as to all communications on the same subject"). But L'Oréal USA was not seeking those communications. (*See* Ex. J at 251:7-253:1.)

Counsel representing Mr. Wyrzykowski at his deposition apparently realized the unsound nature of her position by later trying to retract her several instructions not to answer. (Ex. J at 257:7-259:4.) L'Oréal USA, up against a ticking clock,[6] declined to ask the same questions that had been objected to all over again. Plaintiffs' counsel then proceeded to ask questions nearly identical to those posed by L'Oréal USA's counsel on this topic during her direct examination of the deponent—***the same questions she had objected to just minutes before***. Plaintiffs' counsel then prohibited L'Oréal USA from exploring Mr. Wyrzykowski's answers on re-cross, terminating the deposition with L'Oréal USA's total examination time at just 7 hours and 11 minutes. (Ex. J at 289:1-290:18.) Plaintiffs' refusal to allow re-cross was more than unprofessional; it was legally improper. *Cf. Lipscomb v. Groves*, 187 F.2d 40, 44–45 (3d Cir. 1951) (holding that it was error to allow the introduction of a witness' "incomplete and improper" deposition testimony into evidence at trial, as that deposition was taken via written interrogatories, and the witness failed to respond to appellant's re-cross interrogatories). This Court should order Plaintiffs to produce Mr. Wyrzykowski for another deposition, and permit L'Oréal USA's counsel to question him regarding non-privileged facts regarding statements he made about pre-litigation testing to L'Oréal, particularly as his own counsel's questioning opened the door on this topic during direct examination. *See Samick Music Corp. v. Delaware Music Indus., Inc.*, 1992 WL 39052, at *4 (D. Del. Feb. 12, 1992) (permitting belated amendment of answer to assert additional counterclaim in part because plaintiff "opened the door to the issue in this litigation by affirmatively questioning [defendant]'s personnel about it in the first two depositions taken in the case").

[6] Of some note are the specific obstacles counsel for L'Oréal USA faced conducting the examination of Mr. Wyrzykowski. Mr. Wyrzykowski requested that the question posed be rephrased nearly each time counsel objected to form, making this request ***81 times*** throughout the deposition. He also requested that the question posed be repeated ***49 times***. Plaintiffs' counsel also failed to disclose that Mr. Wyrzykowski has a medical condition that requires he take additional time to review documents; Mr. Wyrzykowski revealed as much to L'Oréal USA's counsel more than halfway through his deposition. (Ex. J at 250:24-251:4.) Mr. Wyrzykowski spent 23 minutes reviewing the first exhibit—an 8-page printout of Mr. Wyrzykowski's biography appearing on a website he was familiar with. (*Id.* at 43:18-55:18 and Exhibit 210 thereto.) Had Plaintiffs' counsel brought this to L'Oréal USA's attention earlier, L'Oréal USA would have attempted to work with Plaintiffs' counsel to ensure timely review of the documents in advance, so as not to waste time during the deposition. But Plaintiffs chose not to do so; instead, they chose to have Mr. Wyrzykowski take substantial time to read the entirety of any document shown to him to answer the most basic question posed about the document. (*See, e.g., id.* at 248:16-249:22.) Plaintiffs also refused to permit Mr. Wyrzykowski to review documents during breaks to expedite the process (notwithstanding their previous request for a "hard stop" at 6pm EST). (*See* Ex. J at 50:25-55:2; Ex. E.) All of this further complicated the deposition unnecessarily, to say the least.

Respectfully,

/s/ Frederick L. Cottrell, III

Frederick L. Cottrell, III (#2555)

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