

# 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 me a minute to get to the docket so that I can  
2 pull up the same exhibit that you're looking at  
3 or discussing. And I think with those  
4 instructions we should be able to proceed  
5 through this fairly expeditiously.

6 Where I thought we'd start were to  
7 discuss the new issues that have been raised by  
8 the parties. That seemed to be the order of the  
9 filings in this instance and it seemed to me to  
10 be a rather clean and, you know, appropriate way  
11 to proceed and then we'll revisit anything  
12 that's lingering from our last teleconference on  
13 March 26th.

14 Since the plaintiffs filed the  
15 first submission at document number 120, I'll  
16 start with the plaintiffs' issues and I believe  
17 the first issue is the production of product  
18 development records. So who will take the lead  
19 for the plaintiff?

20 MS. LUSZTIG: Tamar Lusztig from  
21 Susman Godfrey, Your Honor.

22 THE COURT: Okay.

23 MS. LUSZTIG: The issue here, Your  
24 Honor, is L'Oreal says on its public website and  
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1 the types or categories of information appear to  
2 be beyond request for production number 27,  
3 request for production number 32, request for  
4 production number 53 and interrogatory number 6,  
5 which I think are the primary requests, written  
6 requests that go along with this category of  
7 product development records. Part of the issues  
8 that I had in the prior conference or in prior  
9 conferences, as you know, are the Court's  
10 inability to fashion relief when requests are  
11 overbroad and are just throwing the net to  
12 capture vast categories of documents without  
13 honing in in a more targeted and precisely  
14 focused fashion what specific discovery  
15 responses are lacking in sufficiency.

16 So I am at docket item number 120  
17 and I'm sorry, you were directing me to which  
18 exhibit, exhibit 8?

19 MS. LUSZTIG: Yes, exhibit 8. And  
20 let's talk about those RFPs that Your Honor just  
21 named. We can start with number 27, which is on  
22 page 10.

23 THE COURT: All right. Let me get  
24 there. Okay. I have request -- I have the  
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6 a very small handful of documents that its  
2 produced that it includes adenosine in its  
3 product because of its anti-aging properties.  
4 That's exactly what we're claiming in our  
5 patent. We're looking for information related  
6 to L'Oreal's adenosine. So what research  
7 supported that decision? What testing supported  
8 those decisions? What benefits does L'Oreal  
9 think adenosine confers? What non-infringing  
10 alternatives has L'Oreal considered and why  
11 didn't it use those non-infringing alternatives?  
12 What was the timeline for those product  
13 decisions? Was it before or after L'Oreal  
14 learned about our patents? And those documents  
15 are important. They're critical to damages,  
16 they relate to notice and willfulness and we  
17 served extensive requests to get them.

18 So document 120, exhibit 8, those  
19 are our RFPs or some of our RFPs and I'll wait  
20 for a minute for Your Honor to get there.

21 THE COURT: Give me a moment.  
22 Just a question that I have pending once I get  
23 there that you can think about the response and  
24 point me in the right direction is a number of

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8 request for production number 27 up before me.  
2 Go ahead.

3 MS. LUSZTIG: Okay. And I want to  
4 address the points that Your Honor just raised,  
5 which is whether this request is narrow and  
6 whether the documents we're seeking are  
7 specifically responsive here. The request 27  
8 asks for documents in L'Oreal's possession or  
9 control. Again, we don't need all documents  
10 relating or referring to adenosine, but what  
11 we're asking for here is documents related to  
12 their decision to include adenosine as an  
13 ingredient in your product. And specifically  
14 what we're asking for here is documents related  
15 to including adenosine in the accused product  
16 specifically. And we haven't really gotten  
17 anything like that. We've gotten maybe five  
18 documents. I cite them in a footnote to our  
19 letter related to why L'Oreal includes adenosine  
20 in only a very limited number of products. But  
21 L'Oreal does research, it does testing, it does  
22 analytical studies which it uses to decide what  
23 ingredients to include in its product, what  
24 benefits those ingredients confer and what other

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1 ingredient might confer the same benefits. So  
2 what we're looking for here is a narrow set of  
3 documents that cover those issues related to the  
4 accused product specifically.

5 Now, I'll note, Your Honor, that  
6 L'Oreal told us when it responded to these RFPs  
7 that it would search for and produce these  
8 documents and then when we discussed these  
9 issues in March it told us it had completed its  
10 investigation and produced responsive documents.

11 So it's a little bit confusing now for L'Oreal  
12 to say that the documents aren't responsive or  
13 it's overbroad. It seems to contradict what it  
14 told us previously. And I'm happy to talk about  
15 rog 6 as well, but since Your Honor asked that  
16 question about whether the documents are  
17 responsive to this RFP, does Your Honor have any  
18 questions about that, because I'm happy to  
19 address it further.

20 THE COURT: You've showed me the  
21 actual request. Where do I find L'Oreal's  
22 responses.

23 MS. LUSZTIG: I believe they are  
24 not part of the record we submitted, but we can  
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1 send them to Your Honor right now to your clerk.  
2 THE COURT: With my clerk not here  
3 that does no good. I'm on the phone, we have  
4 over a thousand pages filed -- maybe not quite a  
5 thousand, but certainly more than 500 pages with  
6 respect to the issues all together in the  
7 aggregate and it would seem to me that if you're  
8 challenging the sufficiency of responses to  
9 particular requests for production that you  
10 would attach L'Oreal's responses so that the  
11 Court can determine if there are any, for  
12 instance, any date ranges of documents  
13 identified that I could ask plaintiff, have you  
14 reviewed these bates ranges, are they responsive  
15 in part, what still is lacking? And that's the  
16 difficulty for me. I want discovery to proceed  
17 as expeditiously as possible and I want both  
18 sides to have all of the information that they  
19 need to prosecute and defense and meet their  
20 burden, their respective burdens on each side,  
21 but it's very hard when I don't have the record  
22 in front of me. And lawyers want to supplement  
23 it in real time and it does me no good, because  
24 I'm going to make decisions today based on the

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1 record that's been made today and not on future  
2 submission. So how do I address the sufficiency  
3 of L'Oreal's responses to these requests for  
4 production? How do you suggest I address it?

5 MS. LUSZTIG: So, Your Honor,  
6 there is an e-mail between the parties on this  
7 issue directly that is in the record. It's  
8 docket 103, exhibit B.

9 THE COURT: Give me a moment to  
10 transfer out of this document. I'm sorry, 103?

11 MS. LUSZTIG: Correct.

12 THE COURT: Okay. I'm on the 103.  
13 And I'm sorry, which exhibit, B as in boy or D  
14 as in David?

15 MS. LUSZTIG: B as in boy.

16 THE COURT: Okay. I have B and  
17 B-2. It's exhibit B?

18 MS. LUSZTIG: Correct.

19 THE COURT: Okay. I have it.

20 MS. LUSZTIG: I'm on page 10.

21 THE COURT: Okay. Let me scroll.  
22 Okay. I'm there.

23 MS. LUSZTIG: And so there's a  
24 header there that says plaintiffs' requests for  
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1 production. And this is a summary of a call  
2 that we had with opposing counsel and we wrote  
3 there, after L'Oreal told us this on their call,  
4 was that they've completed their investigation  
5 and they've completed their production with  
6 respect to and there are a large number of  
7 requests listed here, but one of them is 27.  
8 That one you're just looking at where we asked  
9 for documents about L'Oreal's inclusion of  
10 adenosine in the accused products.

11 THE COURT: I'm silent because I'm  
12 looking at it. Just give me one more moment,  
13 okay, and then I'll have a question?

14 MS. LUSZTIG: Sure.

15 THE COURT: Okay. So under the  
16 heading plaintiffs' request for production,  
17 there are a number of the requests for  
18 production listed there and it just repeats that  
19 you were told by L'Oreal that they completed  
20 their investigation and don't know of anything  
21 outstanding. Then the next paragraph refers to  
22 a collection of requests for production, among  
23 them is one that's been mentioned in this call,  
24 it's number 53. But it didn't deal specifically

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1 with the content that's being sought in terms of  
2 a response to number 53. It deals with  
3 searching ESI custodians. And this one, this  
4 specific request number 53, as I understand it,  
5 is for all documents relating to your decision  
6 to include adenosine in certain skincare  
7 products following the Korean Food & Drug  
8 Administration declaration. And then it goes on  
9 to quote it, as described in your supplemental  
10 objections and response to interrogatory number  
11 6. So I don't see that that paragraph is  
12 responsive to what you're seeking here. And  
13 then there are other specific requests for  
14 production for which it, you know, reiterated  
15 that what you were told by L'Oreal, but there's  
16 nothing in terms of what plaintiffs' contend are  
17 still lacking or insufficient. So I'm sorry,  
18 but this e-mail does not help answer my question  
19 about what is insufficient about L'Oreal's  
20 responses.

21 MS. LUSZTIG: Sure. Let me find  
22 one other document that I think will be helpful.  
23 It's DI 120, exhibit 2.

24 THE COURT: All right. I have  
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1 specific to all the other accused products so we  
2 can know not for just this one product but for  
3 all the other products accused why L'Oreal is  
4 including it in the accused products.

5 THE COURT: I think we've been  
6 down this road. And clarify for me if I'm  
7 overlapping issues that you feel are apples and  
8 oranges so to speak, but I recall going down  
9 this road at the last conference and L'Oreal  
10 explaining that for the 150 or so accused  
11 products there may not be information like this  
12 because some products are bundled in a group  
13 with similar products and they haven't gone the  
14 distance on explaining the characteristics or  
15 features of the product or there may be just  
16 like a thumbnail picture of it bundled with the  
17 product that they're really trying to sell as  
18 the, quote unquote, leader of the group that  
19 will bundle the other products with it. So  
20 there may not exist, based on what L'Oreal's  
21 represented in the past on other conferences,  
22 there may not exist documents like this tied to  
23 each and every of the 150 or so accused  
24 products. So am I correct in, you know, we've

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1 exhibit 2.  
2 MS. LUSZTIG: Okay. And this is  
3 an excerpt of a document, Your Honor. It's not  
4 the whole thing. The whole thing was quite a  
5 bit longer, but we only wanted to give Your  
6 Honor the relevant pages. This is an example of  
7 the kind of document we're looking for in  
8 response to this request. So it relates to one  
9 specific product, the Lancome product on the  
10 second page. And then if you turn to the third  
11 page, it discusses in quite a lot of detail what  
12 benefits of adenosine are, what kind of studies  
13 L'Oreal relied on to include adenosine in this  
14 particular product, what the results of those  
15 studies are. And it goes on for several pages  
16 to explain why adenosine was included in this  
17 particular product for its anti-wrinkle effects,  
18 which is exactly what the patents-in-suit claim.

19 THE COURT: I think you're about  
20 to anticipate my question. Go ahead.

21 MS. LUSZTIG: Yeah, we've only  
22 gotten a document like this for approximately  
23 five products. And what we're looking for is  
24 for similar documents, documents like this one

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1 addressed this before and how had the parties  
2 come up with a means of at least sampling or  
3 trying to target a collection of what's out  
4 there? I understand the difficulty with  
5 accepting what L'Oreal has produced thus far if  
6 it's only related to five of these numerous  
7 accused products, but we're in between two  
8 extremes here, that if things don't exist for  
9 all 150 and you've gotten five, where does the  
10 needle land in that gap, in that bracket as to  
11 what L'Oreal should be expected to be capable of  
12 producing?

13 MS. LUSZTIG: Well, I have two  
14 responses, Your Honor. The first one relates to  
15 that interrogatory that we served, that relates  
16 to the same issue, interrogatory number 6. The  
17 second one relates to the 30(b)(6) deposition  
18 that we took yesterday of L'Oreal's witness  
19 about exactly the searches that they did do in  
20 order to find responsive documents here. And  
21 I'm not sure if that's properly before Your  
22 Honor. I believe my colleague, Mr. Nelson, can  
23 address it if Your Honor does want to get into  
24 it, but my understanding --

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