



Frederick L. Cottrell III
302-651-7509
Cottrell@rlf.com

April 22, 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") writes in response to the letter filed by Plaintiffs University of Massachusetts and Carmel Laboratories, LLC (together, "Plaintiffs") on April 20, 2020. Plaintiffs' complaints are either unfounded, or were not the subject of any prior meet and confer discussions. As such, Plaintiffs' requested relief should be denied.

1. L'Oréal USA's Product Development Records

Plaintiffs have misrepresented the parties' meet and confers on this dispute, and also expanded their request for documents beyond those previously sought. As an initial matter, L'Oréal USA has already produced extensive information regarding the accused products, including, but not limited to, officialization documents (which show the composition of each product), product packaging, marketing materials (in accordance with the parties' agreement discussed below), and product testing. During the April 14 meet and confer, Plaintiffs explained that they were now requesting that L'Oréal USA collect any and all documents related to the development of the more than 150 accused products in this case.¹ L'Oréal USA explained the overbroad and unduly burdensome nature of this request, including the difficulties associated with L'Oréal USA even attempting to search for such documents. Plaintiffs then proposed a compromise, requesting that L'Oréal USA provide additional details in response to Interrogatory No. 6 regarding why adenosine is generally used in L'Oréal USA products. Contrary to Plaintiffs' assertion (D.I. 120 at 1-2), L'Oréal USA never "withdrew" any offer to supplement its response to Interrogatory No. 6; instead, the parties' correspondence makes clear that L'Oréal USA was considering Plaintiffs' proposal. (D.I. 120, Ex. 9 at 4, April 17 S. Polatoglu Email to Counsel ("Plaintiffs offered that L'Oréal USA could supplement its response to Interrogatory No. 6 as a 'compromise.' L'Oréal USA is considering this proposal.")) L'Oréal USA intends to provide such a supplementation to Interrogatory No. 6, which would resolve this dispute based on Plaintiffs' compromise offer.

Unfortunately, however, in what has become a recurring theme in this case, Plaintiffs

¹ The document requests identified in Plaintiffs' letter do not encompass the overbroad discovery Plaintiffs currently seek. (D.I. 120, Ex. 8 at RFPs No. 27, 32; Ex. 6 at RFPs No. 53, 59.)

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now seek discovery even beyond that discussed during the meet and confers. Specifically, under the guise of seeking “product development documents,” Plaintiffs are requesting extensive amounts of marketing information (e.g., “[c]laims substantiation studies summary reports,” “[d]ocumentation of claims methodologies,” “[r]aw data,” and “[c]ompetitor surveillance and intelligence reports”). (D.I. 120 at 2.)² As L’Oréal USA previously explained, the parties reached an agreement in October 2019 to produce a sampling of marketing documents for each of the accused products. L’Oréal USA assumed the parties had reached that agreement in good faith, and it has worked diligently since October to produce marketing materials for more than 150 accused products, which it has done. At no time during that production did Plaintiffs complain that L’Oréal USA was providing the wrong documents or that they wished to expand the scope of the parties’ agreement. Nonetheless, and despite the Court already ruling on this issue during the discovery conference held on March 26, L’Oréal USA has agreed to search for any additional launch books for the accused products.

2. L’Oréal S.A.’s Patent Records and L’Oréal USA’s Inventor Files

Plaintiffs’ request that L’Oréal USA search the files of four individuals listed as inventors on the Galey and Cornell applications—which were filed more than 15 years ago—for documents that may reference the patents-in-suit is a fishing expedition. Plaintiffs assert that these applications are somehow relevant to their willfulness allegations because both received rejections from the Patent Office over one of the patents-in-suit, and the Galey application referenced one of those patents in a short paragraph discussing the prior art. To the extent there is any relevant information regarding the Galey and Cornell applications, however, such information is contained in the patent prosecution files already produced by L’Oréal USA.³ Further, L’Oréal USA has already searched L’Oréal USA and L’Oréal S.A.’s central repository for research relating to adenosine, and produced any of those documents that were related to the Galey and Cornell applications months ago, to the extent they exist. For example, L’Oréal USA produced an official report relating to the experiment reported in the Galey application. (*Compare* Ex. A at 7, 10-11 *with* D.I. 120, Ex. 10 at [0047]-[0067], Figure.)

During the April 14 meet and confer, Plaintiffs asked L’Oréal USA to search the inventors’ files from more than 15 years ago for any documents that reference or discuss the

² Indeed, Plaintiffs’ reference to L’Oréal USA’s document retention policies is a red herring meant to imply that L’Oréal USA is withholding relevant documents, which it is not. For example, Plaintiffs list “[a]nalytic studies not related to specific products” and “[i]nnovative and exploratory research reports,” but L’Oréal USA has produced several hundred pages of such documents. (*E.g.*, Ex. A.)

³ After L’Oréal USA realized that a technical glitch had prevented complete production of certain patent prosecution documents, L’Oréal USA notified Plaintiffs of this issue during the April 14 meet and confer and that it was in the process of being remedied. (D.I. 120, Ex. 9 at 4, April 17 S. Polatoglu Email to Counsel.) As of this filing, L’Oréal USA has produced the remaining non-privileged patent prosecution documents, none of which pertain to the Galey or Cornell applications.

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patents-in-suit.⁴ (D.I. 120 at 3.) Despite yet another belated request for documents, and contrary to Plaintiffs' allegations, L'Oréal USA did not "refuse[]" to search those files (*id.*), as even Plaintiffs' own summary of that conference indicates (D.I. 120, Ex. 9 at 8, April 14 T. Lusztig Email to Counsel ("We explained we would like you to search the inventor files for the inventors on two L'Oréal patents You said you will consider this request.")).

L'Oréal USA has been investigating the feasibility of Plaintiffs' request, including by attempting to determine what kind of "inventor files" may be available with respect to the Galey and Cornell applications, and what such a collection would entail under the unique circumstance presented by the ongoing global health crisis. For example, the inventors of the Cornell application left L'Oréal USA more than a decade ago (*see, e.g.*, D.I. 120 at Exs. 14, 16), and identifying any relevant documents from the files of the Galey application's inventors would involve searching nearly 20-year-old files that would exist in France.

3. L'Oréal USA's Organizational Charts

Plaintiffs never raised the issue of organizational charts during the April 14 meet and confer. Defendants alerted Plaintiffs to this when they sought to include organizational charts in the joint motion to be filed with the Court. Nonetheless, in a follow up meet and confer discussion held on April 20, *after* Plaintiffs submitted their letter briefs seeking organizational charts, Plaintiffs finally discussed this issue with L'Oréal USA, noting that they were looking for organizational charts for the marketing, financial and R&I divisions of L'Oréal USA going back to 2011—6 years from the filing of the lawsuit. In a subsequent email sent yesterday, April 21, Plaintiffs indicated that they would be willing to limit their request to current organizational charts maintained at the company, "without prejudice to our asking for additional org charts if a specific need arises." L'Oréal USA has agreed to search for these records and will provide them as soon as it can locate them.

For the foregoing reasons, L'Oréal USA respectfully requests that Plaintiffs' requested relief be denied.

Respectfully,

/s/ Frederick L. Cottrell, III

Frederick L. Cottrell, III (#2555)

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

⁴ L'Oréal USA notes that a search for electronic files from so many years ago would far exceed the six-year time period specified in ¶ 4(e) of the Default Standard for Discovery, Including Discovery of Electronically Stored Information ("ESI").