

EXHIBIT “B”

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VIA ELECTRONIC MAIL

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Re: *Univ. of Mass. et al. v. L'Oréal USA, Inc.*, C.A. No. 17-868-CFC-SRF (D. Del.)

Counsel,

We write regarding Plaintiffs' responses to L'Oréal USA's First Set of Interrogatories and Plaintiffs' document production. As explained below, Plaintiffs' interrogatory responses are deficient in a number of ways, including in their reliance on Federal Rule of Civil Procedure 33(d), as is Plaintiffs' document production.

Interrogatory Nos. 8 and 11. These interrogatories ask for, among other things, a detailed description of research and development efforts, including applicable dates, concerning the subject matter of the Patents-in-Suit, such as the formulations tested, the testing methodologies used, and the results of those tests. In response, Plaintiffs identified the same 15 documents from their production for both interrogatories pursuant to Rule 33(d). As Plaintiffs are no doubt aware, however, Rule 33(d) requires that "the answer to an interrogatory may be determined by examining" the specified records. This is simply not the case here at least because other documents in Plaintiffs' production identify a number of tests for which the formulations tested, testing methodologies used, and test results are not readily ascertainable from the 15 documents cited in Plaintiffs' response. Indeed, even the documents cited in the response refer to tests for which the requested information is not provided. (*See, e.g.*, UMASS_00001086 (██████ testing lacks formulations, methodologies, and results); UMASS_00001116, ETHIER_00000081 (██████ testing lacks formulations, methodologies, and results); DOBSON_00000001 (██████ testing lacks formulation); DOBSON_00000692, ETHIER_00000081 (██████ testing lacks formulations, methodologies, and intelligible results); DOBSON_00000997, 1002, 1139, 1143 (██████ testing lacks formulations, methodologies, and results); ETHIER_00000081 (██████ testing lacks formulation, methodologies, and results).) The testing referenced elsewhere in Plaintiffs' production for which these documents also do not provide the required information include, for example: the inventors' testing described in the Patents-in-Suit, Related Patents and

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Applications, and prosecution histories; [REDACTED] testing; [REDACTED] testing; [REDACTED] testing; the [REDACTED] testing; and Carmel Laboratories' 2010 competitor testing. Plaintiffs' responses to Interrogatories No. 8 and 11 are plainly deficient for at least these reasons.

Interrogatory No. 9. This interrogatory calls for, among other things, a detailed description of the research and analysis, including applicable dates, regarding the amount and/or concentration of topically applied adenosine that reaches the “dermal cell layer” (as that term is used by Plaintiffs), including as specifically referenced in documents from Plaintiffs’ production (*i.e.*, DOBSON_00000139, CARMEL LABS_00000710, UMASS_00000926). Plaintiffs’ response does not provide the requested information, and instead identifies only three further documents pursuant to Rule 33(d), which also do not provide the requested information, including dates and procedural details about the testing conducted. Indeed, UMASS_00002853 is merely a duplicate of DOBSON_00000139 at 140. To the extent Plaintiffs have no other information or documents providing information responsive to this interrogatory, please make a representation to this effect.

Interrogatory No. 10. This interrogatory asks for, among other things, a detailed description of the research and analysis, including applicable dates, regarding the effect of adenosine on dermal cell proliferation, including as specifically referenced in three documents (*i.e.*, the '327 Patent's prosecution history, CARMEL LABS_00000710, DOBSON_00000139). Again, instead of providing a proper response, Plaintiffs have identified only a handful of other documents that do not provide the requested information and are cumulative of the exemplary documents specifically asked about in the interrogatory. And the documents cited by Plaintiffs further underscore the insufficiency of this response. For example, the identified declaration from the prosecution of Plaintiffs’ Korean counterpart application (*i.e.*, UMASS_00002878) simply includes the same data present in the documents L’Oréal USA identified in the interrogatory (*see* DOBSON_00000139 at 146) and lacks any procedural explanation beyond a reference to “the same general experiments . . . described in our earlier two declarations.” Moreover, the declaration specifically references at least one other cell-proliferation data set that is not even addressed in Plaintiffs’ response. (*See, e.g.*, UMASS_00002878 (describing “[t]he Table entitled ‘10⁻³M Adenosine Data’”).) Documents fully describing the experiments that resulted in this data, and any other cell proliferation testing conducted by or on Plaintiffs’ or the inventors’ behalf, must be produced immediately and should be accounted for in the response to this interrogatory. Similarly, neither Plaintiffs’ response nor the documents cited therein provide the dates on which many of the tests were conducted or other details, including tests Plaintiffs have alleged evidence conception and reduction to practice. (*E.g.*, ETHIER_00000040, ETHIER_00000042.) To the extent Plaintiffs have no other information or documents providing information responsive to this interrogatory, please make a representation to this effect.

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Interrogatory No. 12. This interrogatory asks for a description of the facts and circumstances, including applicable dates, surrounding the alleged conception and reduction to practice of the alleged inventions of the Patents-in-Suit. Plaintiffs' response does not provide the requested information, or any substantive response at all. For example, the documents do not provide the dates on which certain experiments were conducted and any information regarding, *inter alia*, (1) the amount and/or concentration of adenosine that reached the "dermal cell layer" following topical application of an adenosine composition, (2) the inventors' respective contributions to the invention, or (3) adenosine's effect on the condition of skin.

Interrogatory No. 13. This interrogatory requests details of the communications between Plaintiffs and L'Oréal USA or L'Oréal S.A. before this litigation. Plaintiffs' response to this interrogatory is similarly deficient. For example, neither the response nor the documents cited pursuant to Rule 33(d) identify the alleged agent of L'Oréal USA and L'Oréal SA about which the interrogatory specifically asks. Nor does the response identify the "former colleague" of Jean-Paul Agon who was allegedly in contact with Dennis Wyrzykowski and encouraged him to write his March 17, 2015 letter to Mr. Agon. Moreover, while Plaintiffs' communications identify certain product testing from 2010 (*See* CARMEL LABS_00014411), no related information or documents have been provided. Plaintiffs' response is thus insufficient.

Interrogatory No. 14. Plaintiffs' response to this interrogatory is inadequate. L'Oréal USA's Initial Invalidity Contentions have identified detailed anticipation and obviousness positions, including defenses based on specific prior art that was not in the intrinsic record, and also contain specific invalidity positions based on 35 U.S.C. §§ 101 and 112. Neither Plaintiffs' limited response nor the citation of the prosecution histories of the Patents-in-Suit and the PTAB's decisions address these invalidity arguments, and Plaintiffs' response is thus insufficient.

Interrogatory No. 15. Plaintiffs' response to Interrogatory No. 15 is also deficient. First, apart from generically listing certain secondary considerations, Plaintiffs have not described how these secondary considerations are allegedly met. It is incumbent on Plaintiffs to, for example, identify which products are allegedly commercially successful, what alleged long-felt need the Patents-in-Suit satisfy, and specify any alleged unexpected results. Plaintiffs' reliance on Rule 33(d) is also inadequate, as the identified documents do not on their face indicate to which secondary consideration(s) they allegedly pertain, and the response does not provide any information as to which of those documents support at least Plaintiffs' claims of long-felt but unresolved need, failure of others, copying, and unexpected results.

Plaintiffs' objections regarding custody and control. Plaintiffs have represented that they collected and produced documents from the named inventors as part of discovery in this case. Yet Plaintiffs have objected "to each Interrogatory to the extent it calls for information that

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is within the custody or control of the patent inventors, who are third parties” (General Objection No. 9; *see also, e.g.*, General Objection No. 10) and, for many of Plaintiffs’ responses, Plaintiffs object to the extent that the interrogatory “calls for information that is not within Plaintiffs’ custody or control” or “seeks information about ‘Your conclusions,’ citing to documents authored by third parties.” Similar language appears in Plaintiffs’ responses to L’Oréal USA’s Requests for Production. Please confirm that Plaintiffs are not withholding any information or documents in response to any discovery request on the basis that it is in the possession, custody, or control of the named inventors.

Testing of the accused products. Interrogatory Nos. 1, 8, 9, and 11 call for, *inter alia*, studies, evaluations, analysis, and testing (including methodologies used and results thereof) of any products that Plaintiffs’ contend are covered by the Patents-in-Suit. This would include any testing of the Accused Products conducted by or on Plaintiffs’ behalf, including the testing disclosed by Plaintiffs as forming the sole basis of Plaintiffs’ Seconded Amended Disclosure of Asserted Claims and Initial Infringement Contentions. No such testing is described in the responses, nor are documents identified that contain this information, despite some of the cited documents making clear references to such testing (*see, e.g.*, CARMEL LABS_00014411) and the disclosure of such testing as the sole alleged support for Plaintiffs’ infringement contentions. In view of Plaintiffs’ positions in this case, a complete response to these interrogatories must include a detailed description of the testing, including methodologies and protocols employed, and/or the documents generated in connection with Plaintiffs’ testing of the Accused Products, including documents reflecting the practices employed for the testing. This includes, for example, testing conditions and protocols, underlying data, other results, and laboratory notebooks.

Requests for Production. Plaintiffs’ insufficient Interrogatory responses reveal broader deficiencies in their document production, including several categories of missing documents that are clearly responsive to various of L’Oréal USA’s Requests for Production. For example, Requests for Production No. 42, 54, 56, 57, 59, 61, 63, 65-66, 69, 72, 97, 109, 111, 112, 115, 121, and 123-125 relate to research, development, formulation work, and testing. But Plaintiffs do not appear to have produced documents showing formulations, methodologies, or results for a number of the experiments and tests that are explicitly referenced in their production. (*See, e.g.*, discussion of Interrogatory Nos. 8 and 11, *supra*.)

Requests No. 41, 43, and 71 relate to conception and reduction to practice documents and related research. Plaintiffs’ production in response to these requests is insufficient, as it does not contain any pre-patent filing documents concerning, *inter alia*, the topical application of adenosine, the extent to which adenosine penetrates the skin and reaches the “dermal cell layer,” and the effect of adenosine on skin. If no such documents exists, please so state. Plaintiffs’ production also lacks documents reflecting the allegedly extensive research that the named

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