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May 12, 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 to address the issues discussed during the parties' April 24 teleconference, pursuant to the Court's Oral Order. (*See* D.I. 153.)

1. Plaintiffs' Request That L'Oréal USA Search for and Produce Additional Documents Responsive to RFP Nos. 27, 32, 40-42, 53, 59, and 66

During the April 24 conference, Plaintiffs requested product development documents regarding L'Oréal USA's "inclusion of adenosine in" the accused products in response to RFP Nos. 27, 32, 53, and 59 (D.I. 120 at 1 n.3), which Plaintiffs asserted to be relevant to "damages" (*id.* at 2). On May 8, L'Oréal USA provided supplemental responses to those RFPs, and produced additional documents, in satisfaction of the Court's April 24 Order. In doing so, and despite its previous searches already exceeding what was required,¹ L'Oréal USA re-reviewed its collection and conducted good-faith follow-up searches to identify any additional potentially relevant documents. These significant efforts detailed in L'Oréal USA's supplemental RFP responses included a re-review of emails collected from R&I custodians discussing adenosine, a re-review of documents collected from a central database for any further product-specific testing, and a collection of development documents known as "Magellan briefs" from another central repository. (*See, e.g.,* Ex. A, First Supplemental Objections and Response to RFP 27.)² Although many of the documents located through these additional efforts did not even refer to adenosine, L'Oréal USA nonetheless produced them to avoid any further disputes. Thus, all potentially responsive documents have now been produced, and L'Oréal USA has complied with its obligations. As of this filing, Plaintiffs have not identified what additional documents they seek. To the extent they attempt to use this briefing to continue their pattern of seeking

¹ For example, L'Oréal USA collected documents from 26 custodians and produced electronic documents dating as far back as 2002, exceeding the Court's Default Standard for Discovery.

² L'Oréal USA provided further information on this issue through a supplemental response to Plaintiffs' Interrogatory No. 6, which explained how the document categories described in its supplemental RFP responses related to the development of the accused products (*e.g.,* Magellan briefs, "officialization" and "INCI" documents, "technical dossiers," and "test syntheses"). (*See* Ex. B, Second Supplemental Objections and Response to Interrogatory No. 6.)



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additional document categories, their request should be denied so that the parties can focus on completing fact discovery.

L'Oréal USA has also met its obligations with respect to RFP Nos. 40-42 and 66, as it has (1) supplemented its responses thereto, as directed by the Court, and (2) produced the additional documents sought by Plaintiffs. (*See* Ex. C at 100:24-104:13; Ex. A, First Supplemental Objections and Responses to RFP Nos. 40-42, 66.) Plaintiffs served these RFPs directed to marketing materials on December 18, 2019—less than two months before fact discovery was then set to close, and after L'Oréal USA had already produced thousands of pages of marketing materials. (*See, e.g.*, D.I. 124 at 1; *id.*, Ex. A at 39:1-14.) Though the Court denied Plaintiffs' initial motion to compel with respect to these Requests,³ reasoning that Plaintiffs were “seeking a very general and broad order that allows them to basically go on a fishing expedition” (*id.*, Ex. A at 39:8-24), Plaintiffs renewed their request for certain additional marketing documents in advance of the April 24, 2020 hearing, indicating that their requests sought launch files and final concept documents that included positioning, pricing, claims, consumer research, forecasting, projections, budgets, timelines, and business plans. (Ex. C at 92:4-95:21.) During the April 24 hearing, L'Oréal USA explained that every brand operates differently and may not have the same category of documents, but agreed to search for and produce additional concept and strategy documents beyond what it had previously produced. (Ex. C at 97:8-100:23.)

Following the Court's ruling that L'Oréal USA supplement its responses to RFP Nos. 40-42 and 66 (*id.* at 103:11-18), L'Oréal USA searched for additional marketing and business documents, including the categories of documents requested by Plaintiffs (and without limiting the time period for these documents), and has been working diligently to collect and produce these materials, including through May 5, May 7 and May 8 productions to Plaintiffs. Because L'Oréal USA has required the assistance of certain L'Oréal S.A. employees, who are not readily available, to obtain some of the requested materials, it has taken significant time and effort to gather these documents. L'Oréal USA expects to make a further production of these documents this week. In short, L'Oréal USA has satisfied its obligations with respect to these RFPs. This has been a monumental effort spanning more than ten brands, each of which operates differently, with different employees working around the clock to meet Plaintiffs' broad demands.

2. Plaintiffs' Request for Production No. 35 (Organizational Charts)

On May 8, 2020, L'Oréal USA produced over 100 pages of organizational charts, notwithstanding Plaintiffs' failure to meet and confer on this issue before adding it to the April 24 discovery conference agenda. (*See* D.I. 118 at 2 n.3.) To be clear, Plaintiffs served RFP No. 35, the document request from which this matter stems, in July 2019—*nine months* before raising any concerns regarding this request. Regardless, L'Oréal USA agreed to meet and confer shortly after this issue was raised, at which time Plaintiffs explained that they sought current organizational charts pertaining to the L'Oréal USA's Research & Innovation, marketing, and finance departments. (*See* Ex. D at 2.) L'Oréal USA agreed to search for these records, and

³ These Requests were never properly teed up for the Court's consideration, as they were first discussed at the March 26, 2020 discovery conference without being included on the agenda for that call. (*See* D.I. 100.) Indeed, Plaintiffs have on various occasions expanded or otherwise blurred the issues properly before the Court. (*See, e.g., infra* Sections 2, 3.)

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so informed the Court. (D.I. 126 at 3.) L'Oréal USA then produced these records on May 8, 2020. It is unclear why Plaintiffs have added this issue to the agenda once again.

3. Plaintiffs' Request for Production No. 65 (FTC Investigation Communications)

On April 24, 2020, the Court ordered L'Oréal USA to produce documents "limited to the single 2014 FTC investigation cited by plaintiffs in their letter brief, including the internal and external communications regarding the specific FTC investigation." (D.I. 144, Ex. C at 113:1-8.) On May 8, 2020, L'Oréal USA produced its communications with the FTC regarding the investigation, as well as documents supporting the challenged claims for the products at issue therein. This production included more than 1,000 pages, as well as four hyperlinked files providing claim-by-claim substantiation for those products. L'Oréal USA filed Objections to the remainder of the Court's Order. (See D.I. 151.) To the extent L'Oréal USA is also obligated to produce its entire *production* to the FTC in connection with the investigation—contrary to Plaintiffs' representation that they "limit[ed] the request to *communications*" for one investigation (D.I. 123 at 2)—that production file consists of more than 7,000 documents (approximately 50,000 pages). L'Oréal USA is diligently working with its counsel for the FTC investigation to obtain these documents, which it believes it would require an additional two to three weeks to produce given, among other things, the limitations of reviewing these documents electronically from remote servers that are not always performing efficiently.

On the other hand, Plaintiffs' request for *internal* and external communications related to the FTC investigation is substantially broader than Plaintiffs' RFP No. 65, which sought only external communications relating to the Accused Products. (D.I. 151, Ex. B at RFP No. 65 (seeking "documents produced, in any litigation or investigation, to any government entity or agency that refer or relate to the Accused Products").) Thus, contrary to the above-quoted representation, Plaintiffs improperly expanded this aspect of their request in their April 21 briefing, to which L'Oréal USA could not respond through simultaneous briefing (and which was not apparent to L'Oréal USA's counsel until after the Court's ruling). (See D.I. 123 at 2; *id.*, [Proposed] Order at 2.) L'Oréal USA has thus complied with RFP No. 65 as narrowed, producing all external communications with the FTC pertaining to the investigation. It should not have to produce documents in response to Plaintiffs' last-minute demand for internal, privileged communications that are not covered by the RFP at issue. See, e.g., *Whitely v. CDCR*, 2018 WL 3159878, at *4 (E.D. Cal. June 28, 2018) ("[T]he court will weigh only the discovery requests that were actually propounded rather than the new ones in his motion to compel.").

Accordingly, L'Oréal USA maintains that producing its production file to the FTC is unduly burdensome at this late stage of discovery, unless and until Plaintiffs identify anything in the already-produced documents supporting further review and production. L'Oréal USA's production to date evinces that such review and production would not be proportional to the needs of this case, as L'Oréal USA's "White Paper" submitted to the FTC at the close of the investigation (which summarized the challenged claims, the products at issue, and the L'Oréal USA's substantiation for those products) does not even reference the word "adenosine." "Where, as here, the defendant challenge[d] the relevance of discovery, the burden first rests with plaintiff to articulate that the material sought is relevant." *Pollock v. Energy Corp. of Am.*, 2014 WL 562726, at *2 (W.D. Pa. Feb. 11, 2014). L'Oréal USA therefore respectfully requests that the Court deem production of the external FTC communications to be sufficient.

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Respectfully,

/s/ Frederick L. Cottrell, III

Frederick L. Cottrell, III (#2555)

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