

EXHIBITS A-B

**REDACTED IN
THEIR ENTIRETY**

EXHIBIT C

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

Hawkins Reporting Service
112 Burning Tree Road - Dover, Delaware 19904
(302) 658-6697 FAX (302) 658-8418

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 their understanding too, okay, because then we
2 issued after this October agreement, we issued
3 new requests for production which came up in the
4 prior discussion this morning and those include
5 more request, including request number 42, which
6 asks for final business plans, strategy
7 documents and request number 66, which talks
8 about customer surveys. And they agreed in
9 those, in that same language that we discussed
10 before, that they were going to produce those
11 documents and they didn't reference any prior
12 agreement. They just said in that same sentence
13 that they were going to produce in mid January.
14 And at this point the document production
15 deadline was February 7. Your Honor, in the
16 February hearing, extended that to February 28.
17 And then we looked at the documents and they
18 just weren't there. And this is their
19 understanding that only applied to requests for
20 production 31 as well. And if I can point Your
21 Honor to docket number 87, this is what they
22 rely on for the supposed agreement.

23 THE COURT: All right. Let me get
24 there. You said 87?

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1 MR. NELSON: 87. This is in
2 advance of this February hearing.
3 THE COURT: Right. Go ahead.
4 MR. NELSON: And --
5 THE COURT: I'm there.
6 MR. NELSON: On page -- on page 3,
7 Your Honor, it references the agreement. And
8 let me see here, so I can point you specifically
9 to that page. Bear with me, Your Honor, I want
10 to make sure that we're exactly on this.

11 THE COURT: Let's just bring in
12 context. My issues with this March 26th issue
13 were that these requests for these business
14 marketing type of documents beyond the launch
15 notebook -- launch books, I guess, or whatever,
16 that the marketing document requests in general
17 were overbroad, not very well defined, targeted,
18 precise and in enough detail that I could figure
19 out what plaintiffs were looking for. And I
20 thought that part of the problem was to -- the
21 plaintiffs didn't know what they were looking
22 for, they needed a 30(b)(6) deposition to kind
23 of delve into what materials may be out there to
24 ask for in this respect for this category of

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1 documents. And so that 30(b)(6) deposition
2 happened. I understand from this call today
3 that there's issues with it that I may be
4 hearing about in the future, but nonetheless,
5 putting aside whatever agreement was understood
6 or perhaps misunderstood, what's more helpful to
7 me today is for you to frame what the plaintiffs
8 are seeking, what proportion of that, if any,
9 has been produced already, by what you've got
10 from L'Oreal. What's missing? I understand
11 you've cited to request for production 40, 41,
12 42, 66. In general those seek sales forecasts,
13 production of documents regarding market share,
14 strategic business plans, marketing strategies,
15 production of consumer surveys and drivers of
16 demand. Again, do I have their responses in
17 front of me so I can look at what L'Oreal
18 formally responded when it answered these
19 requests for production? Are there bates
20 ranges? Are there documents produced? That's
21 more helpful to me than splitting hairs over
22 whether there was a specific agreement or not.
23 Let's get to the heart of the matter. What
24 relief is being sought? What have you got?

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1 Where is it insufficient and what can the Court
2 do in the view of the plaintiff to make this
3 move along?
4 MR. NELSON: Thank you, Your
5 Honor. I will address those specifically.
6 First to answer your last one. With respect to
7 what they did and how they responded on their
8 third set of requests for production, it was the
9 same type -- for request number 40 and 41, they
10 objected completely. For request -- and this is
11 not in the report, but I'm sure L'Oreal's
12 counsel will correct me if I'm wrong. For
13 request number 42, they had that same sentence
14 saying that they will produce after a reasonably
15 diligent search. And same for request 66, just
16 that one sentence. Now, after briefing in March
17 was completed they produced finally their
18 document retention policies. And we then used
19 those, not some language of our requests, but
20 based upon the categories that they themselves
21 keep, we addressed them, we raised them with the
22 specific issues, for example, how they say
23 things. And again, if it would be helpful, I'm
24 happy to talk to exactly what we're seeking

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1 based upon their document retention policies.
 2 And I'm looking now, Your Honor, at docket 123,
 3 exhibit 3.
 4 THE COURT: Let me get there. I
 5 have it.
 6 MR. NELSON: Okay. So on page 5
 7 of the document there's a header number 2A.
 8 THE COURT: I have it.
 9 MR. NELSON: It is the launch
 10 files and number 1 is the final concept
 11 documents with positioning, pricing, claims, et
 12 cetera, not to preview, but we asked this
 13 specifically at the deposition yesterday and
 14 they didn't know. The 2C is the presentation
 15 files. On that same page, 3A, are the consumer
 16 research including any test market studies,
 17 right, whether, for example, anti-aging. And
 18 then on page 8 of that same document, Your
 19 Honor --

20 THE COURT: Getting there. All
 21 right. I have it.
 22 MR. NELSON: Is something called
 23 feasibility and there's what's called a final
 24 marketing decision and final launch time. And

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1 then C is forecasting. And we do not have these
 2 documents, with the possible limited exception
 3 that for some, the few Lancome products, but
 4 they're not these products, they're not these MD
 5 final marketing decisions and there's no
 6 timeline that goes along with them at least as
 7 best we can understand. And when we asked about
 8 this yesterday, the plaintiff just did not know.

9 The other thing, again, based upon
 10 as an example of what we're seeking based upon
 11 their specific -- based upon this old discovery,
 12 based upon their specific, the document
 13 retention guidelines, if you go then to exhibit
 14 4. And as an example, if you go -- let me know
 15 when you're there, page 6 of that document.

16 THE COURT: I have it.
 17 MR. NELSON: Okay. And Roman
 18 numeral 2, number 1, the final business plans,
 19 budgets, projections and trin reports. So
 20 again, we have none of this. And then we asked
 21 about this specifically at the deposition
 22 yesterday and this was the exchange, did L'Oreal
 23 search the final business plans of the accused
 24 products? Answer, I don't know. Did L'Oreal

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1 search the budgets of the accused products to
 2 determine whether there are any relevant
 3 documents? Answer, I don't know. Did L'Oreal
 4 search projections of the accused products for
 5 any relevant documents? Answer, I don't know.
 6 Question, did L'Oreal search the trin reports
 7 for any relevant documents? Answer, I don't
 8 know. And so these are what we tried to get to
 9 the bottom of. We are basing our requests
 10 specifically upon their document retention
 11 policies and we just don't have these documents,
 12 again, after they had said they were going to
 13 produce them. And perhaps I should just stop
 14 there. I know its been a long time. If there's
 15 any follow up questions you might have, but
 16 that's basically it, we tried to expedite this
 17 case, we pointed out specifically based upon
 18 their newly produced document retention
 19 deadlines what exactly we think is missing,
 20 where they are and why they haven't been
 21 produced.

22 THE COURT: All right. L'Oreal,
 23 you've heard the categories of documents that's
 24 tied in with the document retention policies and

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1 the way they're described on this policy. What
 2 is the problem in terms of production here?
 3 MS. MURRAY: Yes, Your Honor.
 4 This is Kathy Murray for L'Oreal. The problem
 5 is burden and proportionality to the needs of
 6 the case. And this is why --

7 THE COURT: Where is the burden
 8 argument made? Where is the burden argument
 9 made in your response?

10 MS. MURRAY: Well, Your Honor,
 11 this is why we reached an agreement with them
 12 and we explained the burden to them. We
 13 organized that call. We reached out to them in
 14 October and we said we need to have a call about
 15 the scope of this case and how discovery is
 16 going to happen because of the number of accused
 17 products. And the only thing in front of us at
 18 that time with respect to their request for
 19 marketing was that RFP 31. They had not served
 20 the other ones at that time. So what we
 21 explained, if you look at request 31, and I can
 22 pull it out for you.

23 THE COURT: They say that was
 24 resolved. And did they have these document

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