



VIA E-FILING

February 13, 2020

The Honorable Sherry R. Fallon
J. Caleb Boggs Federal Building
844 N. King Street
Room 3124, Unit 14
Wilmington, DE 19801-3555

Re: University of Massachusetts, et al. v. L'Oréal USA, Inc., 17-868-CFC-SRF

Dear Judge Fallon:

We write in response to Defendant's letter requesting that the Court extend the document production deadline *nunc pro tunc* to March 6, 2020. The current document production deadline was February 7, 2020. As Plaintiffs detailed in their February 12 letter, *see* D.I. 88, Defendant also had a December 20, 2019 deadline to produce complete technical and financial information for all Accused Products; that production was incomplete, and remains incomplete nearly two months later. This is indicative of Defendant's overall deficient production. Defendant has yet to produce any emails, product testing materials, files for its patents cited in Plaintiffs' complaint, or documents related to its patent-clearing or licensing practices—to name just a few categories. The touchstone for whether a party has shown good cause for amending a scheduling order is whether “a more diligent pursuit of discovery was impossible.” *Dow Chem. Canada Inc. v. HRD Corp.*, 287 F.R.D. 268, 270 (D. Del. 2012); *see also* Fed. R. Civ. P. 16(b)(4) (“A schedule may be modified only for good cause and with the judge’s consent.”); *Compagnie des Grands Hotels d’Afrique S.A. v. Starwood Capital Grp. Global I LLC*, 2019 WL 4740083, at *1 (D. Del. Sept. 27, 2019) (“[S]cheduling orders are at the heart of case management. If they can be disregarded without a specific showing of good cause, their utility would be severely impaired.” (quoting *Koplove v. Ford Motor Co.*, 795 F.2d 15, 18 (3d Cir. 1986)). It is apparent from Defendant's production to date, and its attempted justifications—unsupported by legal authority—that Defendant has not met this standard.

Defendant was required to make a complete production of technical and financial information for all Accused Products on December 20, 2019. *See* D.I. 46 ¶ 6(a), 64. As of the December 20 deadline, Defendant had produced 623 documents, and had produced no technical documents for 21 products and no financial information for 51 products (even excluding products that only later did Defendant assert were not sold by L'Oréal USA). As of the February 7 document production deadline, Defendant had produced only 786 documents, and no documents had been produced for 8 products. Contrary to Defendant's assertion, it has not produced financial records for all accused products. *See* D.I. 87, at 1; D.I. 88, Ex. A. To date, Defendant has produced no testing of any kind for any of the Accused Products, no emails, no consumer studies, and no patent licenses or settlement agreements. By contrast, Plaintiffs completed document production by the February 7 deadline, and are prepared to move on to depositions. *See* D.I. 86 (notice of service of Plaintiffs' 30(b)(6) deposition notice). We cannot do so, however, without a complete production from Defendant.

Only on January 30, 2020—the morning of the parties' meet and confer on the issue, and a week before the document production deadline—did Defendant provide its current proposal for

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extending the case schedule. *See* D.I. 88, Ex. I, at 8. Because of Defendant’s failure to timely complete the December 20 production required by the Scheduling Order, Plaintiffs were willing to consider an extension for the production of *other* responsive documents if Defendant would commit to producing the outstanding technical and financial information for the Accused Products by the February 7 document production deadline. *See id.*, at 7. Defendant would not. Based on Defendant’s disregard for the Court’s current deadlines, Plaintiffs could not agree to allow Defendant to delay this case further. Plaintiffs are particularly troubled by Defendant’s comment in its letter that Defendant may “seek further relief from the Court as to additional deadlines in the coming months, perhaps even including the trial date.” D.I. 87, at 1. Needless to say, Plaintiffs oppose, and will continue to oppose, any extension of the schedule, particularly one that would result in moving the Court-ordered trial date. *See Dow Chem.*, 287 F.R.D. at 270 (“In deciding whether to modify a scheduling order, the Court may consider any prejudice to the party opposing the modification. Prejudice may include the delay of a trial date.”).

Defendant’s only explanation for its production deficiencies is the number of Accused Products Plaintiffs identified, pursuant to the Court’s schedule, along with its Infringement Contentions. *See* D.I. 87, at 1. As the Court observed, Plaintiffs’ complaint put Defendant “on notice that products containing adenosine made by the eighteen brands specified in the FAC are accused of infringement.” D.I. 31, at 9. Contrary to Defendant’s assertion that “the FAC vaguely defined the accused products,” D.I. 87, at 1, the FAC notified Defendant that the accused products would include “the following brands with products containing adenosine,” and then listed eighteen brands, D.I. 13 ¶ 31. Defendant says it “could not have known which products Plaintiffs would accuse.” D.I. 87, at 2. But Defendant knew, as of the 2017 FAC, that the accused products would at most be the group of its products that contain adenosine, and, indeed, the Accused Products consist of the subset of those adenosine-containing products that meet the claim limitations of the asserted patents. The number of Accused Products is therefore smaller, not larger, than what Defendant could reasonably have expected at the outset of this case.

Defendant faults Plaintiffs’ purported “unwillingness to narrow its list of accused products, or to, at the very least, remove improperly accused products.” *Id.*, at 1. Defendant gives no reason, much less any authority, to support the idea that Plaintiffs should voluntarily remove Accused Products that Plaintiffs believe infringe the Patents-in-Suit. As for “improperly accused” products, Defendant has *never* provided Plaintiffs with a list of the products it believes are improperly accused, despite the parties’ many written and verbal communications. Defendant repeatedly asserted, as it does now, that “several of the accused products simply did not exist,” *id.*, at 3, but Plaintiffs provided Defendant with ample information to identify each Accused Product—including product packaging and public websites. *See* D.I. 88, Ex. B.

Defendant also says that some products “were not ever sold by L’Oréal USA” or were sold outside the damages period. D.I. 87, at 3. Again, Defendant has never provided Plaintiffs with a list of these products. Defendant has only belatedly, and piecemeal, suggested that certain products were not sold by L’Oréal USA during the relevant time. For example, despite the fact that Plaintiffs listed The Body Shop as one of the specific brands in the FAC, it was not until Defendant provided its Objections and Responses to Plaintiffs’ Third Set of Interrogatories on January 17, 2020, that Defendant stated that L’Oréal USA never sold products under The Body Shop brand. Ex. N, at 13. And it was only in an email following several inquiries from Plaintiffs that Defendant identified two products apparently launched in 2019. D.I. 88, Ex. I, at 15. One of these products, Kiehl’s

Super Multi-Corrective Cream SPF 30, does in fact show sales in 2017 and 2018. *See* Ex. O (excerpt from LOUSA0005996). If Defendant believed that the presence of improperly accused products would impede its efforts to meet the Court's deadlines, it could have identified those products and sought relief long before the deadline. That would have given the parties the opportunity to ascertain whether the products do, in fact, fall outside the scope of the case. "Where, as here, the party knows or is in possession of the information that forms the basis of the later motion to amend at the outset of litigation, the party is presumptively not diligent." *Boston Scientific Corp. v. Edwards Lifesciences Corp.*, 2018 WL 5043754, at *3 (D. Del. Sept. 19, 2018) (quotations omitted); *see also id.* ("Boston Scientific's failure to seek leave to amend based on the representations made in Edwards' discovery responses, and concomitant failure to further explore Edwards LLC's precise role through additional discovery, precludes a finding of diligence."); *Dow Chemical*, 287 F.R.D. at 271 (denying request to extend discovery because requesting party did not timely challenge opposing party's interpretation of and response to interrogatory).

Not only was Defendant not diligent in raising issues with Plaintiffs, it has not been diligent in seeking relief from the Court. Defendant had an obligation to make a complete production of financial and technical information for all Accused Products on December 20, and yet Defendant did not identify an issue with any product or brand until Plaintiffs repeatedly identified the deficiencies in that production and requested supplementation. *See* D.I. 88, Ex. I, at 17. And Defendant did not move the Court to amend the document production deadline until February 4, just three days before the deadline and at which point Defendant had already admitted it would not comply with the Court's schedule. *See id.*, at 12. "By waiting so long to do so, with seemingly no justification for delay other than an unfounded hope" that Plaintiffs might narrow the list of Accused Products or agree to extend the case schedule, Defendant "ha[s] failed to show the good cause required for the Court to grant [its] Motion." *Meda Pharm. Inc. v. Teva Pharm. USA, Inc.*, 2016 WL 6693113, at *2 (D. Del. Nov. 14, 2016); *see also, e.g., MacQueen v. Union Carbide Corp.*, 2015 WL 167674, at *9 (D. Del. Jan. 8, 2015) ("Plaintiff's lack of diligence is demonstrated not only in her significant delay in propounding discovery in the first instance, but also by her delay in failing to come forward earlier with any request for an extension.").

Finally, Defendant's complaints with respect to a small number of Accused Products do not explain why Defendant has failed to provide documents responsive to the vast majority of Plaintiffs' discovery requests—for example, any emails or communications discussing adenosine or the Patents-in-Suit; any agreements or documents related to Defendant's licensing practices; any documents related to Defendant's patents cited in the FAC; or any product testing of any kind whatsoever. Plaintiffs served their First Set of Requests for the Production of Documents on July 15, 2019, before the Scheduling Order was even entered. *See* D.I. 43; Ex. P. The need for Defendant to produce responsive documents by February 7, 2020, is hardly a new development. Accordingly, Defendant has failed to show good cause for any amendment to the Scheduling Order. *See Compagnie des Grands Hotels d'Afrique*, 2019 WL 4740083, at *3 ("Plaintiff has not supported its request with any 'new information' . . . Rather, plaintiff asks the court to reconsider the scheduling order deadline based upon time pressures of its own making rather than good cause.").

Plaintiffs respectfully request that the Court deny Defendant's request to extend the document production deadline and order that it produce all outstanding documents no later than February 25, 2020.

Respectfully submitted,

/s/ Brian E. Farnan

Brian E. Farnan

cc: Counsel of Record (Via E-Mail)