

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

L'ORÉAL S.A. and L'ORÉAL USA, INC.,)	
)	
Plaintiffs,)	
)	C.A. No. _____
v.)	
)	JURY TRIAL DEMANDED
MERCK AND CO., INC.,)	
)	
Defendant.)	

COMPLAINT FOR PATENT INFRINGEMENT

Plaintiffs L'Oréal S.A and L'Oréal USA, Inc. (collectively, "L'Oréal") allege as follows:

NATURE OF THE ACTION

1. This is an action for patent infringement under the Patent Laws of the United States 35 U.S.C. § 1 *et seq.*

PARTIES

2. Plaintiff L'Oréal S.A. is a French corporation with its principal place of business at 14, rue Royale, 75381 Paris Cedex 08, France.

3. Plaintiff L'Oréal USA, Inc. is a Delaware corporation with its principal place of business at 575 Fifth Ave, New York, New York 10017. L'Oréal USA is a wholly-owned subsidiary of L'Oréal S.A.

4. On information and belief, Defendant Merck and Co., Inc. ("Merck") is a New Jersey corporation with a principal place of business at One Merck Drive, Whitehouse Station, New Jersey 08889.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this complaint pursuant to 28 U.S.C. §§ 1331 and 1338(a).

6. On information and belief, Defendant Merck has systematic and continuous contacts in this judicial district; regularly avails itself of the benefits of this judicial district, including the jurisdiction of the courts; regularly transacts business within this judicial district; regularly sells products in this judicial district; and derives substantial revenues from sales in this district.

7. This Court has personal jurisdiction, general and specific, over Merck.

8. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 and § 1400.

L'ORÉAL'S PATENTS-IN-SUIT

9. L'Oréal S.A. owns United States Patent No. 5,587,150 (the "'150 patent"). The United States Patent and Trademark Office ("USPTO") duly and legally issued the '150 patent entitled "Photostable Cosmetic Screening Composition Containing a UV-A Screening Agent and an Alkyl β,β -Diphenylacrylate or α -Cyano- β,β -Diphenylacrylate" on December 24, 1996. A true and correct copy of the '150 patent is attached as Exhibit A. L'Oréal USA is the exclusive licensee under the '150 patent.

10. L'Oréal S.A. owns United States Patent No. 5,576,354 (the "'354 patent"). The USPTO duly and legally issued the '354 patent entitled "Photostable Cosmetic Screening Composition Containing a UV-A Screening Agent and an Alkyl β,β -Diphenylacrylate or α -Cyano- β,β -Diphenylacrylate" on November 19, 1996. A true and correct copy of the '354 patent is attached as Exhibit B. L'Oréal USA is the exclusive licensee under the '354 patent.

11. The '150 and '354 patents both relate to sunscreen compositions.

12. The '150 patent relates to, *inter alia*, photostable compositions containing sunscreen avobenzone.

13. L'Oréal has complied with the statutory requirements of 35 U.S.C. § 287(a), including by placing notice of its '150 patent on products manufactured or sold in the United States.

14. The '354 patent relates to, *inter alia*, processes for stabilizing sunscreen avobenzone with respect to UV radiation by adding a diphenylacrylate compound such as octocrylene to a composition.

PRIOR SUNSCREEN LITIGATION BETWEEN MERCK AND NEUTROGENA/J&J

15. On information and belief, Defendant was involved in at least one litigation relating to compositions containing sunscreen avobenzone and octocrylene. *Schering-Plough Healthcare Products, Inc. v. Neutrogena Corp.*, Case No. 1:09-cv-642-SLR (D. Del.) (the "Prior Sunscreen Litigation"). In the Prior Sunscreen Litigation, it became clear that Defendant knew of the L'Oréal patents that are the subject of this lawsuit and that it was using the technology described in those patents.

16. The Prior Sunscreen Litigation involved allegations by Merck (which merged with Schering-Plough) that Neutrogena (a subsidiary of Johnson & Johnson, "J&J") falsely advertised its "Ultra Sheer Dry-Touch Sunblock SPF 100+" sunscreen product.

17. On information and belief, J&J's "Ultra Sheer Dry-Touch Sunblock SPF 100+" sunscreen product contained sunscreen avobenzone and octocrylene.

18. On information and belief, Merck's allegation of false advertising against Neutrogena (J&J) arose from Neutrogena's (J&J's) not including diethylhexyl 2,6-naphthalate (DEHN) in the "Ultra Sheer Dry-Touch Sunblock SPF 100+" sunscreen product.

19. On information and belief, during the Prior Sunscreen Litigation, Merck scientist Dr. Patricia Agin submitted a declaration in which she stated: "Since 2001, for photostabilization

of Coppertone sunscreen products containing avobenzone, Schering has used high levels of octocrylene to protect avobenzone from UV degradation. This method of photostabilization is not and was never patented by, exclusive to, developed by, or created by Neutrogena.” A true and correct copy of the Agin declaration is attached as Exhibit C.

20. On information and belief, during the Prior Sunscreen Litigation, Neutrogena (J&J) admitted that octocrylene stabilizes avobenzone, and that L’Oréal patented this technology.

21. On information and belief, during the Prior Sunscreen Litigation, Neutrogena (J&J) admitted that its “Ultra Sheer DryTouch Sunblock SPF 100+” sunscreen product, which did not include DEHN, provided extremely high, photostable UVA/UVB protection.

DEFENDANT’S INFRINGEMENT

22. Merck has been and is now making, using, selling, or offering for sale, within the United States, sunscreen products that contain avobenzone and octocrylene under at least the Coppertone brand (“Merck Sunscreen Products,” listed in Exhibit D, which is incorporated by reference).

23. Upon information and belief, the Merck Sunscreen Products infringe at least one claim in the ’150 patent.

24. Upon information and belief, the Merck Sunscreen Products infringe at least one claim in the ’354 patent.

25. Upon information and belief, Merck has been, and will continue to, unless enjoined by this Court, infringe the ’150 and ’354 patents, by making, using, offering for sale and/or selling sunscreen products, including but not necessarily limited to the Merck Sunscreen Products.

26. Merck, by its infringing products, has caused L'Oréal irreparable harm for which there is no adequate remedy at law.

27. L'Oréal has suffered damage as a result of Merck's infringement to date.

28. This is an exceptional case as that term is used in 35 U.S.C. § 285.

COUNT I

(Infringement of the '150 Patent)

29. The allegations of paragraphs 1 through 28 are incorporated by reference as though fully set forth herein.

30. Merck has been and is now making, using, selling, or offering for sale, within the United States, sunscreen products which directly infringe one or more claims of the '150 patent, including but not necessarily limited to the Merck Sunscreen Products, identified in Exhibit D, in violation of 35 U.S.C. § 271.

31. Merck's infringement of the '150 patent has been and continues to be willful.

32. Merck's acts of infringement have caused and will continue to cause damage to L'Oréal, and L'Oréal is entitled to recover from Merck the damages sustained by L'Oréal and any additional remedy in an amount to be determined at trial.

33. L'Oréal has suffered irreparable harm by Merck's infringement of the '150 patent and will continue to suffer irreparable harm in the future unless and until Merck is enjoined from infringing the '150 patent.

34. Upon information and belief, Merck will continue to infringe the '150 patent unless and until Merck is enjoined by this Court.

COUNT II

(Infringement of the '354 Patent)

35. The allegations of paragraphs 1 through 28 are incorporated by reference as though fully set forth herein.

36. Merck has been and is now making, using, selling, or offering for sale, within the United States, sunscreen products which directly infringe one or more claims of the '354 patent, including but not necessarily limited to the Merck Sunscreen Products, identified in Exhibit D, in violation of 35 U.S.C. § 271.

37. Merck's infringement of the '354 patent has been and continues to be willful.

38. Merck's acts of infringement have caused and will continue to cause damage to L'Oréal, and L'Oréal is entitled to recover from Merck the damages sustained by L'Oréal and any additional remedy in an amount to be determined at trial.

39. L'Oréal has suffered irreparable harm by Merck's infringement of the '354 patent and will continue to suffer irreparable harm in the future unless and until Merck is enjoined from infringing the '354 patent.

40. Upon information and belief, Merck will continue to infringe the '354 patent unless and until Merck is enjoined by this Court.

PRAYER FOR RELIEF

WHEREFORE, L'Oréal prays for judgment against Merck as follows:

(a) judgment that Defendant has infringed the '150 and '354 patents in violation of 35 U.S.C. § 271;

(b) an injunction against continued infringement of the '150 and '354 patents (35 U.S.C. § 283);

(c) an award of damages adequate to compensate L'Oréal for Defendant's infringement of the '150 patent and the '354 patent, together with interest and costs as fixed by the Court (35 U.S.C. § 284);

(d) increased and treble damages for willful infringement (35 U.S.C. § 284);

(e) a finding that this is an exceptional case (35 U.S.C. § 285);

(f) its attorneys' fees (35 U.S.C. § 285);

(g) its costs (Fed. R. Civ. P. 54(d)); and

(h) any other relief appropriate under the circumstances.

DEMAND FOR TRIAL BY JURY

Pursuant to Federal Rule of Civil Procedure 38(b), L'Oréal hereby demands a trial by jury of all issues so triable in this action.

Respectfully submitted,

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

Barry J. Herman
Jeffrey B. McIntyre
Tia D. Fenton
OBLON, SPIVAK, McCLELLAND,
MAIER & NEUSTADT, LLP
1940 Duke St.
Alexandria, VA 22314
Tel.: (703) 413-3000

By: /s/ Richard L. Horwitz
Richard L. Horwitz (#2246)
David E. Moore (#3983)
Hercules Plaza, 6th Floor
1313 N. Market Street
Wilmington, DE 19801
Tel: (302) 984-6000
rhorwitz@potteranderson.com
dmoore@potteranderson.com

Dated: January 27, 2012
1044802 / 38763

*Attorneys for Plaintiffs L'Oréal S.A. and
L'Oréal USA, Inc.*