

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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|--|---|-----------------------|
| LIQWD, INC. and OLAPLEX LLC, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | C. A. No. 17-14 (SLR) |
| |) | |
| L'ORÉAL USA, INC., L'ORÉAL USA |) | REDACTED - |
| PRODUCTS, INC, L'ORÉAL USA S/D, |) | PUBLIC VERSION |
| INC., and REDKEN 5 TH AVENUE NYC, |) | |
| L.L.C., |) | |
| |) | |
| Defendants. |) | |

**PLAINTIFFS' OPENING BRIEF IN SUPPORT
OF MOTION FOR PRELIMINARY INJUNCTION**

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Plaintiffs Liqwd, Inc., and Olaplex LLC (together hereinafter, “Olaplex”) hereby move to preliminarily enjoin Defendants L’Oréal USA, Inc., L’Oréal USA Products, Inc., L’Oréal USA S/D, Inc. and Redken 5th Avenue NYC, L.L.C. (collectively, “L’Oréal”) from patent infringement.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

L’Oréal recently launched three products that infringe Olaplex’s proprietary technology embodied in U.S. Patent No. 9,498,419 (“the ‘419 patent-in-suit”). L’Oréal’s infringing knockoffs compete directly with Olaplex’s patented products in a two-player national market, and unless enjoined, L’Oréal’s infringement will continue to cause Olaplex irreparable harm in the form of lost market share and opportunities, price erosion, and damage to goodwill and reputation. Olaplex seeks to enjoin L’Oréal from engaging in these unlawful activities.

Olaplex was founded in 2014 after CEO Dean Christal partnered with Drs. Craig Hawker and Eric Pressly to invent the holy grail of hair products: a protective additive for chemical treatments that would prevent hair damage. Their novel approach created a brand new “bond builder” hair care product category, and allowed Olaplex to be hugely successful in less than two years. Olaplex has many patents on this technology, including the ‘419 patent-in-suit.

The market response to Olaplex’s revolutionary products grew as word spread about a “miracle treatment” and Olaplex’s sales skyrocketed. L’Oréal took notice and tried—unsuccessfully—to hire away Olaplex’s inventor chemists Drs. Hawker and Pressly. L’Oréal then enticed Olaplex to attend multiple meetings with L’Oréal’s senior executives under the pretense of L’Oréal wanting to acquire Olaplex’s company. L’Oréal executed a Confidentiality Agreement (“NDA”) with Olaplex and received valuable trade secrets from Olaplex about its then pending patents, products, testing, development, financials and marketing strategies.

But L'Oréal never truly wanted to acquire Olaplex. Instead, L'Oréal chose to steal Olaplex's trade secret information it received under the NDA and use this information to copy Olaplex's patented technology to gain accelerated entry into this new product category. L'Oréal's knockoff products include the Matrix Bond Ultim8 Step 1 Amplifier, Redken pH-Bonder #1 Bond Protecting Additive, and L'Oréal Professionnel Smartbond Step 1 Additive (collectively the "Accused Products"¹), all of which use Olaplex's patented "maleic acid" technology. L'Oréal launched these products between August and November 2016, before the '419 patent issued on November 22, 2016. Critically, L'Oréal's trade secret theft gave it a substantial "head-start" in bringing these products to market before issuance of the '419 patent by sidestepping, among other things, formula identification, development, and testing.

Olaplex more than meets the standard required to enjoin L'Oréal from engaging in these unlawful activities. First, there is no serious debate that use of L'Oréal's Accused Products infringes the '419 patent. Olaplex's expert, Dr. Borish, explains in detail using L'Oréal's own publicly available information how the Accused Products meet each element of at least one asserted claim. Given the presumption of validity, and the extensive prior art considered by the United States Patent and Trademark Office, Olaplex is highly likely to prevail on the merits.

Second, L'Oréal's infringing Accused Products will continue to irreparably harm Olaplex in myriad ways. This is a direct-competitor case in a two-player national market where courts recognize the risk of irreparable harm is at its greatest. Unlike L'Oréal, Olaplex is not an international conglomerate with thousands of products. Olaplex currently makes only the

¹ L'Oréal's bond builder systems are sold as a three-step system: the accused bond builder additive (Step 1) and the bond perfecting wash (Step 2), which are sold together in kit form, and the at-home maintenance product (Step 3), which is sold separately. Olaplex's '419 patent covers the Step 1 product for each system. L'Oréal's accused Step 1 products are essentially the same product packaged and marketed with different trade names.

Olaplex bond builder system. Each sale of L'Oréal's Accused Products has led to incalculable lost market share and opportunities, magnified by L'Oréal's market power and size disparity compared to Olaplex. In addition, L'Oréal has eroded prices for Olaplex's products by pricing the Accused Products well below Olaplex and irreparably damaged Olaplex's reputation and goodwill. Waiting until after trial on the merits is not an option. The irreparable damage to Olaplex will already be done.

Third, the balance of equities favors Olaplex. Olaplex's bond builder system, and the patents covering its technology, are the heart of its business. In contrast, L'Oréal has only just begun to market the Accused Products and sales undoubtedly account for just a small fraction of L'Oréal's revenues. Moreover, any harm to L'Oréal is of its own making since it willfully misappropriated and infringed Olaplex's technology to capitalize on this new product category.

Finally, there is a strong public interest in enforcing patent rights, particularly when the infringing product directly competes with the patentee's product.

II. STATEMENT OF FACTS

A. Olaplex Company History and Its Products

Olaplex is a growth company (headquartered in Santa Barbara, CA) in the business of innovating and selling hair care products, including the revolutionary Olaplex "bond builder" hair care system invented by scientists, Drs. Craig Hawker and Eric Pressly. Christal Dec. ¶¶ 3-4; Hawker Dec. ¶ 5. Dean Christal, President/CEO, founded Liqwd (the company that holds Olaplex's IP) in 2008, and Olaplex LLC in 2014. Christal Dec. ¶¶ 1, 3.

Mr. Christal partnered with Drs. Hawker and Pressly in 2012 to invent and develop products to protect hair from the well-known damage that occurs during chemical services. Christal Dec. ¶ 4; Hawker Dec. ¶ 6. Drs. Hawker and Pressly sought out different chemistries to protect chemically treated hair. Hawker Dec. ¶ 6. They worked with Mr. Christal in Dr.

Pressly's home garage over several months evaluating candidate compositions applied to hair swatches while subjecting them to chemicals and subsequent washings. *Id.* Drs. Hawker and Pressly ultimately discovered the unexpected performance of compositions with certain active agents, including but not limited to bis-aminopropyl diglycol dimaleate, maleic acid, and other agents, that provide protection to hair during chemical bleaching. *Id.* ¶ 7. These discoveries allowed Olaplex to commercialize a three step "bond builder" hair care system: Bond Multiplier (No. 1), Bond Perfector (No. 2), and Hair Perfector (No. 3). *Id.*; Christal Dec. ¶ 4.

This innovation created an entirely new hair care product category in 2014, and Olaplex was the first and only company to sell a product of this kind in the National Market (as defined below) until L'Oréal began infringing Olaplex's '419 patent. Walden Dec. ¶ 4; Mody Dec. ¶ 8, Ex. B.² Olaplex has filed over 100 patent applications around the world covering its novel products (and alternative formulations) and methods. Walden Dec. ¶ 3. To date, at least 10 patents (including four U.S. patents) have issued covering these inventions, including the '419 patent-in-suit that L'Oréal is infringing. *Id.*

B. The '419 Patent-In-Suit

The '419 patent, titled "Keratin Treatment Formulations And Methods," issued on November 22, 2016. Hawker Dec. ¶ 1, Ex. A (hereinafter, the "'419 Patent"). As the patent explains, many hair treatments use chemicals to break natural bonds in hair. '419 Patent at 1:24-2:10, 2:23-33, 23:63-24:2; Borish Dec. ¶ 28. To solve this problem, the '419 patent describes formulations and methods that treat hair that has been damaged during bleaching. Borish Dec. ¶

² Other manufacturers have purported to introduce *similar* products to Olaplex on a small scale, but these products are not considered substitutes because they do not prevent and reduce damage to the hair during chemical treatments like Olaplex's products. Mody Dec. ¶ 9. Rather, these products generally coat hair so that it looks and feels shiny without actually fixing the damage caused during bleaching that is solved by Olaplex's patented technology. *Id.*; Lim Dec. ¶ 9.

31. A typical bleaching process involves two chemicals: a powder lightener, i.e., bleach, and a “developer” (usually peroxide). ‘419 Patent at 16:56-58; Borish Dec. ¶ 29. As described, novel formulations with polyfunctional actives are applied at the same time as the hair bleaching treatment. ‘419 Patent at 3:20-35; Borish Dec. ¶ 31. One of the claimed methods for bleaching hair that provides the novel protections involves combining a formulation including maleic acid with a bleaching formulation to create a mixture with a specific concentration range of the active compound, which is then applied to hair during the bleaching process. ‘419 Patent at 25:42-26:5; Borish Dec. ¶ 31.

C. L’Oréal’s Infringing Products, Market and Pricing

L’Oréal is a French cosmetics company headquartered in Clichy, Hauts-de-Seine and New York City. It is the world’s largest beauty and cosmetics company and makes and sells thousands of products in a variety of product categories.

L’Oréal is fully aware of the value of the ‘419 patented inventions, as well as its infringement of the patent. In 2014, a L’Oréal subsidiary (Salon Centric) entered into a contract to distribute Olaplex’s bond building system throughout the United States. Christal Dec. ¶ 5. L’Oréal, which is vertically integrated with Salon Centric, took notice as Olaplex’s sales of this revolutionary system skyrocketed in late 2014 and early 2015 and began discussing a possible acquisition. *See id.* ¶ 6. In March of 2015, it tried unsuccessfully to poach Olaplex’s inventor chemists, but Drs. Hawker and Pressly did not respond to L’Oréal’s advances. Hawker Dec. ¶ 8. When L’Oréal’s plan to steal Olaplex’s inventor chemists failed, it intensified its efforts to approach Olaplex’s CEO, Mr. Christal, under the pretense of exploring a potential acquisition of Olaplex by L’Oréal. Christal Dec. ¶¶ 6-9.

An NDA was executed between L’Oréal and Olaplex, and Olaplex provided L’Oréal with, among many other things, a copy of Olaplex’s then unpublished maleic acid patent

application describing Olaplex's technology. Christal Dec. ¶ 7, Ex. A and B; *see also* D.I. 1, ¶¶ 46-54. This confidential unpublished patent application ultimately led to a continuation patent application that later issued as the '419 patent.

L'Oréal brought numerous senior executives to its meetings with Olaplex, including L'Oréal's research division lead chemist. Christal Dec. ¶ 8. L'Oréal asked probing questions about Olaplex's technology and the unpublished patent application. *Id.*; *see also* D.I. 1, ¶¶ 46-54. After meeting with Olaplex on multiple occasions, L'Oréal had the information it needed to develop infringing products and accordingly dropped the pretense and told Olaplex that it was no longer interested in acquiring the company (or its technology). Christal Dec. ¶ 8.

Knowing full well that Olaplex had pending patent applications to protect its technology, L'Oréal chose to breach the parties' NDA and misappropriate Olaplex's trade secret information to get a substantial "head start" in developing infringing knock off bond builder products. It did not spend time and money to invent, develop, and test its own novel formulations and methods. Instead, L'Oréal's Accused Products use the formulations and methods claimed in the '419 patent, including maleic acid as the active ingredient. Borish Dec. ¶¶ 40-108, Appendices ("Appx.") 1-3. [REDACTED]

[REDACTED]

[REDACTED]³

The Accused Products immediately competed directly with Olaplex's patented products. Christal Dec. ¶ 9. L'Oréal markets the Accused Products to the same end-consumers,

³ While this motion to preliminarily enjoin L'Oréal's patent infringement, Olaplex believes it may be appropriate to also enjoin L'Oréal on the basis of its breach of the NDA and misappropriation of Olaplex's trade secrets. Olaplex reserves the right to seek leave to supplement this motion with such grounds based on information learned through discovery.

professional hair stylists, and uses similar messaging as Olaplex, touting the Accused Products' ability to protect and repair bonds during lightening.⁴ *Id.* [REDACTED]

[REDACTED] Cosmoprof and Salon Centric, which is a L'Oréal subsidiary, sell L'Oréal's Accused Products directly against Olaplex. Walden Dec. ¶ 5; Mody Dec. ¶ 11. Prior to the sale of the Accused Products, Olaplex was the only "bond builder" sold in the National Market. Walden Dec. ¶ 3; Mody Dec. ¶ 10.

In addition, L'Oréal prices its Accused Products below the price of Olaplex's products. Walden Dec. ¶ 8; Mody Dec. ¶ 12. Moreover, since the Accused Products have been on the market, L'Oréal has extensively discounted the retail price and "bundled" the Accused Products with other L'Oréal products to convert Olaplex's customers to the Accused Products at a dramatically reduced effective cost. Walden Dec. ¶¶ 9-10; Mody Dec. ¶¶ 12-14.

D. Market Effects of L'Oréal's Infringement

Olaplex has percipient and expert testimony and market evidence showing the irreversible damage L'Oréal's infringement will continue to have on the market for Olaplex's products. *See infra* Section III.B. Without a preliminary injunction, Olaplex's patent protection will be eviscerated and the market Olaplex has established for its patented products and related hair care products will shrink, prices will erode, market opportunities will be lost, and Olaplex's goodwill and reputation will be forever tarnished.

4 [REDACTED]

III. ARGUMENT

A preliminary injunction is warranted where there is (a) likely success on the merits, (b) likely irreparable harm, (c) equities favoring the movant, and (d) public interest in the injunction. *See Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1375-76 (Fed. Cir. 2009).⁵ When considering the above factors in a preliminary injunction case, this Court has noted that “equal weight for each factor is not required since the formula cannot be reduced to a set of rigid rules.” *Honeywell Int’l, Inc. v. Universal Avionics Sys. Corp.*, 397 F. Supp. 2d 537, 548 (D. Del. 2005). The Third Circuit adopts a “sliding-scale approach” to balancing the factors. *In re Revel AC, Inc.*, 802 F.3d 558, 567-68 (3d Cir. 2015).

A. Olaplex Will Succeed on the Merits

Olaplex’s technical expert, Dr. Borish, conducted a detailed element-by-element analysis of L’Oréal’s infringement for each Accused Product against asserted claim 1 of the ‘419 patent.⁶ Borish Dec. ¶¶ 40-108, Appx. 1-3. Dr. Borish’s declaration, claim charts, and accompanying exhibits setting forth this analysis demonstrate that use of L’Oréal’s Accused Products infringes. L’Oréal is unlikely to prove that asserted claim 1 of the ‘419 patent is invalid.

1. Use of L’Oréal’s Accused Products Infringes the ‘419 Patent

Claims are generally given their ordinary and customary meaning to a person of ordinary skill in the relevant art at the time of the invention. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005) (*en banc*). Here, the words used in ‘419 patent claim 1 have well-understood meanings. Borish Dec., ¶¶ 34-39. Nothing in the patent, or its file history, requires deviation

⁵ Federal Circuit law governs the preliminary injunction standards for patent infringement cases. *See Hybritech, Inc. v. Abbott Labs.*, 849 F.2d 1446, 1451 n.12 (Fed. Cir. 1988) (recognizing “that purely procedural questions involving the grant of a preliminary injunction are controlled by the law of the appropriate regional circuit.”).

⁶ Only one instance of infringement of one claim is needed to grant an injunction. *Abbott Labs. v. Andrx Pharmaceuticals, Inc.*, 473 F.3d 1196, 1201 (Fed. Cir. 2007).

from the ordinary meanings. *Id.*; *Phillips*, 415 F.3d at 1312. As such, a claim construction hearing is not necessary to decide this motion and L'Oréal's direct and indirect infringement⁷ of '419 patent asserted claim 1 is clear. Claim 1 recites the following elements:

(i) *"A method for bleaching hair"*

To the extent the preamble of claim 1 is limiting, L'Oréal's Accused Products are unquestionably part of "a method for bleaching hair." Borish Dec. ¶ 42. The '419 patent uses the word "bleaching" with reference to hair in its plain and ordinary way: "lightening." *Id.* ¶¶ 35, 42. L'Oréal instructs hair care professionals to combine the Accused Products with bleach, which it calls "lightener" in its instructions for use. *Id.* ¶¶ 43-47. L'Oréal's promotional videos also show L'Oréal applying the Accused Products Step 1 bond additive mixed with bleach to hair, and the result is lighter colored hair. *Id.*, Ex. Y (videos). As such, the preamble, if limiting, is met by use of the Accused Products. *See also* Appx. 1-3.

(ii) *"mixing a formulation comprising an active agent with a bleaching formulation, wherein the active agent has the formula [of maleic acid] or salts thereof"*

L'Oréal directs hair care professionals to mix the Accused Products (a formulation comprising an active agent) with lightener (a bleaching formulation). Borish Dec. ¶¶ 49, 52, 55, 57. The material safety data sheets for the Accused Products show that the active agent in the Accused Products is maleic acid. *Id.* ¶¶ 51, 54. In addition, maleic acid is listed as one of the ingredients on the Accused Products. *Id.* ¶¶ 48, 51, 54, 57. The combination of "lightener" and developer that L'Oréal instructs hair care professionals to mix with the Accused Products is a bleaching formulation. *Id.* ¶¶ 50, 53, 56. In fact, L'Oréal's product promotional videos show L'Oréal mixing the Accused Products with lightener/developer and the result is that the mixture

⁷ L'Oréal directly infringes the '419 patent through its use and testing of the Accused Products, and with knowledge of the patent, induces hair care professionals to infringe the '419 patent through its explicit instructions for use of the Accused Products as described herein.

lightens the color of the hair. *Id.*, Ex. Y (videos). This limitation is thus met by use of the Accused Products. *See also* Appx. 1-3.

(iii) *“applying the mixture to the hair”*

L’Oréal instructs hair care professionals to apply the above mixture to hair. Borish Dec. ¶¶ 58-66. L’Oréal’s promotional videos for the Accused Products also show L’Oréal applying this mixture to hair. *Id.*, Ex. Y (videos). This limitation, too, is met by use of the Accused Products. *See also* Appx. 1-3.

(iv) *“wherein the active agent in the mixture is at a concentration ranging from about 0.1% by weight to about 50% by weight”*

Dr. Borish’s laboratory test results and L’Oréal’s material safety data sheets and instructions for use of the Accused Products show that the concentration of maleic acid in the Accused Product and bleaching formulation mixture, when mixed in accordance with L’Oréal’s instructions, is within the claimed range. Borish Dec. ¶¶ 67-85; *See also* Appx. 1-3.

Maleic acid is present at a concentration of about 10.2-10.6% by weight (before the Accused Products are mixed with the bleaching formulation). *Id.* ¶¶ 69-71. L’Oréal’s instructions specify the amount of Accused Products that is mixed with the bleaching formulation. *Id.* ¶¶ 72, 77, 80. Analyzing this information demonstrates that the concentration of maleic acid (weight percentage) in the mixture that is applied to the hair is between 0.1% by weight and 50% by weight as claimed. *Id.* ¶¶ 73-76, 78-79, 81-85.

(v) *“wherein the mixture does not contain a hair coloring agent”*

Finally, the Accused Products do not contain a “hair coloring agent” when used in accordance with L’Oréal’s instructions for bleaching treatments.⁸ “Hair coloring agent” has a

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plain and ordinary meaning set forth in the file history, namely, “a colorant or pigment that is customarily used in hair care products, which changes the color or tone of the hair it is applied to based on visual inspection.” Borish Dec. ¶ 39, 86, Ex. B. For example, a colorant or pigment that is intended to permanently, demi-permanently or semi-permanently change the color or tone of hair. Borish Dec. ¶ 39, 86. By contrast, a colorant or pigment that is not intended to change the color or tone of hair, e.g., the colorant or pigment easily washes out or is not visible in the hair, in this fashion is not a “hair coloring agent.” *Id.*

L’Oréal’s Accused Products do not contain any “hair coloring agents,” and their instructions for use do not include such agents for bleaching treatments. Borish Dec. ¶¶ 87-93; *see also* Appx. 1-3. While the ingredient lists for L’Oréal’s Accused Products include three product-coloring chemicals (Yellow 5, Blue 1, and Red 4), these chemicals are not customarily used in hair care products to change the color or tone of hair. *Id.* ¶ 94. L’Oréal has dozens of actual hair coloring products (and by contrast bleach/lightener products) that it markets and sells to color hair. The Accused Products, by contrast, are used as “bond builders” or “additives” to protect and repair hair during chemical treatments, not to color it. Lim Dec. ¶¶ 11-12. In fact, L’Oréal has a number of shampoos and conditioners that contain the above chemicals, which ‘obviously do not color hair. Borish Dec. ¶¶ 94-98.

Rather, L’Oréal likely adds these chemicals to its Accused Products in an attempt to copy the “Liquid Gold” color of Olaplex’s products which Olaplex users identify with Olaplex. Borish Dec. ¶ 99. However, neither Olaplex’s Liquid Gold product-color nor the generic

product-coloring chemicals used in L'Oréal's Accused Products permanently, demi-permanently or semi-permanently change the color or tone of hair. *Id.*

2. Olaplex's '419 Patent Is Valid

"Every patent is presumed valid" and if L'Oréal fails to identify clear and convincing "evidence of invalidity," the mere existence of the issued patent satisfies Olaplex's burden at the preliminary injunction stage. *Purdue v. Boehringer*, 237 F.3d 1359, 1365 (Fed. Cir. 2001).

Less than two months ago, the '419 patent issued with more than 135 prior art references cited on the face of the patent, including U.S. and foreign patents and applications and printed publications. '419 Patent at cover page item (56). The '419 patent also issued over prior art identified and submitted by an apparently motivated (but unidentified) competitor in pre-issuance proceedings (in parallel proceedings for a United Kingdom foreign counterpart application the competitor was identified as L'Oréal).⁹ Indeed, four separate third-party prior art submissions were provided to the patent office in an attempt to prevent Olaplex's '419 patent from issuing. *See* Borish Dec. ¶¶ 110-111. These submissions identified five alleged prior art references—undoubtedly the well-funded competitor's best prior art—and included the competitor's reasons why it believed the references should prevent the '419 patent from issuing. *Id.* The Examiner fully considered the identified prior art and reasoning, and found none of it persuasive. *Id.* ¶ 111, Ex. Z, AA. Given that the patent issued over the competitor's likely best prior art, there is strong likelihood of prevailing on validity.

⁹ While Olaplex believes that the unidentified competitor in the case of the patent-in-suit is L'Oréal, under the America Invents Act (effective Sept. 16, 2012), third-party submissions to the patent office may be made without naming the real party in interest. 35 U.S.C. § 122.

B. Olaplex Has Suffered and Will Continue to Suffer Irreparable Harm if L'Oréal's Infringement Is Not Enjoined

The irreparable harm factor requires Olaplex to show that absent an injunction, it will suffer irreparable harm and that a causal nexus between the harm and infringement exists. *Apple Inc. v. Samsung Elecs. Co.*, 695 F.3d 1370, 1374 (Fed. Cir. 2012). Important to this case, the Federal Circuit and numerous courts have found a high likelihood of irreparable harm when the patent owner and the accused infringer are direct competitors, especially in a two-player market. *See, e.g., Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1345 (Fed. Cir. 2013) (“Where two companies are in competition against one another, the patentee suffers the harm—often irreparable—of being forced to compete against products that incorporate and infringe its own patented inventions.”). In fact, as the court in *Robert Bosch LLC v. Pylon Mfg. Corp.*, found, “the existence of a two-player market may well serve as a substantial ground for granting an injunction.” 659 F.3d 1142, 1151 (Fed. Cir. 2011) (emphasis omitted); *TruePosition Inc. v. Andrew Corp.*, 568 F. Supp. 2d 500, 532 (D. Del. 2008) (“[P]laintiff and defendant are the only suppliers in a two-supplier market, defendant’s infringement has necessarily affected plaintiff’s market position. On this record, plaintiff has established irreparable harm.”).

Actual and/or potential lost market share, opportunities, price erosion, and damage to goodwill and reputation all demonstrate irreparable harm. *Douglas Dynamics*, 717 F.3d at 1344. With any of these showings, “[t]he patent statute provides injunctive relief to preserve the legal interests of the parties against future infringement which may have market effects never fully compensable in money.” *Reebok Int’l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1557 (Fed. Cir. 1994). Moreover, L’Oréal should be estopped from arguing against such relief where, as here, it agreed to such relief when breaching the NDA to get a “head start” on infringement. *See Christal Dec.*, Ex. B at ¶ 15; *N. Atl. Instruments, Inc. v. Haber*, 188 F.3d 38 (2d Cir. 1999) (affirming

preliminary injunction where defendant agreed breach of confidentiality obligation would cause irreparable injury).

1. Irreparable Harm Is Highly Likely Since Olaplex and L'Oréal Are Direct Competitors in a Two-Player National Market, and the Patent Protects Olaplex's Core Business

Olaplex literally created a new product category, which its patents broadly cover, when it invented its “bond builder” hair care system. Christal Dec. ¶ 4; Walden Dec. ¶ 3; Mody Dec. ¶¶ 5, 8; Lim Dec. ¶ 8. With L'Oréal's entrance into the National Market, it became a direct competitor with Olaplex and created a two-player National Market. Christal Dec. ¶ 9; Walden Dec. ¶ 5; Lim Dec. ¶ 11; Mody Dec. ¶¶ 5-17. Indeed, L'Oréal's Accused Products are designed and intended to compete with Olaplex as “bond builders.” *Id.* As such, Olaplex is now being forced “to compete against its own patented invention, with the resultant [irreparable] harms described above, [which] places a substantial hardship on [Olaplex].” *Robert Bosch*, 659 F.3d at 1156. There are no other participants in the bond builder product category in the National Market and Olaplex has no intention of licensing L'Oréal or anyone else under the '419 patent since Olaplex's patented products are its core, and in fact, its only business. Walden Dec. ¶ 15; Mody Dec. ¶ 17. Any argument that Olaplex could simply be compensated with monetary damages for patent infringement by L'Oréal would eviscerate the protections of Olaplex's patent as an exclusive right in the market that is its core business. By retaining exclusive rights to the '419 patent (and Olaplex's other patents covering this product category), Olaplex has ensured that potential copiers of its technology, such as L'Oréal, are excluded from this market that is fundamental to the success of Olaplex's products.

Moreover, there is a substantial risk that L'Oréal's continued infringement suggests to others that this market is open to new entrants, even those that may be infringing, leading to irreparable harm. *Upjohn Co. v. Medtron Labs., Inc.*, 751 F. Supp. 416, 430 (S.D.N.Y. 1990)

(“[Medtron’s] continued infringement, left unchecked, could conceivably encourage many others to infringe.”), *aff’d without op.*, 937 F.2d 622 (Fed. Cir. 1991). This would create immeasurable harm to Olaplex (especially given its comparatively smaller size and financial resources) and the risk is heightened due to L’Oréal’s false statements to the market that Olaplex’s products are not patented and that its patents expired. Walden Dec. ¶¶ 15-16; Mody Dec. ¶ 17.

2. L’Oréal’s Infringement Has Caused and Will Continue to Cause Olaplex to Lose Market Share and Business Opportunities

Olaplex has and will continue to lose market share and market opportunities because of L’Oréal’s infringement, including for Olaplex’s patented Bond Multiplier (No. 1) itself, as well as Olaplex’s Bond Perfector (No. 2) and Hair Perfector (No. 3) products, and other new products. Mody Dec. ¶¶ 18-20, 24-26. For example, Olaplex’s bond builder hair care system historically enjoyed unique promotional opportunities in the Salon Centric distribution channel prior to L’Oréal’s launch of the Accused Products. Salon Centric specifically targeted its customers who purchased bleach and hair color to also purchase Olaplex’s system. Walden Dec. ¶ 6. However, Salon Centric informed Olaplex after launch of the Accused Products that it would no longer market or target Salon Centric customers who buy L’Oréal branded bleach or hair color [REDACTED] to also buy Olaplex. *Id.* This is a significant lost market opportunity for Olaplex, and will likely result in lost market share if L’Oréal continues infringing. *Id.* ¶¶ 6, 12-14; Mody Dec. ¶ 25.

Olaplex’s other products (Bond Perfector (No. 2) and Hair Perfector (No. 3) also suffer lost market share and opportunities because of L’Oréal’s infringement. Olaplex sells the Bond Multiplier (No. 1) and Bond Perfector (No. 2) products together in a kit. Walden Dec. ¶ 7; Mody Dec. ¶¶ 12-13. Hairstylists that use Bond Multiplier on a client’s hair are likely to use the Bond Perfector after bleaching since they are sold as a system and the No. 2 product has already been

purchased. Walden Dec. ¶ 7. Similarly, Olaplex’s No. 3 product is offered for sale to customers for take-home use as part of the Olaplex system. *Id.* Accordingly, a hair stylist who uses the Accused Products on a client (instead of Olaplex’s Bond Multiplier) is not likely to recommend Olaplex’s Hair Perfector (No. 3) for home use. *Id.*; Lim Dec. ¶ 13. As such, each customer that L’Oréal convinces to use the Accused Products (instead of Olaplex’s Bond Multiplier) represents lost market share and opportunities for Olaplex’s entire bond builder system. Mody Dec. ¶¶ 18-20; Walden ¶ 8.

In addition, each Accused Product sale negatively impacts Olaplex’s professional and retail customer base. *Id.* Hair stylists, salons and clients are brand loyal and price conscious. Lim Dec. ¶ 13. Thus, each customer enticed to use the Accused Products (and by extension products in its “system”) instead of Olaplex’s products is likely to continue using the Accused Products in the future. *Id.* By the same token, L’Oréal’s infringement will cause Olaplex, which is a comparatively small but growing company, to lose opportunities to market new products and expand its customer base. Mody Dec. ¶¶ 18-26. It would be difficult, if not impossible, to value these lost opportunities if L’Oréal’s infringement continues eroding Olaplex’s customer base. *Id.*

3. L’Oréal’s Infringement Has Caused and Will Continue to Cause Price Erosion for Olaplex’s Patented and Other Products

L’Oréal’s direct sales against Olaplex has led to price erosion in Olaplex’s products. For example, for the short time after the Accused Products launched and before the asserted ‘419 patent issued, Olaplex was forced to begin to give its Back-Bar Bond Perfector No. 2 product away for free with the purchase of a large kit in order to compete with L’Oréal’s lowball pricing and aggressive discounting and bundling. Walden Dec. ¶¶ 8-11. [REDACTED]

[REDACTED]

Without an immediate injunction, L'Oréal's actions will undoubtedly lead to further irreversible price erosion. Mody Dec. ¶¶ 18-20.

To wit, L'Oréal uses cheaper ingredients in its Accused Products than Olaplex uses in its patented products, and L'Oréal avoided research and development costs that Olaplex incurred to develop the patented technology. Walden Dec. ¶ 8; Christal Dec. ¶ 8. As such, even putting aside its aggressive discounting and bundling, L'Oréal is able to price its Accused Products and related products more cheaply than Olaplex. Walden Dec. ¶ 8. To date, at least four L'Oréal "elite" salons that previously used Olaplex stopped selling Olaplex's patented products in favor of L'Oréal's cheaper infringing Accused Products. Walden Dec. ¶ 12. If L'Oréal's infringement continues and expands, customers who have not yet switched brands or demanded price reductions will likely do so in response to L'Oréal's infringing (albeit cheaper) Accused Products. *Id.* at ¶ 13. Thus, if L'Oréal continues infringing the '419 patent, Olaplex will be forced to alienate customers and lose revenue by maintaining its current pricing, or drop prices during the period of infringement (causing immediate revenue decreases) in order to compete with L'Oréal, making it difficult if not impossible to raise prices later when L'Oréal's infringement is stopped. Mody Dec. ¶¶ 18-20; *see, e.g., Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (affirming finding of irreparable harm where patentee changed pricing model to compete). In fact, L'Oréal's pricing has already engendered numerous negative reviews and complaints directed toward Olaplex's pricing. Walden Dec. ¶ 13.

Price erosion to Olaplex's products under the facts of this case is inevitable, and will be permanent, absent a preliminary injunction. Mody Dec. ¶ 18. It would be extremely difficult for Olaplex to raise prices once customers have received lower prices for essentially the same product in the same stores. *Id.* ¶ 20; *see also Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970,

975-76 (Fed. Cir. 1996) (“Years after infringement has begun, it may be impossible to restore a patentee’s . . . exclusive position by an award of damages and a permanent injunction Requiring purchasers to pay higher prices after years of paying lower prices to infringers is not a reliable business option.”). Thus, the opportunity for Olaplex to price its products as it currently does is seriously undermined by L’Oréal’s infringement and pricing strategy. Such price erosion would be very difficult if not impossible to measure. Mody Dec. ¶¶ 18-20.

4. L’Oréal’s Infringement Has Damaged and Will Continue to Damage Olaplex’s Goodwill and Reputation

Olaplex invests considerable resources in developing its reputation and goodwill through social media. Walden Dec. ¶ 14. In fact, Olaplex has one of the most active social media networks in the professional hair care industry, and the highest earned media value in the hair care industry (both professional and consumer). Mody Dec. ¶¶ 21-23. The result of these efforts is invaluable because hairstylists use social media to market themselves (and by extension, the companies and products they use and promote), and consumers learn what products to buy or to request in their professional services in order to achieve the results pictured in social media. Lim Dec. ¶ 13; Mody Dec. ¶ 23. In this way, L’Oréal’s infringement has damaged Olaplex’s goodwill and reputation where salons, hairstylists and customers have tagged or linked to the Accused Products instead of Olaplex. Walden Dec. ¶ 14; Mody Dec. ¶ 23. Indeed, L’Oréal’s very entrance into the market diverts social media endorsements and potential customer purchases away from Olaplex. *Id.* Relatedly, L’Oréal’s cheaper infringing Accused Products have led to negative customer reviews about Olaplex. It is impossible to calculate the damage to Olaplex’s goodwill and reputation from these actions. Mody Dec. ¶ 26.

5. L’Oréal’s Infringement is the Cause of Olaplex’s Harm

The irreparable harm to Olaplex is a direct result of L’Oréal’s infringement. *See Apple*, 695 F.3d at 1375. Olaplex invented the bond builder product category. Olaplex’s patented

products were and would still be the only product offering in the National Market but for L'Oréal's infringement. Under these circumstances, all of the irreparable harm to Olaplex is directly attributable to L'Oréal's infringement. Thus, the causal relationship is direct and clear.

C. The Balance of Equities Favors Entry of a Preliminary Injunction

The balancing of the hardships favors entry of a preliminary injunction against L'Oréal. As the court in *Power Survey v. Premier Utility Services* explained, in balancing the hardships "it is appropriate to consider, among other things: (1) the fact that the field of technology covered by the patent is new; (2) the fact that the patentee has a large presence in the field; (3) the patent could help establish a market presence and create business relationships; and (4) in the absence of an injunction, other infringers would be encouraged to join." 61 F. Supp. 3d 477, 486 (D.N.J. 2014) (*citing Hybritech*, 849 F.2d at 1456).

Here, Olaplex created the bond builder product category a little more than two years ago and was the only participant in the National Market until L'Oréal started infringing the '419 patent. Olaplex is essentially a one product company offering only its bond builder hair care system. Olaplex is committed to and capable of meeting the growth and demand for its patented system. Without an injunction, the irreparable harm that Olaplex has already suffered because of L'Oréal's infringement will be exacerbated by encouraging others to infringe.

By contrast, L'Oréal is a very large and well-established company whose overall business would not be greatly affected by a preliminary injunction. *See Power Survey*, 61 F. Supp. 3d at 486 ("[g]ranting the injunction would only affect one line of Defendants' businesses [while] Power Survey's major revenue source is the [patented] services, [and] it would face a greater comparative hardship if the injunction were not granted."). Moreover, because L'Oréal avoided research and development costs by misappropriating and copying Olaplex's technology, and only began selling the Accused Products very recently, its investment is limited. Any harm to

L'Oréal would be “the result of its own calculated risk in selling a product with knowledge of [Olaplex’s] patent.” *Celsis*, 664 F.3d at 931. And L'Oréal’s agreement to injunctive relief for breach of the NDA shows that it was aware of the consequences and expected to be enjoined. Christal Dec., Ex. B at ¶ 15.

D. The Public Interest Favors Entry of a Preliminary Injunction

There is a strong public interest in enforcing patent rights, particularly when the infringing product directly competes with the patentee’s product. *See Impax Labs., Inc. v. Aventis Pharm., Inc.*, 235 F. Supp. 2d 390, 397 (D. Del. 2002) (“[S]trong public interest in protecting valid patents by preventing the premature entry of [infringing products] into the marketplace.”); *E.I. du Pont de Nemours & Co. v. Polaroid Graphics Imaging, Inc.*, 706 F. Supp. 1135, 1146 (D. Del. 1989), *aff’d*, 887 F.2d 1095 (Fed. Cir. 1989) (finding that the “public has an interest in protection of rights found in valid patents.”). Moreover, “[t]o the extent that this Court has found a substantial likelihood that the [patent in suit] is valid and enforceable, there can be no serious argument that public interest is not best served by enforcing it.” *See Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1361 (Fed. Cir. 2008).

IV. CONCLUSION

For the foregoing reasons, Olaplex requests that the Court issue a preliminary injunction to enjoin L'Oréal from infringing the ‘419 patent.

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