

<p>1 PAUL, HASTINGS, JANOFSKY & WALKER LLP ROBERT L. SHERMAN 2 <i>PRO HAC VICE</i> (New York Bar No. 1189521) SARA J. CRISAFULLI 3 <i>PRO HAC VICE</i> (New York Bar No. 4343976) 75 East 55th Street 4 New York, NY 10022 Telephone: (212) 318-6000 5 Facsimile: (212) 319-4090</p>	<p>WINSTON & STRAWN LLP ANDREW P. BRIDGES (Bar No. 122761) JENNIFER GOLINVEAUX (Bar No. 203056) JOSEPH M. MORRIS (Bar No. 245000) 101 California Street San Francisco, CA 94111-5894 Telephone: (415) 591-1000 Facsimile: (415) 591-1400</p>
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<p>6 PAUL, HASTINGS, JANOFSKY & WALKER LLP MARK E. MCKEEN (Bar No. 130950) 7 SEAN D. UNGER (Bar No. 231694) T. LEE KISSMAN (Bar No. 233434) 8 55 Second Street Twenty-Fourth Floor 9 San Francisco, CA 94105-3441 Telephone: (415) 856-7000 10 Facsimile: (415) 856-7100</p>	<p>Attorneys for Plaintiff BARE ESCENTUALS BEAUTY, INC.</p>
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11 Attorneys for Defendants
 12 L'ORÉAL USA, INC. and L'ORÉAL S.A.

13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN FRANCISCO DIVISION

16 BARE ESCENTUALS BEAUTY, INC., a
 Delaware corporation,

17 Plaintiff,

18 vs.

19 L'ORÉAL USA, INC., a Delaware corporation,
 20 and L'ORÉAL S.A., a French Société Anonyme

21 Defendants.

Case No. C-07-1669 MMC

STIPULATED PROTECTIVE ORDER

23 1. PURPOSES AND LIMITATIONS

24 Disclosure and discovery activity in this action are likely to involve production of
 25 confidential, proprietary, or private information for which special protection from public disclosure
 26 and from use for any purpose other than prosecuting this litigation would be warranted.

27 Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated
 28 Protective Order. The parties acknowledge that this Order does not confer blanket protections on all

1 disclosures or responses to discovery and that the protection it affords extends only to the limited
2 information or items that are entitled under the applicable legal principles to treatment as
3 confidential. The parties further acknowledge, as set forth in Section 10, below, that this Stipulated
4 Protective Order creates no entitlement to file confidential information under seal; Civil Local Rule
5 79-5 sets forth the procedures that must be followed and reflects the standards that will be applied
6 when a party seeks permission from the court to file material under seal. The parties further
7 acknowledge that Defendant L'Oréal S.A., by entering into this stipulation, does not waive any
8 objections to personal jurisdiction and expressly reserves all its objections to personal jurisdiction.

9 2. DEFINITIONS

10 2.1 Party: any party to this action, including all of its officers, directors,
11 employees, consultants, retained experts, and outside counsel (and their support staff).

12 2.2 Disclosure or Discovery Material: all items or information, regardless of the
13 medium or manner generated, stored, or maintained (including, among other things, testimony,
14 transcripts, or tangible things) that are produced or generated in disclosures or responses to
15 discovery in this matter.

16 2.3 "Confidential" Information or Items: information (regardless of how
17 generated, stored or maintained) or tangible things that qualify for protection under standards
18 developed under F.R.Civ.P. 26(c).

19 2.4 "Highly Confidential – Attorneys' Eyes Only" Information or Items:
20 extremely sensitive "Confidential Information or Items" whose disclosure to another Party or non-
21 party would create a substantial risk of serious injury that could not be avoided by less restrictive
22 means.

23 2.5 Receiving Party: a Party that receives Disclosure or Discovery Material from
24 a Producing Party.

25 2.6 Producing Party: a Party or non-party that produces Disclosure or Discovery
26 Material in this action.

1 2.7 Designating Party: a Party or non-party that designates information or items
2 that it produces in disclosures or in responses to discovery as “Confidential” or “Highly Confidential
3 — Attorneys’ Eyes Only.”

4 2.8 Protected Material: any Disclosure or Discovery Material that is designated
5 as “Confidential” or as “Highly Confidential – Attorneys’ Eyes Only.”

6 2.9 Outside Counsel: attorneys who are not employees of a Party but who are
7 retained to represent or advise a Party in this action.

8 2.10 House Counsel: attorneys who are employees of a Party.

9 2.11 Counsel (without qualifier): Outside Counsel and House Counsel (as well as
10 their support staffs).

11 2.12 Expert: a person with specialized knowledge or experience in a matter
12 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert
13 witness or as a consultant in this action and who is not a past or a current employee of a Party or of a
14 competitor of a Party and who, at the time of retention, is not anticipated to become an employee of
15 a Party or a competitor of a Party. This definition includes a professional jury or trial consultant
16 retained in connection with this litigation.

17 2.13 Industry Expert: a person with specialized knowledge or experience in a
18 matter pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert
19 witness or as a consultant in this action and (1) who is employed in the cosmetics industry, (2) who
20 is or has been an employee and/or consultant of a Party, or of any of its affiliates, or of a competitor
21 of a Party, in the past five (5) years, or (3) who, at the time of retention, anticipates becoming an
22 employee and/or consultant in the cosmetics industry.

23 2.14 Professional Vendors: persons or entities that provide litigation support
24 services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations;
25 organizing, storing, retrieving data in any form or medium; etc.) and their employees and
26 subcontractors.

27 3. SCOPE

28 The protections conferred by this Stipulation and Order cover not only Protected Material (as

1 defined above), but also any information copied or extracted therefrom, as well as all copies,
2 excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by
3 parties or counsel to or in court or in other settings that might reveal Protected Material.

4 4. DURATION

5 Even after the termination of this litigation, the confidentiality obligations imposed by this
6 Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order
7 otherwise directs.

8 5. DESIGNATING PROTECTED MATERIAL

9 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each
10 Party or non-party that designates information or items for protection under this Order must take
11 care to limit any such designation to specific material that qualifies under the appropriate standards.
12 A Designating Party must take care to designate for protection only those parts of material,
13 documents, items, or oral or written communications that qualify – so that other portions of the
14 material, documents, items, or communications for which protection is not warranted are not swept
15 unjustifiably within the ambit of this Order.

16 Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown
17 to be clearly unjustified, or that have been made for an improper purpose (e.g., to unnecessarily
18 encumber or retard the case development process, or to impose unnecessary expenses and burdens
19 on other parties), expose the Designating Party to sanctions.

20 If it comes to a Party's or a non-party's attention that information or items that it designated
21 for protection do not qualify for protection at all, or do not qualify for the level of protection initially
22 asserted, that Party or non-party must promptly notify all other parties that it is withdrawing the
23 mistaken designation.

24 5.2 Manner and Timing of Designations. Except as otherwise provided in this
25 Order (see, e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or ordered,
26 material that qualifies for protection under this Order must be clearly so designated before the
27 material is disclosed or produced.

28 Designation in conformity with this Order requires:

1 (a) for information in documentary form (apart from transcripts of
2 depositions or other pretrial or trial proceedings), that the Producing Party affix the legend
3 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” at the top or
4 the bottom of each page that contains protected material. If only a portion or portions of the material
5 on a page qualifies for protection, the Producing Party also must clearly identify the protected
6 portion(s) (e.g., by making appropriate markings in the margins) and must specify, for each portion,
7 the level of protection being asserted (either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
8 ATTORNEYS’ EYES ONLY”).

9 A Party or non-party that makes original documents or materials available for inspection
10 need not designate them for protection until after the inspecting Party has indicated which material it
11 would like copied and produced. During the inspection and before the designation, all of the
12 material made available for inspection shall be deemed “HIGHLY CONFIDENTIAL –
13 ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the documents it wants
14 copied and produced, the Producing Party must determine which documents, or portions thereof,
15 qualify for protection under this Order, then, before producing the specified documents, the
16 Producing Party must affix the appropriate legend (“CONFIDENTIAL” or “HIGHLY
17 CONFIDENTIAL – ATTORNEYS’ EYES ONLY”) at the top of each page that contains Protected
18 Material. If only a portion or portions of the material on a page qualifies for protection, the
19 Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate
20 markings in the margins) and must specify, for each portion, the level of protection being asserted
21 (either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).

22 (b) for testimony given in deposition or in other pretrial or trial
23 proceedings, that the Party or non-party offering or sponsoring the testimony identify on the record,
24 before the close of the deposition, hearing, or other proceeding, all protected testimony, and further
25 specify any portions of the testimony that qualify as “HIGHLY CONFIDENTIAL – ATTORNEYS’
26 EYES ONLY.” When it is impractical to identify separately each portion of testimony that is entitled
27 to protection, and when it appears that substantial portions of the testimony may qualify for
28 protection, the Party or non-party that sponsors, offers, or gives the testimony may invoke on the

1 record (before the deposition or proceeding is concluded) a right to have up to 20 days to identify the
2 specific portions of the testimony as to which protection is sought and to specify the level of
3 protection being asserted (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’
4 EYES ONLY”). Only those portions of the testimony that are appropriately designated for
5 protection within the 20 days shall be covered by the provisions of this Stipulated Protective Order.

6 Transcript pages containing Protected Material must be separately bound by the court
7 reporter, who must affix to the top of each such page the legend “CONFIDENTIAL” or “HIGHLY
8 CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” as instructed by the Party or non-party offering
9 or sponsoring the witness or presenting the testimony.

10 (c) for information produced in some form other than documentary, and
11 for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the
12 container or containers in which the information or item is stored the legend “CONFIDENTIAL” or
13 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” If only portions of the information
14 or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected
15 portions, specifying whether they qualify as “Confidential” or as “Highly Confidential – Attorneys’
16 Eyes Only.”

17 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure
18 to designate qualified information or items as “Confidential” or “Highly Confidential – Attorneys’
19 Eyes Only” does not, standing alone, waive the Designating Party’s right to secure protection under
20 this Order for such material. If material is appropriately designated as “Confidential” or “Highly
21 Confidential – Attorneys’ Eyes Only” after the material was initially produced, the Receiving Party,
22 on timely notification of the designation, must make reasonable efforts to assure that the material is
23 treated in accordance with the provisions of this Order.

24 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

25 6.1 Timing of Challenges. Unless a prompt challenge to a Designating Party’s
26 confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary
27 economic burdens, or a later significant disruption or delay of the litigation, a Party does not waive
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1 its right to challenge a confidentiality designation by electing not to mount a challenge promptly
2 after the original designation is disclosed.

3 6.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating
4 Party's confidentiality designation must do so in good faith and must begin the process by conferring
5 directly (in voice to voice dialogue; other forms of communication are not sufficient) with counsel
6 for the Designating Party. In conferring, the challenging Party must explain the basis for its belief
7 that the confidentiality designation was not proper and must give the Designating Party an
8 opportunity to review the designated material, to reconsider the circumstances, and, if no change in
9 designation is offered, to explain the basis for the chosen designation. A challenging Party may
10 proceed to the next stage of the challenge process only if it has engaged in this meet and confer
11 process first.

12 6.3 Judicial Intervention. A Party that elects to press a challenge to a
13 confidentiality designation after considering the justification offered by the Designating Party may
14 file and serve a motion under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if
15 applicable) that identifies the challenged material and sets forth in detail the basis for the challenge.
16 Each such motion must be accompanied by a competent declaration that affirms that the movant has
17 complied with the meet and confer requirements imposed in the preceding paragraph and that sets
18 forth with specificity the justification for the confidentiality designation that was given by the
19 Designating Party in the meet and confer dialogue.

20 The burden of persuasion in any such challenge proceeding shall be on the Designating
21 Party. Until the court rules on the challenge, all parties shall continue to afford the material in
22 question the level of protection to which it is entitled under the Producing Party's designation.

23 7. ACCESS TO AND USE OF PROTECTED MATERIAL

24 7.1 Basic Principles. A Receiving Party may use Protected Material that is
25 disclosed or produced by another Party or by a non-party in connection with this case only for
26 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be
27 disclosed only to the categories of persons and under the conditions described in this Order. When
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1 the litigation has been terminated, a Receiving Party must comply with the provisions of section 11,
2 below (FINAL DISPOSITION).

3 Protected Material must be stored and maintained by a Receiving Party at a location and in a
4 secure manner that ensures that access is limited to the persons authorized under this Order.

5 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise
6 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
7 disclose any information or item designated CONFIDENTIAL only to:

8 (a) the Receiving Party’s Outside Counsel of record in this action, as well
9 as employees of said Counsel to whom it is reasonably necessary to disclose the information for this
10 litigation and who have signed the “Agreement to Be Bound by Protective Order” that is attached
11 hereto as Exhibit A;

12 (b) the officers, directors, and employees (including House Counsel) of
13 the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have
14 signed the “Agreement to Be Bound by Protective Order” (Exhibit A);

15 (c) experts (as defined in this Order) of the Receiving Party to whom
16 disclosure is reasonably necessary for this litigation and who have signed the “Agreement to Be
17 Bound by Protective Order” (Exhibit A);

18 (d) the Court and its personnel;

19 (e) court reporters, their staffs, and professional vendors to whom
20 disclosure is reasonably necessary for this litigation and who have signed the “Agreement to Be
21 Bound by Protective Order” (Exhibit A);

22 (f) during their depositions, witnesses in the action to whom disclosure is
23 reasonably necessary and who have signed the “Agreement to Be Bound by Protective Order”
24 (Exhibit A). Pages of transcribed deposition testimony or exhibits to depositions that reveal
25 Protected Material must be separately bound by the court reporter and may not be disclosed to
26 anyone except as permitted under this Stipulated Protective Order.

27 (g) the author of the document or the original source of the information.
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1 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
2 Information or Items. Unless otherwise ordered by the court or permitted in writing by the
3 Designating Party, a Receiving Party may disclose any information or item designated “HIGHLY
4 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to:

5 (a) the Receiving Party’s Outside Counsel of record in this action, as well
6 as employees of said Counsel to whom it is reasonably necessary to disclose the information for this
7 litigation and who have signed the “Agreement to Be Bound by Protective Order” that is attached
8 hereto as Exhibit A;

9 (b) Experts (as defined in this Order) (1) to whom disclosure is reasonably
10 necessary for this litigation, and (2) who have signed the “Agreement to Be Bound by Protective
11 Order” (Exhibit A).

12 (c) Industry Experts (as defined in this Order) (1) to whom disclosure is
13 reasonably necessary for this litigation, (2) who have signed the “Agreement to Be Bound by
14 Protective Order” (Exhibit A), and (3) as to whom the procedures set forth in paragraph 7.4, below,
15 have been followed;

16 (d) the Court and its personnel;

17 (e) court reporters, their staffs, and professional vendors to whom
18 disclosure is reasonably necessary for this litigation and who have signed the “Agreement to Be
19 Bound by Protective Order” (Exhibit A); and

20 (f) the author of the document or the original source of the information.

21 7.4 Procedures for Approving Disclosure of “HIGHLY CONFIDENTIAL –
22 ATTORNEYS’ EYES ONLY” Information or Items to “Industry Experts.” Unless otherwise
23 ordered by the court or agreed in writing by the Designating Party, a Party that seeks to disclose to
24 an “Industry Expert” (as defined in this Order) any information or item that has been designated
25 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” first must make a written request to
26 the Designating Party that (1) identifies the specific HIGHLY CONFIDENTIAL information that the
27 Receiving Party seeks permission to disclose to the Industry Expert, (2) sets forth the full name of
28 the Industry Expert and the city and state of his or her primary residence, (3) attaches a copy of the

1 Industry Expert's current resume, (4) identifies the Industry Expert's current employer(s), (5)
2 identifies each person or entity from whom the Industry Expert has received compensation for work
3 in his or her areas of expertise or to whom the Industry Expert has provided professional services at
4 any time during the preceding five years, and (6) identifies (by name and number of the case, filing
5 date, and location of court) any litigation in connection with which the Industry Expert has provided
6 any professional services during the preceding five years.

7 (b) A Party that makes a request and provides the information specified in
8 the preceding paragraph may disclose the subject Protected Material to the identified Industry Expert
9 unless, within seven court days of delivering the request, the Party receives a written objection from
10 the Designating Party. Any such objection must set forth in detail the grounds on which it is based.

11 (c) A Party that receives a timely written objection must meet and confer
12 with the Designating Party (through direct voice to voice dialogue) to try to resolve the matter by
13 agreement. If no agreement is reached, the Party seeking to make the disclosure to the Industry
14 Expert may file a motion as provided in Civil Local Rule 7 (and in compliance with Civil Local Rule
15 79-5, if applicable) seeking permission from the court to do so. Any such motion must describe the
16 circumstances with specificity, set forth in detail the reasons for which the disclosure to the Industry
17 Expert is reasonably necessary, assess the risk of harm that the disclosure would entail and suggest
18 any additional means that might be used to reduce that risk. In addition, any such motion must be
19 accompanied by a competent declaration in which the movant describes the parties' efforts to resolve
20 the matter by agreement (i.e., the extent and the content of the meet and confer discussions) and sets
21 forth the reasons advanced by the Designating Party for its refusal to approve the disclosure.

22 In any such proceeding the Party opposing disclosure to the Industry Expert shall bear the
23 burden of proving that the risk of harm that the disclosure would entail (under the safeguards
24 proposed) outweighs the Receiving Party's need to disclose the Protected Material to its Industry
25 Expert.

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8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION.

If a Receiving Party is served with a subpoena or an order issued in other litigation that would compel disclosure of any information or items designated in this action as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” the Receiving Party must so notify the Designating Party, in writing (by fax, if possible) immediately and in no event more than three court days after receiving the subpoena or order. Such notification must include a copy of the subpoena or court order.

The Receiving Party also must immediately inform in writing the Party who caused the subpoena or order to issue in the other litigation that some or all the material covered by the subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must deliver a copy of this Stipulated Protective Order promptly to the Party in the other action that caused the subpoena or order to issue.

The purpose of imposing these duties is to alert the interested parties to the existence of this Protective Order and to afford the Designating Party in this case an opportunity to try to protect its confidentiality interests in the court from which the subpoena or order issued. The Designating Party shall bear the burdens and the expenses of seeking protection in that court of its confidential material – and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL.

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

1 10. FILING PROTECTED MATERIAL. Without written permission from the
2 Designating Party or a court order secured after appropriate notice to all interested persons, a Party
3 may not file in the public record in this action any Protected Material. A Party that seeks to file
4 under seal any Protected Material must comply with Civil Local Rule 79-5.

5 11. FINAL DISPOSITION. Unless otherwise ordered or agreed in writing by the
6 Producing Party, within sixty days after the final termination of this action, each Receiving Party
7 must return all Protected Material to the Producing Party. As used in this subdivision, “all Protected
8 Material” includes all copies, abstracts, compilations, summaries or any other form of reproducing or
9 capturing any of the Protected Material. With permission in writing from the Designating Party, the
10 Receiving Party may destroy some or all of the Protected Material instead of returning it. Whether
11 the Protected Material is returned or destroyed, the Receiving Party must submit a written
12 certification to the Producing Party (and, if not the same person or entity, to the Designating Party)
13 by the sixty day deadline that identifies (by category, where appropriate) all the Protected Material
14 that was returned or destroyed and that affirms that the Receiving Party has not retained any copies,
15 abstracts, compilations, summaries or other forms of reproducing or capturing any of the Protected
16 Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all
17 pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney work product,
18 even if such materials contain Protected Material. Any such archival copies that contain or
19 constitute Protected Material remain subject to this Protective Order as set forth in Section 4
20 (DURATION), above.

21 12. MISCELLANEOUS

22 12.1 Inadvertent disclosure. Inadvertent disclosure of any document or other
23 information covered by the attorney-client privilege, work-product or other applicable privileges
24 during discovery in this matter, or inadvertent disclosure of confidential information without
25 appropriate designation, shall be without prejudice to any claim that such document or other
26 information is privileged or confidential, and no party shall be held to have waived any rights by
27 such inadvertent disclosure. If the Producing Party claims that document or other information was
28 inadvertently disclosed the Receiving Party shall not use for any purpose and shall immediately

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By: /s/ Jennifer A. Golinveaux
Andrew P. Bridges (SBN 122761)
Jennifer A. Golinveaux (SBN 203056)
Joseph M. Morris (SBN: 245000)
101 California Street
San Francisco, CA 94111
Tel: 415-591-1506

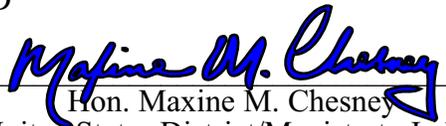
Attorneys for Plaintiff
BARE ESCENTUALS BEAUTY, INC.

I attest that concurrence in the filing of this document has been obtained from Jennifer Golinveaux.

By: /s/ T. Lee Kissman
T. Lee Kissman
Attorney for Defendants
L'ORÉAL USA, INC. and L'ORÉAL S.A.

PURSUANT TO STIPULATION, IT IS SO ORDERED

DATED: February 6, 2008


Hon. Maxine M. Chesney
United States District ~~Magistrate~~ Judge

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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____
_____ [print or type full address], declare under
penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that
was issued by the United States District Court for the Northern District of California on
_____ [date] in the case of *Bare Escentuals Beauty, Inc. v. L'Oréal USA, Inc. et al.*, Case
Number C-07-1669 MMC. I agree to comply with and to be bound by all the terms of this
Stipulated Protective Order and I understand and acknowledge that failure to so comply could
expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not
disclose in any manner any information or item that is subject to this Stipulated Protective Order to
any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Northern District of California for the purpose of enforcing the terms of this Stipulated Protective
Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of
_____ [print or type full address and telephone number]
as my California agent for service of process in connection with this action or any proceedings
related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed Name: _____
[printed name]

Signature: _____
[signature]