IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNIVERSITY OF MASSACHUSETTS MEDICAL SCHOOL and CARMEL LABORATORIES, LLC, Plaintiffs, v. L'ORÉAL S.A. and L'ORÉAL USA, INC., Defendants.	Case No. 17-cv-868-CFC-SRF

PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE FALLON'S NOVEMBER 13, 2018 REPORT AND RECOMMENDATION

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, Plaintiffs University of Massachusetts Medical School ("UMass") and Carmel Laboratories, LLC ("Carmel Labs") (together, "Plaintiffs") submit these objections to the Report and Recommendation (the "Report") dated November 13, 2018 (D.I. 31), which recommends that the Court grant Defendant L'Oréal S.A.'s Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.

The Report discredits Plaintiffs' argument that L'Oréal U.S.A. is L'Oréal S.A.'s United States agent for the purpose of designing and developing the accused products ("Accused Adenosine Products"), and therefore recommends dismissing L'Oréal S.A. for lack of personal jurisdiction. But, as set forth in the First Amended Complaint ("FAC"), in Plaintiffs' brief in opposition to L'Oréal S.A.'s Motion ("Plaintiffs' Opposition") (D.I. 27 and 28, incorporated herein by reference), and as explained further below, the Report's findings on agency should be rejected, and Plaintiffs' objections should be sustained.

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A. Standard of Review

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b), the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made" and "may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1)(C). Likewise, Rule 72(b) requires de novo review of any recommendation that is "dispositive of a claim or defense of a party."

B. An Agency Relationship is Not Appropriate for a Motion to Dismiss

"Under the agency theory [of personal jurisdiction], the court may attribute the actions of a subsidiary company to its parent where the subsidiary acts on the parent's behalf or at the parent's direction." *Cephalon, Inc. v. Watson Pharm., Inc.*, 629 F. Supp. 2d 338, 348 (D. Del. 2009). "[A]n agency relationship is determinable only after appropriate discovery and, thus, is not appropriate for a motion to dismiss." *Kuhn Const. Co. v. Ocean & Coastal Consultants, Inc.*, 844 F. Supp. 2d 519, 531 (D. Del. 2012) (*citing Jurimex Kommerz Transit G.M.B.H. v. Case Corp.*, 65 F. App'x 803, 808 (3d Cir. 2003) ("[D]iscovery is necessary when an agency relationship is alleged, thereby implicitly allowing allegations of agency to survive a facial attack.")).

Therefore, the Report's recommendation that the Court dismiss L'Oréal S.A., based on finding no agency between L'Oréal S.A. and L'Oréal U.S.A., is contrary to controlling law.

C. The Undisputed Record Demonstrates an Agency Relationship Between L'Oréal S.A. and its Subsidiary L'Oréal U.S.A. with Respect to at Least Design and Development of the Accused Products

Even without the aforementioned presumption, the record in this case demonstrates an agency relationship between L'Oréal S.A. and L'Oréal U.S.A.

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The FAC alleges that Defendant L'Oréal USA, a wholly-owned subsidiary of Defendant L'Oréal S.A, "is the agent of L'Oréal [S.A.], which controls or otherwise directs and authorizes the activities of L'Oréal USA." (FAC ¶ 7; *see also* ¶¶ 32 ("On information and belief, Defendants both create and design the Accused Adenosine Products."), 33 ("On information and belief, L'Oréal USA manufactures, markets, and sells the Accused Adenosine Products across the United States, including in Delaware. L'Oréal USA's activities are controlled by its parent, L'Oréal.").) Although "plaintiffs cannot be expected to have personal knowledge of the details of corporate internal affairs" at the pleading stage, *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1989), even without the benefit of discovery, Plaintiffs' Opposition sets forth extensive publicly available facts demonstrating that L'Oréal USA is L'Oréal S.A.'s agent for at least the purpose of designing, manufacturing, and selling Accused Adenosine Products in the United States and in Delaware.

The Report brushed this evidence aside, relying instead on a conclusory and self-serving affidavit submitted by L'Oréal S.A., which claims that L'Oréal S.A. and L'Oréal U.S.A. "observe standard corporate formalities" and do not have an agency relationship. (*See* D.I. 25.) L'Oréal S.A. purports that its subsidiary "maintains separate licensing and distribution contracts, manufactures and distributes its own products, has its own board of directors, issues separate financial statements, files separate tax returns, and maintains its own workforce from L'Oréal S.A.[,]" and that "L'Oréal S.A. does not directly develop, sell, market, or advertise to consumers in Delaware any of the products at issue in this action." (*Id.* ¶¶ 4, 6.)

But Plaintiffs' Opposition advanced substantial evidence that L'Oréal S.A. develops and sells the Accused Adenosine Products in the United States, and in Delaware, by designing and

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developing the infringing Accused Adenosine Products, which its subsidiary then manufactures and distributes here.

Specifically, L'Oréal S.A. "defines . . . global strategy and spearhead[s] the portfolio of innovations" for the international group's "skin care" "line[ ] of business." (D.I. 28 at Ex. 8.) That "global strategy" includes L'Oréal S.A.'s international patent portfolio, by which it "patent[s] major active ingredients," including "over 130 molecules," "well in advance of competitors." (*Id.* at Ex. 9 at 2.) L'Oréal S.A.'s "global strategy" to "patent major active ingredients" extends to its efforts to patent infringing adenosine technology, the subject of multiple L'Oréal S.A. United States patents and patent applications. Indeed, L'Oréal S.A.'s United States patents and applications, which it relies on to design and develop the Accused Adenosine Products, are specifically connected to this case, repeatedly cite the patents-in-suit, and in one instance, a L'Oréal S.A. patent application was rejected as obvious over one of the patents-in-suit. (FAC ¶¶ 19-22.) That rejection prompted an agent of L'Oréal S.A. to reach out to the inventor of the patents-in-suit in an attempt to obtain a license, and, as alleged in the FAC, was the subject of correspondence between Plaintiff Carmel Labs and Jean-Paul Agon, the CEO of L'Oréal S.A. (*Id.* ¶¶ 23, 30.) L'Oréal U.S.A. publicly credits this work by its parent company for the inclusion of adenosine in the Accused Adenosine Products (*See* FAC ¶¶ 26, 27; *see also* D.I. 28 at Ex. 12 (L'Oréal Paris: Adenosine Anti-Aging Skincare Benefit, https://www.loralparisusa.com/ingredientlibrary/adenosine.aspx) at 6, Ex. 13 (M.I. Abella, L'Oréal Recherche, Evaluation of anti-wrinkle efficacy of adenosine-containing products using the FOITS technique, International Journal of Cosmetic Chemistry, 2006 at 447-451)).

L'Oréal S.A. argues that its subsidiary "manufactures and distributes" the Accused Adenosine Products in the United States, but L'Oréal S.A.'s own pivotal role in developing and

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designing the Accused Adenosine Products for sale in the United States is undisputed. Plaintiffs will obtain discovery from both L'Oréal U.S.A. and L'Oréal S.A. that conclusively proves L'Oréal S.A.'s role in at least developing, designing, and testing the Accused Adenosine Products, but at this stage—before any such discovery has been provided—Plaintiffs' agency argument passes muster. For that reason, the Report's reliance on *Nespresso USA, Inc. v. Ethical Coffee Co. SA*—in which, unlike here, the foreign parent did not "design or manufacture" the infringing goods—is misplaced, and the Report should be overruled in this respect. 263 F. Supp. 3d 498, 502 (D. Del. 2017) (emphasis added). At the very least, Plaintiffs' argument that L'Oréal S.A. designs and develops the Accused Adenosine Products is not "clearly frivolous," given the extensive supporting public evidence, and Plaintiffs should be permitted to take jurisdictional discovery. *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003).

D. Conclusion

For the reasons stated above, Plaintiffs respectfully request the Court overrule the Report's recommendation that the Court dismiss Defendant L'Oréal S.A. for lack of personal jurisdiction.

Dated: November 27, 2018

Respectfully submitted,

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