

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

UNIVERSITY OF MASSACHUSETTS)	
and CARMEL LABORATORIES, LLC,)	C.A. No. 17-868-CFC-SRF
)	
Plaintiffs,)	CONFIDENTIAL—
)	FILED UNDER SEAL
v.)	
)	
L'ORÉAL USA, INC.,)	
)	
)	
Defendant.)	

**DEFENDANT L'ORÉAL USA, INC.'S OBJECTIONS TO
MAGISTRATE JUDGE'S APRIL 24, 2020 ORDER**

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Dated: May 8, 2020

I. INTRODUCTION

Defendant L'Oréal USA, Inc. ("L'Oréal USA") objects, in part, to the Magistrate Judge's April 24, 2020 Order (the "Order") granting Plaintiffs' request to compel L'Oréal USA's production of external and internal communications regarding Federal Trade Commission ("FTC") Investigation DOCKET NO. C-4489 (the "Investigation"). (See D.I. 144, Ex. A at 113:1-10; D.I. 123 at [Proposed] Order.) While L'Oréal USA is producing to Plaintiffs its communications with the FTC pertaining to the Investigation, as well as documents supporting the challenged claims for the products at issue therein, it objects to the remainder of the Order. That is, L'Oréal USA objects to the Order insofar as it requires L'Oréal USA to: (1) produce the entire volume of its production to the FTC, totaling over 7,000 documents; and (2) search for, review and log privileged, internal communications regarding the Investigation that span at least three years. These aspects of the Order are "clearly erroneous" and "contrary to law" for two principal reasons.¹ Fed. R. Civ. P. 72(a).

¹ L'Oréal USA believes that the logistical issues implicated by the Order, including the impact of the global health crisis, are currently before the Magistrate Judge, and will be dealt with during the parties' upcoming discovery conference on May 18, 2020. (See D.I. 144, Ex. A at 113:1-14; see also Oral Order (May 7, 2020) (ordering L'Oréal USA to be prepared to discuss the "location and the volume of the documents, the efforts made to review the documents, and the anticipated timing of the document production and submission of a privilege log, if any" during the May 18th discovery conference).)

First, the Order is overbroad and unduly burdensome. This is based, in large part, on Plaintiffs’ representation to the Magistrate Judge that they had narrowed their request, which was originally before the Court on March 26, 2020. Plaintiffs initially sought the “production of any communication with the FTC or any agency regarding the *accused products*.” (Ex. A at 73:6-9 (emphasis added); *see also* Ex. B at Request for Production No. 65 (seeking “[a]ll documents produced, in any litigation or investigation, to any government entity or agency that refer or relate to the Accused Products”).) The Magistrate Judge denied this request, deeming it a “fishing expedition.” (Ex. A at 78:7-8.) Less than one month later, Plaintiffs renewed their request under the guise that they had narrowed it, “limit[ing] [it] to Defendant’s internal and external communications about th[e] specific FTC investigation”—by far, the largest investigation implicated by the request. (D.I. 123 at 2.) In doing so, rather than narrow the request, Plaintiffs expanded its scope, as they removed the limitation that the responsive documents relate to the accused products, and for the first time requested privileged, internal communications relating to the Investigation in addition to the external communications initially sought. This expanded request was never actually served in discovery, but rather proposed in connection with a discovery conference with the Magistrate Judge. Because the Order is based on this purported narrowing of the request by Plaintiffs that did not amount to any narrowing at all (and actually

broadened it), the Order is erroneous. (*See* D.I. 144, Ex. A at 113:1-8 (granting Plaintiffs’ request “to compel the production of documents responsive to requests [sic] for production number 65” because it was limited to a “single 2014 FTC investigation”).)

Second, the Order errs in implicating numerous privileged documents. While the Magistrate Judge retained jurisdiction on the issue of privilege (*see* D.I. 144, Ex. A at 113:1-24; Oral Order (May 7, 2020)), even setting aside the privilege concerns raised by Plaintiffs’ request for internal communications, the Order requires L’Oréal USA to go through its entire production file to the FTC (over 7,000 documents, all of which reside with L’Oréal USA’s former counsel for the Investigation), to ensure it does not contain privileged documents, or documents that should otherwise be withheld from production for confidentiality reasons, as the FTC entered a confidentiality order exempting the Investigation from Freedom of Information Act (FOIA) requests.² L’Oréal USA cannot simply hand these documents over to Plaintiffs wholesale, and the review and logging of such

² L’Oréal USA is producing to Plaintiffs its direct external communications with the FTC pertaining to the Investigation, as well as documents supporting the challenged claims for the products at issue therein. However, L’Oréal USA objects to producing all of the documents it produced to the FTC in connection with the Investigation (the production file containing over 7,000 documents referenced above), which more broadly, *inter alia*, provide support for its claim substantiation and other issues in the Investigation completely unrelated to this case.

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