FARNAN LLP

May 6, 2020

VIA E-FILING
The Honorable Sherry R. Fallon
J. Caleb Boggs Federal Building
844 N. King Street
Wilmington, DE 19801-3568

RE: ***University of Massachusetts, et al. v. L'Oreal U.S.A., Inc.***
(C.A. No. 17-cv-868-CFC-SRF)

Dear Magistrate Judge Fallon,

Plaintiffs oppose L'Oréal's request to delay its objections to the District Court. *First*, Local Rule 7.1.5(b) specifically states: "Motions for reargument on a ruling made by a Magistrate Judge pursuant to Fed. R. Civ. P. 72 are not permitted." L'Oréal's request is nothing more than an attempt to raise new arguments that it never raised before in this Court. As L'Oréal candidly admits, it seeks an extension until after the next discovery conference on May 18 because "the discussion with this Court may obviate the need to file Objections." D.I. 144 at 2. Moreover, as explained in more detail below, its current position flatly contradicts arguments made to this Court. *Second*, even if L'Oréal could overcome the rule expressly precluding reargument, an extension to appeal would prejudice Plaintiffs given the short time remaining in discovery. Notably, L'Oréal has not agreed to abide by any decision this Court may issue at the next hearing on May 18. Instead, if it loses this next bite at the apple too, it will object then and further delay its production of documents this Court has already ordered be produced.

I. L'Oréal Seeks to Undo This Court's Prior Ruling by Raising New Arguments at the May 18 Hearing, which is Prohibited by the Rules

On April 24, this Court "grant[ed] Plaintiffs' request to compel production of documents responsive to request for production number 65 limited to the single 2014 FTC investigation," and ordered production by May 8. Ex. 1. at 113. The Court left it "to the parties to meet and confer if L'Oreal is unable to meet that deadline *due to global circumstances or national health emergency circumstances beyond its control*." *Id.* (emphasis added).

L.R. 7.1.5(b) specifically prohibits reargument to this Court. The Standing Order on the Utilization of Magistrate Judges provides the same restriction. The only way to object is to file certified objections to the District Court under Rule 72. *In re: Utilization of Magistrate Judges* C.1.g. (D. Del 2011). But rearguing the motion it already lost is exactly what L'Oréal wants to do.

Specifically, L'Oréal does not state that that it intends to produce responsive documents but needs more time due to COVID-19. Rather, L'Oréal argues that it might not produce responsive documents at all—an argument this Court already rejected. For example, L'Oréal now argues burden as a reason not to produce the documents. L'Oréal states in its letter it made the burden argument previously. This Court properly rejected it when it ordered production. Ex. 1 at 113. The forum to make a continued burden objection is to the District Court. *See* L.R. 7.1.5.(b). Put simply,

L'Oréal has refused to commit to producing these documents, for reasons unrelated to the global health crisis.

The reality is that L'Oréal provided very little information to this Court or to Plaintiffs over the previous months. Despite repeated requests by Plaintiffs, evidently L'Oréal did not inquire into the specifics about these FTC documents until after the Court granted Plaintiffs' request. Failure to do a proper investigation prior to a hearing is not an excuse for an untimely argument. This is particularly true where the FTC issue has been pending for months. Plaintiffs served their request for documents regarding this investigation in December 2019. The parties met and conferred several times about this request. L'Oréal consistently objected wholesale to producing any documents related to the FTC investigation, saying that the documents were either irrelevant or "cumulative" of documents that had already been produced. *See* Exs. 2 at 2, 3 at 2. When this issue was briefed before the Court, on both occasions L'Oréal's only objection was that any documents "that would be relevant to this case would be duplicative and cumulative of documents that have already been produced," D.I. No. 105 at 4, and that Plaintiffs could not "demonstrate that [their] request is non-cumulative," D.I. 124 at 3. The Court itself already has heard this issue twice. Yet only now does L'Oréal raise these new issues.

Perhaps due to this failure to investigate, L'Oréal now makes arguments flatly contradictory to what it previously told the Court. For example, L'Oréal claims that Plaintiffs "did not, in actuality narrow the request at all" because "the FTC investigation is the only investigation that was ever implicated by the Request." D.I. 144 at 1 n.1. Yet L'Oréal told this Court the exact opposite at a prior hearing: "This request seeks all documents produced in any litigation or government investigation for any of the over 150 accused products in this case. . . . So now they want to know all our communications with any agency about any of those products." Ex. 4 at 75:11-13, 75:22-23.

This Court relied on these representations from L'Oréal. In its March 26 Order, which preceded its April 24 order requiring L'Oréal to produce documents from this FTC investigation, this Court held that the request for "all documents from all government entities or agencies overbroad and not relevant or proportional." Ex. 4 at 78:5-7. The Court then allowed Plaintiffs to narrow their request to a particular investigation, and stated that "L'Oreal can confer with the plaintiffs on . . . whether there's anything to produce, or whether it resists production, or whatever the response from L'Oreal is." *Id.* at 78:17-19. Yet when Plaintiffs attempted to engage L'Oréal to determine what it had that was responsive to this particular FTC investigation, L'Oréal refused to provide any details.

Similarly, L'Oréal's letter hints that it might not produce documents due to privilege issues. The privilege it has identified to Plaintiffs is not between L'Oréal and its counsel. Rather, L'Oréal has told Plaintiffs it may assert a broad governmental investigation privilege. Plaintiffs have told L'Oreal that this argument is contrary to binding law, and in fact would be frivolous. *See, e.g., Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414 (3d Cir. 1991) (rejecting government investigation privilege). Regardless, L'Oréal could have and should have made this argument to this Court. Either L'Oreal knew about this governmental privilege issue at the last hearing and chose not to raise it specifically in the briefing or to the Court, or it did not know and is raising this new argument for the first time.

To be clear, Plaintiffs believe that L'Oréal's new arguments on burden and privilege are not well-founded and are simply a further excuse not to produce what the Court ordered. Plaintiffs will address these substantive arguments in later briefing as appropriate.

Plaintiffs have expressed their willingness to work through any accessibility and timing issues as they relate to the global health emergency. But L'Oréal wants to reconsider issues this Court already has ruled on, and raise new issues in order to overturn this Court's order that L'Oréal needs to produce documents responsive to the particular FTC investigation at issue. Indeed, the very fact that L'Oréal intends to file an objection demonstrates that its goal here is not a timing one. It is to reconsider what the Court has ruled. This Court should not allow it.

II. Regardless of the Rules Prohibiting Reargument, Plaintiffs Would Suffer Prejudice from Further Delay

The close of fact discovery is rapidly approaching. Under the new schedule agreed to by the parties, L'Oréal has until May 8 to finish producing documents. Plaintiffs have until June 19 to take depositions of L'Oréal witnesses as well as to submit any expert report aside from damages. D.I. 139. This schedule does not move the summary judgment deadline nor the trial date. Even assuming L'Oréal could overcome the procedural obstacles, pushing the objection deadline until May 19 would make it virtually impossible for the issue to be resolved by mid-June.

L'Oréal could have ascertained the scope of the potential FTC production months ago, when Plaintiffs first requested these documents, and included specific details in the arguments it made to the Court. It did not. L'Oréal should not be rewarded with an opportunity to reargue a ruling it does not like and to present new arguments it could have made months ago. This is particularly true when the clock is running out on discovery, and Plaintiffs will need time to review these documents once they are produced so that they are able to use them in upcoming depositions.

Finally, it is revealing that L'Oréal is not agreeing to be bound by any order the Court may issue on May 18. Putting aside the procedural hurdles, L'Oréal wants the option to appeal if its third bite at the apple does not succeed. L'Oréal's insistence on filing objections should the Court not resolve the issue to its satisfaction demonstrates the impropriety of L'Oréal's extension request and the prejudice it would cause Plaintiffs given this late date.

In conclusion, this Court should not allow L'Oréal more time to file its objections under Rule 72. L'Oréal explicitly states that the reason for this extension is for this Court to address the issue a third time. L'Oréal is attempting to use this extension request to relitigate an issue on which the Court has already ruled, by providing additional argument that it could have—but did not—raise in either of the two hearings where the Court heard argument on these FTC documents, in the related briefing, or in the parties' conferences prior to those hearings. This attempt to reargue is expressly foreclosed by Local Rule 7.1.5(b) and any delay in filing these Rule 72 objections would prejudice Plaintiffs.

Respectfully submitted,

/s/ Brian E. Farnan

Brian E. Farnan

cc: Counsel of Record (Via E-Mail)