IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNIVERSITY OF MASSACHUSETTS and CARMEL LABORATORIES, LLC, Plaintiffs, v. L'ORÉAL USA, INC., Defendant.	C.A. No. 17-cv-868-CFC-SRF

PLAINTIFFS' RESPONSE TO DEFENDANT L'OREAL USA, INC.'S OBJECTIONS TO MAGISTRATE JUDGE'S APRIL 24, 2020 ORDER

I. INTRODUCTION

After months of failed meet and confers, on April 24, Magistrate Judge Fallon ordered L'Oréal to produce all documents it had provided to the FTC during a 2014 investigation, by May 8. *See* Ex. 1 at 113:1-14. L'Oréal did not do so. Instead, L'Oréal produced only a subset of these documents—just the letters and other attorney-drafted communications exchanged between L'Oréal and the FTC.

Nothing in L'Oréal's latest brief on this issue demonstrates that Magistrate Judge Fallon's decision was "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). To begin with, the bulk of L'Oréal's arguments involve issues not raised before Magistrate Judge Fallon, and thus are plainly improper grounds for objection.

See Bukovinsky v. Pennsylvania, 455 F. App'x 163, 165–66 (3d Cir. 2011) ("Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived.") (quotations and alterations omitted); *see also Jordan v. Mirra*, No. CV 14-1485, 2019 WL 2121346, at *1 (D. Del. May 15, 2019) (citing District of Delaware Standing Order for Objections Filed Under Fed. R. Civ. P.72, ¶ 5).

Even if considered, L'Oréal's arguments fail. Lacking any real complaint, L'Oréal instead makes new arguments that these documents do not fall within the scope of Plaintiffs' formal document request, or that Magistrate Judge Fallon misunderstood the request. Not so. This dispute is about the 7,000 documents that L'Oreal *actually turned over* to the FTC (the "source" documents). These documents were requested by Plaintiffs in a written discovery request. "Based on her familiarity with this case," Magistrate Judge Fallon ordered L'Oréal to produce them. *Minerva Surgical, Inc. v. Hologic, Inc.*, No. CV 18-00217-JFB-SRF, 2019 WL 5092254, at *3 (D. Del. Oct. 11, 2019). Indeed, L'Oréal's source documents—including whether they were cumulative of what L'Oréal already provided Plaintiffs—were a focus of prior hearings.

There is no support for L'Oréal's claim that it is somehow too late for this issue. To the contrary, the record paints a very different picture—namely, that L'Oréal has routinely dragged its feet and shirked its discovery obligations, despite Plaintiffs having sought these documents for months. As Magistrate Judge Fallon

said at the hearing granting Plaintiffs' request, L'Oréal is "talking out of both sides of [its] mouth." Ex. 2 at 101:7-102:8. If any prejudice exists, it is the prejudice Plaintiffs will suffer by having to take depositions against a fact discovery deadline without the time to review these documents.

Magistrate Judge Fallon correctly decided this issue. L'Oréal did not even raise the issues it now complains about, the decision was not clearly erroneous or contrary to law, and it should stand.

II. BACKGROUND

The asserted patents relate to using adenosine for anti-aging skincare. Around 2014, the FTC alleged that L'Oréal misled the public with respect to its claims about anti-aging aspects of its products, including certain Accused Products. That investigation appears to have concluded with an order that L'Oréal support anti-aging claims with "competent and reliable scientific evidence." D.I. 103, Ex. J. It is difficult to imagine more relevant documents than what L'Oréal provided the FTC in an investigation about what "competent and reliable scientific evidence" exists with respect to the anti-aging benefits of Accused Products.

Plaintiffs repeatedly asked for these documents, and L'Oréal objected, claiming, without detail, they have "nothing to do with this case," and—in an obvious contradiction—that they are "duplicative and cumulative" of what L'Oréal already produced to Plaintiffs. D.I. 105 at 4; *see also* D.I. 124 at 2-3 (same).

This issue was presented to Magistrate Judge Fallon twice before she issued her April 24 ruling. Plaintiffs' initial request—which included *any* government investigations—was denied as overbroad. *See* D.I. 148, Ex. 4 at 78:5-19 ("THE COURT: . . . I find the request for all documents from ***all government entities or agencies*** overbroad . . ."). (emphasis added). Despite L'Oréal now claiming that Plaintiffs "expanded" their request, L'Oréal previously said the opposite, complaining that "this request seeks ***all documents produced in any litigation or government investigation*** for any of the over 150 accused products in this case." *Id.* at 75:11-13 (emphasis added).

On the basis of that representation, Magistrate Judge Fallon denied the request without prejudice to Plaintiffs limiting it. Plaintiffs' revised request—which was limited to the single 2014 FTC investigation described above—was granted as narrowed. *See* Ex. 1 at 113:1-14 ("THE COURT: On this request, I will grant plaintiffs' request to compel production of documents responsive to requests for production number 65 limited to the single 2014 FTC investigation cited by the plaintiff in their letter brief, including the internal and external communications regarding the specific FTC investigation.").

Immediately after that ruling, L'Oréal began backtracking, asking Magistrate Judge Fallon to undo her clear ruling on the basis of new burden and privilege arguments that L'Oréal did not bother to investigate or disclose in the five months

the parties had been litigating this issue, which included two rounds of briefing to the Court and multiple meet and confers. Magistrate Judge Fallon properly denied that request. *See* Ex. 3 at 21:21-23:2; *see also* Local Rule 7.1.5(b) ("Motions for reargument on a ruling made by a Magistrate Judge pursuant to Fed. R. Civ. P. 72 are not permitted."). At the parties' recent May 18 hearing Magistrate Judge Fallon also questioned L'Oréal as to why it was raising new arguments. *See id.* at 6:3-8 ("THE COURT: . . . I do wish to hear from defendants with respect to those particular items that were listed in my oral order on May 7th and ***why that information was not gathered and provided to the Court*** in anticipation of the previous discovery conference on April 24th) (emphasis added).

III. ARGUMENT

A magistrate judge's order is "contrary to law only where the magistrate judge has misinterpreted or misapplied the applicable law." *Align Tech., Inc. v. 3Shape A/S*, No. CV 17-1646-LPS, 2020 WL 1873026, at *1 (D. Del. Apr. 15, 2020) (citations and quotations omitted). Factual findings are "clearly erroneous" where the Court is "left with the definite and firm conviction that a mistake has been committed." *Id.* (quoting *Green v. Fornario*, 486 F.3d 100, 104 (3d Cir. 2007)). "The district court must accept the ultimate factual determination" of a magistrate "unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the

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