



May 12, 2020

VIA E-FILING

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

PUBLIC VERSION

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

Dear Magistrate Judge Fallon,

This is the fourth time Plaintiffs have had to request an order compelling L'Oréal to fulfill its most basic discovery obligations. *See* Feb. 28 Oral Order; Mar. 26 Oral Order; Apr. 24 Oral Order. Despite Plaintiffs' diligent efforts over the past six months, L'Oréal has still not produced some of its most essential documents. And contrary to this Court's recent admonition, L'Oréal still has not involved Plaintiffs in the process in order to assure a comprehensive search.

Specifically, L'Oréal has failed to comply with the Court's April 24 order requiring it to complete—by May 8—its production of: (1) organizational charts; (2) product development and business strategy documents responsive to RFPs 27, 32, 40, 41, 42, 53, 59, and 66; and (3) documents related to a 2014 FTC investigation. Since the hearing, L'Oréal produced 654 new documents—40% of which were related to its *affirmative defenses* and not to Plaintiffs' requests. L'Oréal's production remains woefully incomplete—as this new production confirms.

Documents Responsive to RFPs 27, 32, 40, 41, 42, 53, 59, and 66. On April 24, the Court ordered L'Oréal to supplement its responses to RFPs 27, 32, 53, and 59, which ask for documents related to product development and L'Oréal's use of adenosine in its products. *See* Ex. A, Apr. 24 Tr. 32:19-24. The Court observed that “[i]t shouldn't be a guessing game for the plaintiffs to determine where L'Oréal is searching and have they conducted a thorough search,” and directed the parties to “please talk about it ahead of drafting the formal response.” *Id.* 33:17-20; 36:17-20. Similarly, for RFPs 40, 41, 42, and 66—seeking marketing and business strategy documents—the Court ordered L'Oréal to supplement those responses and continue to meet and confer with Plaintiffs regarding the appropriate scope of production. *Id.* 103:11-24.

L'Oréal did not involve Plaintiffs in these searches. Immediately following the hearing, Plaintiffs sent an email asking to be involved at the front end of L'Oréal's efforts to comply with the Court's order, and posing specific questions about those efforts related to databases, custodians, and search terms. *See* Ex. B. L'Oréal finally responded, and the parties finally met and conferred eight days later (only four days before L'Oréal's production was due), but L'Oréal did not meaningfully engage with Plaintiffs' overtures, and still has not provided much of the information Plaintiffs are seeking. *See* Ex. C. Plaintiffs remain in the same disadvantaged position they were in when the parties last appeared before this Court. *See* D.I. 123, Ex. 8.

919 N. MARKET STREET, 12TH FLOOR, WILMINGTON, DE 19801

In response to these RFPs, L'Oréal produced just 251 new documents. And even this limited production confirms the woeful deficiency of L'Oréal's search, and that L'Oréal is withholding plainly responsive material. For example, only last week, and after it represented to both Plaintiffs and this Court that "to the extent that there is something really tied to a specific product rather than overall research on adenosine . . . Plaintiffs have that already," Apr. 24 Tr. 28:8-16, L'Oréal produced multiple emails discussing its decision to use adenosine in certain Accused Products. These documents are plainly relevant to the parties' dispute. One, for example, states: [REDACTED]

Ex. D; *see also, e.g.*, Exs. E, F. Similarly, only last week, L'Oréal produced 100 product development records called "Magellan briefs" that, among other things, provide sales targets and development concepts for the Accused Products. *See, e.g.*, Ex. G.

Instead of engaging with Plaintiffs, L'Oréal now points to interrogatory and supplemental RFP responses served on May 8. *See* Exs. H, H-2. These responses fail to provide answers and ignore the specific issues raised by Plaintiffs. Those supplemental responses show, for example, that L'Oréal has not searched any custodians' files for the names of the Accused Products, or the ingredient code for adenosine ("75156"). *See id.* It has not run a search in its central databases for the standalone term "adenosine." And it has not searched for custodial files for any marketing or corporate custodians, *see id.*, or responded to Plaintiffs' request for information about the shared drives to which L'Oreal USA has access, *see* Ex. C. While L'Oréal cites thousands of pages of Bates numbers in those supplemental responses, it has never answered Plaintiffs' questions about whether other potentially responsive documents exist. From what Plaintiffs can glean, L'Oréal ran few, if any, new searches following the April 24 hearing, and instead re-reviewed documents that had been previously collected but improperly withheld. Plaintiffs can only guess what other responsive documents may be outstanding. As the Court noted at the April 24 hearing, this is not a proper approach to discovery. *See* Apr. 24 Tr. 101:22-102:6.

Moreover, despite L'Oréal's specific representation by email to Plaintiffs in October 2019 and to this Court in February, it has not searched L'Oréal S.A. files. *See* Ex. I ("[W]e are not going to insist that Plaintiffs proceed through the Hague to obtain documents from L'Oréal S.A. Rather, we will make all reasonable efforts to collect and produce any relevant documents maintained by L'Oréal S.A."); Feb. 18 Hr. Tr. at 6:17-23 ("[A] part of what we have agreed to do is to produce documents without requiring plaintiffs to go through the Hague Commission to get documents from the parent company, L'Oréal S.A., and we have been doing that."). Likewise, as discussed below, L'Oréal apparently has not searched L'Oréal USA executives for strategy documents related to the accused products.

L'Oréal has drawn out this dispute by failing to comply with both aspects of this Court's most recent order by failing to conduct a search and failing to consult with Plaintiffs. To effectuate its prior orders, this Court should order L'Oréal to immediately provide the specific information, and run the specific searches, requested below and in the Proposed Order. L'Oréal should likewise be required to provide a written certification that it has complied with this Court's orders. The following describes in brief what Plaintiffs' Proposed Order seeks:

The Search Terms “Adenosine” and “75156” Run Across Certain Databases and L’Oréal S.A. Custodians: Amazingly, despite adenosine being central to this case and a very specific term, L’Oréal has not searched for “adenosine” or its code number on the most relevant databases. And it never searched S.A. custodians Plaintiffs identified as having potentially relevant documents.

Business Strategy and “Magellan” Documents Similar to Those Just Produced: Defendant’s recent production just revealed that it does keep the business strategy documents requested by Plaintiffs. It just has not produced all of them for the relevant timeframe. Exs. J, K. Likewise, Plaintiffs learned that L’Oréal possesses so-called “Magellan briefs” that discuss forecasts and strategy for each Accused Product, but it has not produced all of them. Ex. G.

Directory of Shared Files and Folders: Plaintiffs do not know what else may be missing. A directory of shared files will help reveal what exists. Plaintiffs will supply ten reasonable, limited search terms to the drives Plaintiffs identify as containing potential responsive material.

Given the parties’ behavior to date—including Plaintiffs’ diligence and L’Oréal’s stonewalling—and given the advanced stage of this case—including the fast approaching deadline for depositions—this Court should order the specific disclosures and searches identified in Plaintiff’s concurrently filed proposed order on the dates specified therein.

Organizational Charts. This seemingly minor failure exemplifies the problems at hand. On April 24, the Court ordered L’Oréal to produce organizational charts by May 8. Apr. 24 Tr. 52:2-7. On that date, L’Oréal produced some organizational charts, including charts for its finance, brand, and research divisions, but not others. But it did not produce a chart for its corporate leadership and L’Oréal USA marketing teams—information Plaintiffs need to, among other things, understand the adequacy of L’Oréal’s document searches; request depositions; and address L’Oréal’s assertion that there is no one person capable of appearing as a 30(b)(6) witness on a variety of topics. *See* Ex. L. Moreover, L’Oréal has refused to confirm it will provide this Court-ordered information at any point in the future, let alone by a date certain. These charts also may reveal additional custodians that should have been searched, but Plaintiffs do not yet have sufficient information to know.

Documents Related to the 2014 FTC Investigation. L’Oréal produced 127 documents consisting of external communications with the FTC. But it now claims that there are 7,000 source documents it produced to the FTC in addition to internal communications, and has filed its objections with the District Court to avoid having to produce these materials. *See* D.I. 151, at 1. That dispute is now with the District Court, and will not succeed. *See Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414 (3d Cir. 1991) (rejecting government investigation privilege). Indeed, even the one Arkansas district court case L’Oréal cites finding a limited privilege holds that the underlying source documents provided to the government agency should be produced. *See Concord Boat Corp. v. Brunswick Corp.*, 1997 WL 34854479, at *6 (E.D. Ark. Jun. 13. 1997) (“[A]ll of the business documents produced in response to the FTC subpoenas have already been produced to Plaintiffs.”).

Respectfully submitted,

/s/ Brian E. Farnan

Brian E. Farnan

cc: Counsel of Record (via E-Mail)