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| **Related Cases** | **Color** |
| **Are there any related cases?** | **No other appeal involving this civil action was previously before this or any other appellate court. There are no pending cases known to counsel that would directly affect or be directly affected by this Court’s decision in the pending appeal.** |
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| **Introduction** | **Color** |
| **What does Metricolor’s patent cover?** | **Metricolor obtained a patent on an apparatus and method for coloring hair — the “Metricolor System.”** |
| **How did L’Oréal become involved with Metricolor?** | **Metricolor pitched its concept for coloring hair to L’Oréal. L’Oréal had conversations with Metricolor, but decided not to enter a business deal.** |
| **What L’Oréal products are involved in this appeal?** | **L’Oréal introduced two products for strengthening hair bonds (the “Accused Products”) that are not used to color hair.** |
| **Why did Metricolor sue L’Oréal?** | **After its business pitch failed, Metricolor sued L’Oréal and its French parent corporation, L’Oréal S.A., for a host of claims relating to L’Oréal’s new unrelated products. These claims included patent infringement, breach of contract, trade secret misappropriation, breach of confidence, and unfair competition.** |
| **What did the district court decide?** | **The district court found Metricolor’s complaint meritless and determined that it lacked personal jurisdiction over L’Oréal S.A.** |
| **What is the first patent infringement claim at issue in this appeal?** | **The first claim concerns the apparatus comprising the Metricolor System.** |
| **What are the elements of the apparatus claim of the Metricolor System?** | **Two key elements of the apparatus claim are that the system includes:**  **(1) containers with an air-tight reclosing seal, and**  **(2) a means for engaging the container with a container holder.** |
| **What is the purpose of containers having an air-tight reclosing seal?** | **An air-tight reclosing seal ensures that the hair dye within the containers, which is susceptible to damaging oxidization, is not exposed to air.** |
| **What is the purpose of a container holder?** | **It helps reduce the clutter associated with existing hair coloring solutions.** |
| **Do the Accused Products have an air-tight reclosing seal or a container holder?** | **No. The Accused Products have neither of these features, either literally or by equivalents.** |
| **What is the second patent infringement claim at issue in this appeal?** | **The second patent claim describes a method for coloring hair that features the use of at least two of the specifically configured containers.** |
| **What are the other, non-infringement counts of Metricolor’s complaint?** | **The other counts are based on the allegation that L’Oréal somehow misused Metricolor’s confidential information or trade secrets to produce infringing products. But the complaint fails to identify any confidential information or trade secrets.** |
| **Why did the district court decline to exercise personal jurisdiction over L’Oréal S.A.?** | **Metricolor failed to allege any facts that would allow the district court to exercise personal jurisdiction over L’Oréal S.A., a French corporation that, by Metricolor’s own account, had only a single contact with Metricolor and none with the forum state (California).** |

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| **Jurisdictional  Statement** | **Color** |
| **Where does the district court’s jurisdiction lie?** | **The district court had jurisdiction over this patent-infringement action under 28 U.S.C. §§ 1331 and 1338(a).** |
| **When did the district court enter final judgment?** | **The district court entered final judgment on August 15, 2018.** |
| **When did Metricolor file its notice of appeal?** | **Metricolor timely filed a notice of appeal on September 13, 2018.** |
| **Where does this Court’s jurisdiction lie?** | **This Court has jurisdiction under 28 U.S.C. § 1295(a)(1).** |
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| **Issues  Presented** | **Color** |
| **What does Metricolor’s patent require?** | **Metricolor’s patent requires:**   * **containers that have an air-tight reclosable seal;** * **a means for engaging the container with a container holder; and** * **a method for mixing hair dye using such specifically configured containers.** |
| **What is the first question presented in this appeal?** | **Whether the district court properly dismissed Metricolor’s patent infringement claims with prejudice.** |
| **What is the second question presented in this appeal?** | **Whether the district court properly dismissed Metricolor’s claims for breach of contract, trade secret misappropriation, breach of confidence, and unfair competition with prejudice.** |
| **What is the third question presented in this appeal?** | **Whether the district court properly dismissed the claims against L’Oréal S.A.** **for lack of personal jurisdiction.** |
| **What are the issues on appeal according to Metricolor?** | **(1) Whether the district court erred in granting defendants’ motion to dismiss under Fed. R. Civ. P. 12(b)(6).**  **(2) Whether the district court erred in granting L’Oréal S.A.’s motion to dismiss for lack of personal jurisdiction.**  **(3) Whether the district court erred in denying Metricolor leave to amend the complaint.**  **(4) Whether the district court erred in denying Metricolor’s request to conduct jurisdictional discovery as to L’Oréal S.A.**  **OB 2.** |

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| **Statement  of the Case** | **Color** |
| **What do traditional hair coloring systems include?** | **Traditional systems consist of “a series of capped tubes, such as collapsible aluminum tubes or bottle-type containers, each containing a different hair coloring agent or additive paste or liquid.”** |
| **What are the problems with traditional hair coloring systems according to Metricolor?** | **According to Metricolor, traditional hair coloring systems are cumbersome and wasteful and have three problems:**  **(1) they are inaccurate because they require stylists to measure certain amounts by sight;**  **(2) they are wasteful because hair dyes, which are sensitive to oxidization, are kept in containers that expose the dye to air; and**  **(3) they are disorganized.** |
| **According to Metricolor, what is the *accuracy problem* caused by using aluminum tubes containing a hair coloring agent or additive paste or liquid?** | **Stylists are often required to measure certain amounts by sight or “squeeze a line” in the mixing receptacle itself. This inaccurate process makes it difficult for stylists to measure properly, since a change of even 0.1 milliliters can alter the hue of a color mixture. OB 7.** |
| **According to Metricolor, what is the *waste problem* caused by using aluminum tubes containing a hair coloring agent or additive paste or liquid?** | **Because of the nature of the aluminum tubes (which are like toothpaste tubes), it is difficult to dispense all of the liquid or paste from a single tube, leading to a waste of approximately 25% of the product in a typical tube. OB 7.** |
| **What prior efforts were taken to address the inaccuracy problem in hair coloring?** | **One prior art is disclosed in the Rodriguez Patent, issued August 2008.** |
| **What is depicted in this figure?** | **This figure depicts the Rodriguez Patent, issued August 2008, which describes a “hair roots coloring kit” that includes a “measuring device adapted for measuring necessary quantities of the hair coloring material … comprising a syringe having a hollow body … with a measuring indicia and an elongate tapered needle.”** |
| **Did L’Oréal make any prior efforts to address the inaccuracy problem in hair coloring?** | **Yes. L’Oréal has a prior patent application on technology relating to “the packaging, withdrawing and dispensing of doses of a product, in particular a hair dyeing product.”** |
| **What is depicted in this figure?** | **This is L’Oréal’s prior patent application relating to “the packaging, withdrawing and dispensing of doses of a product, in particular a hair dyeing product.”** |
| **According to Metricolor, what is the problem with the prior efforts that addressed the inaccuracy issue?** | **Metricolor alleges that the prior efforts didn’t fully address the other problems associated with traditional hair coloring systems, namely the oxidization problem: “[S]ince there is no oxygen barrier between the syringe and the distribution end of the dye tube when uncapped, oxidation will occur.”** |
| **What is the Metricolor System?** | **The Metricolor System is an apparatus comprising:**  **(1) a graduated measuring and dispensing vessel—e.g., a syringe;**  **(2) a container comprising an air-tight chamber, an opening with an air-tight reclosing seal which can engage with the graduated measuring vessel; and**  **(3) a means for engaging the container with a supporting container-holder, such as a rack.** |
| **What is the purpose of the first component of the Metricolor System (a graduated syringe)?** | **The graduated syringe addresses the inaccuracy problem in much the same way as the prior art.** |
| **What is the purpose of the second component of the Metricolor System (an air-tight chamber with an air-tight reclosing seal)?** | **The air-tight chamber with an air-tight reclosing seal solves the waste problem by ensuring that, even when the syringe is disengaged from the hair** **dye container, no air can get in to the container and oxidize the hair dye.** |
| **What is the purpose of the third component of the Metricolor System (a container designed with a means for engaging a container holder)?** | **A container with a means for engaging a container holder allows stylists to use a rack to keep their workspace organized.** |
| **Who founded Metricolor?** | **Stephen D’Amico and his father, Salvatore D’Amico. OB 6.** |
| **Who conceived of the Metricolor System?** | **Stephen D’Amico conceived of the Metricolor System in 2000. On January 14, 2013, Stephen and his father, Salvatore D’Amico, filed their provisional patent application. OB 6, 9.** |
| **When was Metricolor’s patent application for its hair coloring system published?** | **July 17, 2014.** |
| **When did Metricolor’s patent for its hair coloring system ultimately issue?** | **Metricolor’s patent issued in 2016 as U.S. Patent No. 9,301,587 (the ’587 Patent).** |
| **Has Metricolor licensed the ’587 Patent for use to any other entity or person?** | **No. OB 10.** |
| **How many claims are included in Metricolor’s patent?** | **The patent includes 17 claims, 2 of which (Claim 1 and Claim 14) are independent and the other 15 of which depend on Claim 1 and Claim 14.** |
| **What does Claim 1 of the ’587 Patent describe?** | **Claim 1 of the’587 Patent describes the apparatus for storing, measuring, and dispensing hair coloring agents and additives. OB 11.** |
| **What specifically does Claim 1 of the ’587 Patent describe?** | **Claim 1 describes “[a]n apparatus for preparing a hair coloring comprising:”**  **a graduated measuring and dispensing vessel;**  **a container having a hair dye contained therein, the container comprising an air-tight chamber and an opening;**  **the container further including means for engaging the container with a container holder to support the container;**  **an air-tight reclosing seal at the opening; and**  **thereby permitting a known quantity of the hair dye to be withdrawn from the container into the measuring and dispensing vessel, allowing an accurate and repeatable quantity of hair dye to be dispensed from the container.** |
| **What does the apparatus described in Claim 1 of the ’587 Patent comprise?** | **The apparatus described in Claim 1 generally comprises:**  **(1) a graduated measuring and dispensing vessel;**  **(2) a container comprising an air-tight chamber, an opening with an air-tight reclosing seal which can engage with the graduated measuring vessel; and**  **(3) a means for engaging the container with a supporting container-holder, such as a rack. OB 11.** |
| **How do Claims 1, 9, 10, and 11 of the ’587 Patent describe the graduated measuring and dispensing vessel?** | **They describe the graduated measuring and dispensing vessel as a reusable catheter syringe, which is tapered to allow for a secure connection with the hair coloring agent or additive containers. OB 11.** |
| **How do Claims 1, 3, and 4 of the ’587 Patent describe the container used in the Metricolor System?** | **They describe a poly-plastic container, which is comprised of an outer layer or semi-rigid poly-plastic material and which includes an opening at the bottom of the container relative to a container label, such that the container is faced down to engage with the catheter syringe. OB 11.** |
| **How do Claims 1 and 5 of the ’587 Patent describe an “orifice reducer”?** | **They describe an “orifice reducer” as an air-reducing seal that allows for the catheter syringe to engage with the hair coloring agent or additive containers in a controlled manner, to extract specific, measured amounts of hair coloring agent or additive while preventing leakage and reducing wasteful oxidation of the hair coloring agent or additive. OB 11-12.** |
| **What does Metricolor’s Figure 2 depict?** | **This is an embodiment of the Metricolor System’s “graduated measuring and dispensing vessel” to enable more accurate measuring.** |
| **What does Metricolor’s Figure 14 depict?** | **This depicts the outside of a “self-sealing orifice reducer … that creates an airtight seal. A catheter syringe is inserted into the orifice reducer to withdraw the required amount of color according to a formula. Upon withdrawal of the syringe, the opening in the orifice reducer closes firmly, preventing leakage and protecting the color from oxidation.”** |
| **What does Metricolor’s Figure 1 depict?** | **Figure 1 depicts containers that are “designed to removably install into a rack 12, which is adapted to hold multiple containers 10.”** |
| **What does Metricolor’s Figure 9 depict?** | **Figure 9 depicts an “‘IV Bag type of container” where the containers are pouches with holes on one end, which can be hung “in a rack designed to suspend individual containers in an organized and easy to access manner.”** |
| **What does Claim 14 of the ’587 Patent describe?** | **Claim 14 describes a multi-step method of coloring hair.** |
| **According to Metricolor, what does Claim 14 of the ’587 Patent describe?** | **According to Metricolor, Claim 14 describes a methodology for storing, measuring, and dispensing hair coloring agent or additive using the apparatus described elsewhere in the ’587 Patent. OB 12.** |
| **What are the steps for coloring hair in Metricolor’s Claim 14?** | **(1) gathering the components described in Claim 1 (a container with an air-tight reclosable seal; a graduated syringe; and a rack);**  **(2) using a graduated syringe to withdraw hair dyes from multiple containers with “air-tight reclosable seals”; and**  **(3) mixing the dyes.** |
| **What makes the Metricolor System unique according to Metricolor?** | **In contrast with traditional hair coloring agent or additive systems, Metricolor’s syringe allows for an accuracy of +/- 1% in measuring liquid/pastes. This accuracy, combined with the reusable syringe and the easily stored rack storage system, make the Metricolor System unique in the field of hair coloring systems. OB9.** |
| **When did Metricolor approach L’Oréal about the Metricolor System?** | **In August 2014, a month after Metricolor’s patent application was published, Metricolor founders Salvatore and Stephen D’Amico approached L’Oréal USA to pitch a “potential sale, partnership or licensing of the Metricolor System.”** |
| **What did the nondisclosure agreement between Metricolor and L’Oréal provide?** | **The NDA provided that neither party would “copy or reproduce” or “decompile, disassemble or reverse engineer” any “Confidential Information.”** |
| **What did the parties discuss regarding the Metricolor System?** | **The parties engaged in sporadic discussions over the course of two years. Metricolor alleges that the “D’Amicos presented and demonstrated the Metricolor System.” Metricolor discussed the possibility of entering into “an Exclusive Evaluation Agreement” with L’Oréal, but it was never consummated. Metricolor also alleges a single interaction with two “corporate executives” from “L’Oréal Group France who specifically asked the D’Amicos for ten samples of the Metricolor System.”** |
| **Was there any allegation that the L’Oréal people were in California when they asked for Metricolor samples?** | **No.** |
| **Did Metricolor provide samples of its system to L’Oréal?** | **No. (Metricolor does not say whether it fulfilled the request—L’Oréal confirms it did not.)** |
| **When did L’Oréal notify Metricolor that it would be terminating negotiations?** | **June 16, 2016.** |
| **Why did L’Oréal terminate negotiations?** | **[Explain.] L’Oréal provided no reason for the sudden termination of negotiations that had been ongoing for nearly two years. OB 16.** |
| **When did L’Oréal launch two new hair bond strengthening products?** | **September 2016.** |
| **What were the two new hair bond strengthening products that L’Oréal launched in September 2016 (the Accused Products)?** | **(1) Matrix brand’s Matrixcolor *Bond Ultim8* product; and**  **(2) Redken brand’s *pH-Bonder* product.** |
| **What were the Accused Products designed to do?** | **Both products were designed to repair and strengthen the bonds in hair strands that might fray during chemical processing.** |
| **Are the Accused Products hair dyes?** | **No. Although Metricolor suggests that the Accused Products contain small quantities of a “hair dye additive,” OB 46, it ultimately seems to recognize that the products are not hair dyes and cannot be used to color hair. OB 46 n.7.** |
| **On what basis does Metricolor suggest that the Accused Products contain small quantities of a “hair dye additive”?** | **In an unrelated case involving the Accused Products, an expert opined that the products contained small quantities of “direct action dyes.” OB 46 n.8 (quoting *Liqwd, Inc. v. L’Oréal USA, Inc.*, 2017 WL 2881351, at \*3 (D. Del. July 6, 2017)). That decision was vacated. 720 F. App’x 623 (Fed. Cir. 2018). In any event, another expert in that case explained that he was “not aware of any hair dye product which uses these chemicals to actually impart color to hair in the low concentrations that [he] believe[d] . . . [were] used in the Accused Products.” *Liqwd*, 2017 WL 2881351, at \*3.** |
| **Does L’Oréal’s Matrix brand advertise haircare products designed to color, style, and texture hair?** | **[Explain.] OB 17.** |
| **Is L’Oréal’s Bond Ultim8 product advertised under the banner “MATRIXCOLOR” with the word “color” appearing in red?** | **[Explain.] OB 17.** |
| **Is Metricolor correct in asserting that the advertisement of L’Oréal’s Bond Ultim8 product—advertised under the banner “MATRIXCOLOR” with the word “color” appearing in red—bears a striking similarity to Metricolor’s name, color scheme, and logo?** | **[Explain. ] OB 17.** |
| **What is included in the Accused Products’ systems?** | **The Bond Ultim8 and the pH-Bonder system both consist of a bottle of hair bonder, other haircare compounds, and a graduated syringe.** |
| **According to Metricolor, how do the Accused products infringe on its patent?** | **According to Metricolor, the Accused Products “feature the apparatus described in Claim 1 of the ’587 Patent,” and their promotional materials and instructional videos describe a process for mixing the hair bonders that infringes Claim 14 of the ’587 Patent.** |
| **What is depicted in this image?** | **The Matrix brand’s Bond Ultim8.** |
| **What is depicted in this image?** | **The Redken brand’s pH-Bonder.** |
| **Does the pH-Bonder product feature three separate containers of various liquids which are mixed using a syringe?** | **[Explain.] OB 21.** |
| **Does the pH-Bonder product include a “hair coloring agent”?** | **[Explain.] The Redken pH-Bond Protecting Additive contains direct action dyes used for hair coloring. The Delaware District court, relying on L’Oréal’s expert testimony, determined that the Accused Products contained a “hair coloring agent.” *Liqwd, Inc. v. L’Oréal USA, Inc.* at \*3, vacated (Fed. Cir. 2018). OB 21 n.4.** |
| **Does a YouTube marketing video titled “pH Bonder Product Knowledge” and uploaded by “RedkenCANADA” show a stylist using a graduated syringe with the Redken pH-Bonder product?** | **[Explain.] OB 22.** |
| **What is depicted in this image?** | **These are two images from a YouTube video titled “pH Bonder Product Knowledge” and uploaded by “RedkenCANADA” that show a stylist using a graduated syringe with the Redken pH-Bonder product. The stylist is using the syringe to extract a hair coloring agent or additive from a plastic container and then mixing it with additional hair coloring agents and additives in a mixing receptacle. OB 22.** |
| **What is the overlap between the Accused Products and the Metricolor System?** | **Metricolor identifies no alleged overlap other than the** **presence of containers generally, graduated syringes, and allegedly infringing instructions. There is no other overlap.** |
| **Do the containers included with the Accused Products have air-tight reclosable seals?** | **No. They have no need for air-tight reclosable seals because they do not contain hair dye that is sensitive to oxidization.** |
| **Do the containers included with the Accused Products have any means for engaging with a container holder?** | **No. The Accused Products have no rack at all, and even Metricolor acknowledges that the Accused Products “use a standard-looking off-the-shelf bottle.” OB 46.** |
| **What is depicted in this image?** | **This image is captured from Metricolor’s ’587 Patent, and features Metricolor’s patented graduated syringe apparatus injecting a measured amount of liquid or paste into a mixing receptacle. OB 19.** |
| **What is depicted in this image?** | **This image appears in L’Oréal’s Bond Ultim8’s advertisements and shows a graduated syringe injecting a measured amount of liquid or paste into a mixing receptacle. OB 19.** |
| **What is depicted in this image?** | **This is a screen capture of a YouTube video titled “Introducing NEW! Bond Ultim8 Bond Protection System | Matrix.” It features a hair stylist using a graduated syringe to extract an exact amount of different hair coloring agents or additives and inserting them into a mixed receptacle. OB 20.** |
| **Do videos on the Matrix YouTube page show stylists using a graduated syringe with the Matrixcolor Bond Ultim8 product?** | **[Explain.] OB 20.** |
| **What is depicted in this image?** | **This is a hair coloring agent or additive product in the Matrixcolor line. OB 21.** |
| **Is the pouch design of the Logics Color DNA System in the Matrixcolor line similar to Metricolor’s pouch design for its hair coloring agent and additive containers?** | **[Explain.] OB 21.** |
| **When was the last time that Metricolor contacted L’Oréal about the Metricolor System?** | **On January 9, 2017, Metricolor contacted L’Oréal USA in a final bid to communicate “Metricolor’s intent to place the Metricolor system in the marketplace and commence meetings with other interested parties.”** |
| **When did Metricolor sue L’Oréal?** | **[Explain.]** |
| **Which L’Oréal entities did Metricolor sue?** | **Metricolor filed suit against L’Oréal USA, Inc., its French parent corporation (L’Oréal S.A.), and several subsidiaries and associated brands (L’Oréal USA Products, Inc., L’Oréal USA S/D, Inc., and Redken 5th Avenue NYC, LLC).** |
| **What does Metricolor allege in its complaint?** | **Metricolor’s complaint asserts claims for patent infringement, breach of contract, trade secret misappropriation under federal law, breach of confidence, and unfair competition under state law.** |
| **On what basis did L’Oréal move to dismiss the complaint?** | **All L’Oréal defendants moved to dismiss for failure to state a claim. And L’Oréal S.A., a French corporation, moved to dismiss for lack of personal jurisdiction.** |
| **What did the district court decide on L’Oréal’s motion to dismiss?** | **The district court took the matter under submission and issued an order granting both motions on August 15, 2018.** |
| **What did the district court decide regarding L’Oréal S.A.’s motion to dismiss for lack of personal jurisdiction.?** | **The court found that it lacked *general jurisdiction* because the complaint lacked any allegation that L’Oréal S.A. had “continuous and systematic” contacts adequate to render it “at home” in California. And the court held that it lacked *specific jurisdiction* because alleging one instance in which two executives from L’Oréal S.A. requested product samples from Metricolor “fails the purposeful direction test because the conduct is not ‘expressly aimed’ at the forum state.”** |
| **What did the district court decide with respect to the patent infringement claims?** | **The district court concluded that the patent infringement claims were meritless because Metricolor failed to “plausibly allege that the accused product practices each of the limitations found in at least one asserted claim.”** |
| **What did the district court decide with respect to patent infringement on Claim 1 of the ’587 Patent?** | **The district court concluded that Metricolor failed to plausibly allege that the Accused Products practice at least two limitations of the claim.**  **(1) The complaint failed entirely “to allege that either product contains a ‘means for engaging the container with a container holder to support the container.’”**  **(2) The complaint failed to allege that the *Bond Ultim8* product has an air-tight reclosing seal at the opening.**  **(3) “[A]lthough the complaint alleges that the *pH-Bonder* product has an airtight seal, this is plainly contradicted by images of the product contained in the complaint, which plainly show an open hole at the base of the bottle.”** |
| **What did the district court decide with respect to patent infringement on Claim 14 of the ’587 Patent?** | **The district court concluded that, despite Metricolor’s allegations that the methodology for mixing the Accused Products “clearly reads” onto Claim 14, “after comparing the two, it is clear that they do not.”** |
| **What did Metricolor argue regarding the doctrine of equivalents?** | **In its opposition to L’Oréal’s motion to dismiss, Metricolor raised a new argument (not pleaded in the complaint) that infringement could be shown under the doctrine of equivalents. But this argument could not overcome the fact that the Accused Products totally lacked at least two of the limitations of the Metricolor System.** |
| **What did the district court decide regarding the indirect, contributory, and induced infringement claims?** | **The district court dismissed the indirect, contributory, and induced infringement claims, given the lack of plausible allegations of direct infringement.** |
| **What did the district court decide regarding the breach of contract, trade secret misappropriation, breach of confidence, and unfair competition claims?** | **The district court found these claims flawed because Metricolor failed to plausibly allege that it disclosed any trade secret or confidential information, aside from what was contained in the public patent application.** |
| **What did Metricolor allege regarding breach of contract?** | **Metricolor alleged that L’Oréal had violated the NDA by misusing confidential information.** |
| **What did the district court decide regarding the breach of contract claim?** | **The only specific allegation on this count was the allegation that L’Oréal U.S. breached the NDA by creating products that infringe the ’587 Patent.** **The district court found this allegation inadequate because the information in the ’587 Patent application—which was already generally known or available to the public when the parties met—was expressly excluded from the definition of “confidential information” under the NDA.** |
| **What did the district court decide regarding the trade secret misappropriation claim?** | **The district court found that the trade secret misappropriation claim was untenable because it rested on the barebones assertion that L’Oréal gained a “complete working knowledge of Metricolor’s confidential and trade secret information.” As the district court explained, “[b]ecause Plaintiff does not allege a trade secret, and the information in the ’587 Patent cannot be protected as a trade secret, [this] claim fails.”** |
| **What did the district court decide regarding the state law breach of confidence claim?** | **A state law breach of confidence claim requires the plaintiff to “convey[] confidential and novel information to the defendant.” Because information contained in the patent cannot constitute confidential information, and “[a]part from the patent claims, Plaintiff makes nothing more than vague and conclusory allegations that it provided Defendants with ‘confidential and novel information,’” the district court also dismissed this claim.** |
| **What did the district court decide regarding the claim that L’Oréal had violated California’s Unfair Competition Law?** | **The district court dismissed the UCL claim because this claim relied entirely on Metricolor’s failed predicate claims for patent infringement, breach of contract, trade secret misappropriation, and breach of confidence.** |
| **When did the district court enter its order dismissing all claims against L’Oréal?** | **August 15, 2018.** |
| **You argue in footnote 2 of your brief that this Court may dismiss Metricolor’s appeal for failure to comply with this Court’s rules. Please explain.** | **This Court rejected Metricolor’s initial opening brief as both non-compliant and filed out of time. It then rejected the corrected brief as non-compliant and rejected the second corrected brief as well. Metricolor filed a *third corrected brief*, which changed the order of two sub-sections. Because “[c]orrections … must be limited to nonsubstantive matters,” Practice Notes to Fed. Cir. R. 32, it would be “within [the Court’s] powers” to dismiss the appeal for “failure to comply with this [C]ourt’s rules.” *Julien v. Zeringue* at 1574.** |

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| **Summary  of Argument** | **Color** |
| **Why do you argue that Metricolor’s patent infringement claim is without merit?** | **Metricolor’s patent infringement claim cannot stand because it fails to allege any plausible basis that the Accused Products meet each limitation of any claim of the ’587 Patent.** |
| **What does Claim 1 of the ’587 Patent state?** | **Claim 1 of the ’587 Patent states that the Metricolor System includes containers with an “air-tight reclosing seal at the opening” and a “means for engaging the container with a container holder to support the container.”** |
| **Do the Accused Products include containers with an air-tight reclosing seal at the opening and a means for engaging the container with a container holder to support the container?** | **No. The Accused Products do not meet either of these limitations and are not designed to address the problems Metricolor was tackling with these limitations.** |
| **What does Claim 14 of the ’587 Patent state?** | **Claim 14 describes a method for coloring hair that makes use of containers with air-tight reclosing seals. The Accused Products have no such containers and practice no such method.** |
| **What is the basis of Metricolor’s claims for breach of contract, trade secret misappropriation, breach of confidence, and unfair competition?** | **These claims are premised on the assumption that Metricolor has disclosed confidential information or trade secrets to L’Oréal and that L’Oréal then made use of this information to develop the Accused Products.** |
| **What confidential information or trade secret does Metricolor allege that it disclosed to L’Oréal?** | **None. Metricolor’s complaint lacks any allegation about what confidential information or trade secret it disclosed, much less any plausible claim that L’Oréal utilized Metricolor’s allegedly protected information to develop a product line unrelated to the Metricolor System.** |
| **Why do you argue that Metricolor’s state law unfair competition lacks merit?** | **Metricolor’s state law unfair competition claim is preempted by its federal patent infringement and trade secrets misappropriation claims arising out of the same nucleus of facts.** |
| **Why do you argue that the district court correctly dismissed the claims against L’Oréal S.A.?** | **Metricolor has provided no basis for revisiting the district court’s conclusion that it lacked personal jurisdiction over L’Oréal S.A., a French corporation that had, by Metricolor’s own account, only one interaction with Metricolor and no connection to the forum state (California).** |
| **Standard of Review** | **Color** |
| **What is the standard of review for the district court’s dismissal for failure to state a claim?** | **The Ninth Circuit, whose law applies here, reviews a district court’s dismissal for failure to state a claim de novo. *Livid Holdings* at 1055; *Classen Immunotherapies* at 896 (regional circuit law applies).** |
| **What is the standard of review for the district court’s denial of leave to amend the complaint?** | **The Ninth Circuit reviews the denial of leave to amend for abuse of discretion. *Leadsingeri* at 532.** |
| **What must a complaint contain to survive a motion to dismiss?** | **To survive a motion to dismiss, a complaint must contain “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal* at 662. Although the court “accept[s] the plaintiffs’ allegations as true and construe[s] them in the light most favorable to plaintiffs,” *Gompper* at 895, “only pleaded facts, as opposed to legal conclusions, are entitled to assumption of the truth,” *Corinthian Colls.* at 991.** |
| **When is a claim “plausible” under *Iqbal*?** | **A claim is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal* at 678. Plausibility “is not akin to a ‘probability’ requirement,’” rather, it requires “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* OB 25.** |
| **What relevance does Form 18 have to this case?** | **No relevance. In its opening brief, Metricolor discussed the relationship between the plausibility standards in *Twombly* and *Iqbal* and the now-defunct Federal Rule of Civil Procedure 84, which authorized the use of a simplified pleading form (Form 18). OB 37-39. But Rule 84 was repealed in December 2015, three years before Metricolor filed its complaint. And, in any event, Metricolor did not use Form 18 to file this suit. *Lyda* at 1337 n.2.** |
| **How did this Court treat Form 18 while it was still in effect?** | **While Form 18 was still in effect, this Court stated that, to the extent that “*Twombly* and its progeny conflict with the Forms and create differing pleadings requirements, the Forms control” because only a formal amendment, not judicial interpretation, can override the Federal Rules. *In re Bill of Lading Transmission & Processing Sys. Patent Litig.* at 1334.** |
| **While Form 18 was still in effect, did it displace *Iqbal* and *Twombly*’s requirement that a plaintiff must state a claim to relief that is plausible on its face?** | **No, Form 18 did not displace *Iqbal* and *Twombly*’s foundational requirement that a plaintiff must “state a claim to relief that is plausible on its face” — only that, in a “case involv[ing] simple technology,” the use of the form accompanied by allegations “that the accused products meet ‘each and every element of at least one claim’” of the patent might satisfy the plausibility standard. *Disc Disease Sols.* at 1260.** |
| **While Form 18 was still in effect, what did complaints need to include in patent infringement lawsuits?** | **To satisfy the requirements of Form 18, a complaint needed to include:**  **(1) an allegation of jurisdiction;**  **(2) a statement that the plaintiff owns the patent;**  **(3) a statement that defendant has been infringing the patent “by making, selling, and using [the device] embodying the patent”;**  **(4) a statement that the plaintiff has given the defendant notice of its infringement; and**  **(5) a demand for an injunction and damages.**  **Fed. R. Civ. P. 84 (repealed 2015).** |
| **Since both Rule 84 (and, as a result, Form 18) were abrogated by amendments to the Federal Rules of Civil Procedure, has this Court decided whether a patent infringement claim requires more than the requirements of Form 18?** | **No. And district courts have had conflicting rulings. OB 38.** |
| **Since both Rule 84 (and, as a result, Form 18) were abrogated by amendments to the Federal Rules of Civil Procedure, what have district courts held regarding whether patent infringement claims require more than the requirements of Form 18?** | **Some courts, such as the Northern District of California, have held that patent infringement claims require a higher standard than Form 18. *Windy City Innovations* a 1115. Others, including the Central District of California, have held that a lesser standard is required. *Incom Corp.* at 3-4 (“Plaintiff has stated a plausible claim for direct infringement by specifically identifying Defendants’ products and alleging that they perform the same unique function as Plaintiff’s patented system.”). OB 38.** |
| **Can the plausibility standard be met by attaching the infringed patent to the complaint, describing the patented invention and how it was novel, and naming specific products developed by the infringing party?** | **Yes. *Incom Corp.* OB 39.** |
| **What is the standard of review for the district court’s dismissal for lack of personal jurisdiction?** | **The Ninth Circuit reviews a district court’s dismissal for lack of personal jurisdiction de novo. *Swartz* at 760.** |
| **What is the standard of review for the district court’s denial of jurisdictional discovery?** | **The Ninth Circuit reviews a district court’s denial of jurisdictional discovery for abuse of discretion. *Pebble Beach* at 1154.** |

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| **Patent Infringement Argument** | **Color** |
| **What must Metricolor allege to maintain a claim of literal infringement under patent law?** | **To maintain a claim of literal infringement, Metricolor must plausibly allege that “every limitation set forth in a claim … [is] found in an accused product, exactly.” *Southwall Techs.* at 1575.** |
| **Could Metricolor could have asserted a claim under the doctrine of equivalents?** | **Yes. Metricolor could have asserted a claim under the doctrine of equivalents had it alleged “that the accused product contain[ed] each limitation of the claim or its equivalent.” *Leggett & Platt* at 1358-59. But Metricolor’s suit falls short in both regards.** |
| **Did Metricolor plead the doctrine of equivalents in its complaint?** | **No. The district court, acting within its discretion, dismissed the new theories of infringement advanced for the first time in Metricolor’s opposition brief.** |
| **What does the doctrine of equivalents state?** | **The doctrine of equivalents states that a product infringes a patent “if two devices do the same work in substantially the same way, and accomplish substantially the same result . . . even though they differ in name, form, or shape.” *Machine Co.* at 125. OB 41.** |
| **Should the district court have granted Metricolor leave to amend its complaint to properly include a doctrine of equivalents claim?** | **[Explain.] OB 41.** |
| **Was the district court required to allow Metricolor leave to amend its complaint?** | **No. The district court was not required to give leave to amend where, as here, Metricolor “presented no new facts but only ‘new theories’ and ‘provided no satisfactory explanation for [its] failure to fully develop [its] contentions originally.’” *Vincent* at 570-71.** |
| **Why does Metricolor’s literal infringement claim fail?** | **Metricolor’s complaint fails to “include allegations sufficient to ‘permit [the] court to infer that the accused product infringes each element of at least one claim.’” *TeleSign* at \*3.** |
| **Why does Metricolor’s doctrine of equivalents claim fail?** | **(1) Metricolor fails to recognize *substantial differences* between individual claim elements of the ’587 Patent and the Accused Products. *Sage Prods.* at 1423.**  **(2) Metricolor fails to show that each relevant “component in the accused subject matter performs substantially the *same function* as the claimed limitation *in substantially the same way* to achieve *substantially the same result*.” *Ethicon Endo-Surgery* at 1315 (emphasis added).** |
| **What does the Metricolor System described in Claim 1 of the ’587 Patent aim to do?** | **The Metricolor System aims to solve several purported deficiencies in existing hair coloring technologies.** |
| **What were the specific ways in which the Metricolor System aimed to solve deficiencies in hair coloring technologies?** | **(1) Address the concern of mixing an accurate amount of hair dye by including “a graduated measuring and dispensing vessel.”**  **(2) Decrease waste caused by hair oxidizing in uncapped containers by designing containers with “an air-tight reclosing seal at the opening.”**  **(3) Solve the problem of a disorganized workspace by including a “means for engaging the container with a container holder to support the container.”** |
| **What are the essential components of Metricolor’s vision for revamping hair coloring systems?** | **The limitations describing the graduated syringe, air-tight reclosing sealing, and means for engaging the container with a container holder, among other claim limitations, are elements of the ’587 Patent claims and are essential components of Metricolor’s vision for revamping hair coloring systems.** |
| **What overlap exists between the Metricolor System and the Accused Products?** | **Metricolor has plausibly alleged only a single point of overlap between the Metricolor System** **and the Accused Products — both include graduated syringes.** |
| **Do the Accused Products include graduated syringes?** | **Yes. L’Oréal has not contested that the Accused Products include graduated syringes. But Metricolor’s own patent acknowledges that graduated syringes are part of the prior art. And, in any event, this single commonality is insufficient to claim infringement, and no amendment can save Metricolor’s claim.** |
| **What is the purpose of the air-tight reclosing seal described in Claim 1 of the ’587 Patent?** | **The air-tight reclosing seal allows hair dye to be extracted from the air-tight chamber with a syringe. When the syringe is disengaged from the container, the air-tight reclosing seal closes off the air-tight chamber.** |
| **How does the air-tight reclosing seal function?** | **Claim 5 explains that the air-tight reclosing seal is comprised of “a self-sealing orifice reducer.” Upon withdrawal of a syringe, “the opening in the orifice reducer closes firmly, preventing leakage and protecting the** **color from oxidation.”** |
| **What is a simple way of explaining how the air-tight reclosing seal functions?** | **The openings of Metricolor’s claimed hair-dye containers will have “air-tight reclosing seals” that, when engaged by a syringe, allow hair dye out and, otherwise, are airtight (*i.e.*, impervious to air).** |
| **Why would an air-tight reclosing seal be a useful feature for hair dye containers?** | **Assuming the technology works, this is a useful feature because it prevents the wasteful oxidization of hair dye when uncapped containers are left lying around.** |
| **Do the Accused Products contain an air-tight reclosing seal?** | **No.** **The Accused Products have an open hole in the orifice reducer and do not have any sort of air-tight reclosing seal.** |
| **Does Metricolor allege that the Accused Products contain an air-tight reclosing seal?** | **No. Unable to allege that an open hole is an air-tight reclosing seal, Metricolor merely suggests that the Accused Products include containers with “a similar air-tight chamber,” and “all use closure apparatuses which feature orifice-reducing qualities to mitigate against leakage and oxidization.”** |
| **Would Metricolor be able to amend its complaint to allege that the Accused Products contain an air-tight reclosing seal?** | **No. Any attempt by Metricolor to amend its complaint to allege this claim limitation would be futile. Metricolor does not dispute that L’Oréal uses a “standard- looking off-the-shelf bottle,” OB 46, that “plainly show[s] an open hole at the base of the bottle.”** |
| **What is depicted in this image?**    **Appx41.** | **This is an image Metricolor included in its complaint that shows the Redken pH-Bonder product.** |
| **Why don’t the Accused Products have an air-tight reclosing seal?** | **The Accused Products have no need for such a seal because they do not contain hair dyes,** **and the solutions contained in the Accused Products are not subject to oxidization concerns.** |
| **Does air flow into the containers in the Accused Products?** | **Yes. Air unquestionably and desirably flows into the containers in the Accused Products through the hole in the orifice reducer. Air needs to replace the removed product; otherwise the bottle would become deformed as the product is repeatedly emptied from the container.** |
| **According to Metricolor, what creates an air-tight seal in the Accused Products?** | **According to Metricolor, there is equivalent infringement because there is an air-tight connection for the moment when the syringe is engaged with the reduced orifice at the top of the bottle. OB 43. But that is *not* what the patent claims and requires. *Vitronics Corp.* at 1582 (“[W]e look to the words of the claims themselves … to define the scope of the patented invention.”).** |
| **Does the patent claim require the syringe engaging with the opening to create an air-tight seal?** | **No. The claim requires that “when the measuring and dispensing vessel is disengaged from the container, the air-tight reclosing seal closes off the air-tight chamber.”** |
| **What is the purpose of the Accused Products’ orifice reducers?** | **The Accused Products contain off-the-shelf orifice reducers to narrow the opening at the top of the bottle to accommodate a syringe, which is their standard use. But the superficial similarity of these orifice reducers to the orifice reducers shown in Fig. 14 of the Metricolor patent does not lead to a plausible claim.** |
| **What does Fig. 14 of the Metricolor patent show regarding orifice reducers?** | **The Metricolor patent explains that Fig. 14 shows “self-sealing orifice reducers” — “[u]pon withdrawal of the syringe, the opening in the orifice reducer closes firmly, preventing leakage and protecting the color from oxidization.” This is consistent with the invention’s claimed goal of maintaining an air-tight chamber.** |
| **Has Metricolor alleged that the Accused Products use a self-sealing orifice reducer or perform any self-sealing function?** | **No. And the lack of this “self-sealing” component is not an “insubstantial difference,” *Warner-Jenkinson Co.* at 39, given that one permits oxidization and the other does not. There is no plausible allegation that the hole in the Accused Products’ orifice reducer is the claimed air-tight reclosable seal.** |
| **What does Metricolor allege regarding the Accused Products’ screw-on-top?** | **Metricolor notes that the Accused Products have a “reclosable screw-on-top,” which “creates an airtight seal when the operator is not extracting product.” OB 43. This is irrelevant and fails to satisfy the doctrine of equivalents. *Intendis* at 1363 (“A patentee may not assert a scope of equivalency that would encompass, or ensnare, the prior art.”).** |
| **Were screw-on-tops part of the prior art?** | **Yes. Screw caps are exactly what was used in the prior art that Metricolor sought to improve upon.** |
| **Do ordinary screw tops create an airtight seal?** | **No. Even if an ordinary screw top created an “airtight seal” when a bottle was closed, it offers no airtight seal when the cap is off.** |
| **What does the patent require regarding an air-tight seal?** | **As the ’587 Patent makes clear, the claimed innovation here is the integration of an “air-tight reclosing seal at the opening” and having a syringe that “engages the air-tight reclosing seal.** |
| **Is a simple hole in a bottle equivalent to a reclosing seal?** | **No. This argument is futile because it would render the “airtight reclosing seal” limitation “meaningless.” *Freedman Seating Co.* at 1359 (alleged equivalents must not “render[] the pertinent limitation meaningless”).** |
| **Were Metricolor’s allegations that the Accused Products worked in substantially the same way and accomplished substantially the same result as its products sufficient under the Doctrine of Equivalents to survive a motion to dismiss?** | **[Explain.] RB 6.** |
| **Does the complaint allege that the ’587 Patent provides *alternative methods* to provide an air-tight seal (or does it only allege the method of using a self-sealing orifice reducer)?** | **[Explain.] RB 8-11.** |
| **Is it your position that the ’587 Patent *requires* a self-sealing orifice reducer?** | **[Explain.] RB 11.** |
| **What does Claim 1 of the ’587 Patent require with respect to a container holder?** | **Claim 1 of the ’587 Patent requires that the “container further includ[es] means for engaging the container with a container holder to support the container.”** |
| **What does a means-plus-function limitation cover?** | **A means-plus-function limitation, such as the means for engaging the container with a container holder, covers “only the structure, materials,** **or acts described in the specification as corresponding to the claimed function and equivalents thereof,” *Williamson* at 1347.** |
| **How does the ’587 Patent illustrate “a means for engaging the container with a container holder to support it”? Appx66.** | **(1) A container with a hole at one end such that the container can be suspended from a rack like an IV bag.**  **(2) Or, the container might be shaped to fit into a corresponding slot into a rack in such a way that several dyes can be placed in a row together.** |
| **Does the ’587 Patent cover an ordinary container with no means of engaging a rack?** | **No. This is the prior art that the Metricolor “invention” was supposed to be an improvement over and what is depicted in Metricolor’s images of the Accused Products—ordinary bottles left on a table with no organization, much less a means for engaging a rack.** |
| **What problem does the ’587 Patent’s design of containers to pair with a container holder remedy?** | **Designing the containers to pair with a container holder remedies the problem of “containers [that] usually end up haphazardly thrown in drawers or on shelves, forcing stylists to search for a desired color among many disorganized dyes.”** |
| **Does Metricolor’s complaint allege that the Accused Products include means for engaging the container with a container holder?** | **No. And this is fatal to Metricolor’s infringement claim. *Lemelson* at 1551 (holding that the absence of any claim element is fatal to a charge of literal infringement).** |
| **Can Metricolor amend its complaint to remedy the defects in its infringement claim, *i.e.*, to allege that the Accused Products include means for engaging containers with a container holder?** | **No. The Accused Products do not include any means for engaging a container holder, let alone the specific means required by the claims. The Accused Products are “standard-looking off-the-shelf bottle[s].” *Lockheed Martin* at 1320 (“Literal infringement … requires that the relevant structure in the accused device perform the identical function recited in the claim and be identical or equivalent to the corresponding structure in the specification.”).** |
| **What does Metricolor argue in its brief to suggest that the limitation regarding a “means for engaging the container with a container holder to support the container” is met?** | **Metricolor reprises the doctrine of equivalents to suggest that this limitation is met because “any off-the-shelf bottle can be placed in any type of container holder.” OB 44. This revisionist account of the limitation is contrary to law, as it reads the limitation out of the claim. *Lockheed* at 1319 (“In identifying the function of a means-plus-function claim, a claimed function may not … be improperly broadened by ignoring the clear limitations contained in the claim language.”).** |
| **What does claim 14 of the ’587 Patent describe?** | **Claim 14 “describes a methodology for storing, measuring and dispensing hair coloring agent or additive using the apparatus described elsewhere in the ’587 Patent.”** |
| **Do the Accused Products have any containers with hair dye or with an air-tight reclosable seal?** | **No. Metricolor does not allege and the Accused Products do not have any containers with hair dye or an air-tight reclosable seal, and they involve no withdrawing, accessing, dispensing, or mixing hair dyes of any sort.** |
| **According to Metricolor, how do the Accused Products infringe on the method set forth in Claim 14?** | **Metricolor argues that a sample set of instructions on the Accused Products’ website and on the** **packaging box for the Bond Ultim8 product “follow the same method set forth in Claim 14.” OB 47.** |
| **What are the instructions on the Bond Ultim8 product that Metricolor alleges infringes on the method set forth in Claim 14?** | **HOW DO I USE THE SYRINGE?**  **1. Remove cap of Step 1 Amplifier.**  **2. Snap the orifice securely into the bottle neck with the ridged end facing into the bottle.**  **3. Push air out of syringe. Firmly push syringe into bottle opening.**  **4. Turn the bottle upside down and pull syringe to the correct dose.**  **5. Dispense liquid slowly into lightener/color mixture. Rinse syringe after each use.** |
| **Are there any common features between the Accused Products and the Metricolor System?** | **There is one common feature between the two products and related methods: they both use syringes. That is also what the Accused Products and the Metricolor System have in common with prior art such as the Rodriguez Patent, which describes “[a] hair roots coloring kit for mixing together standard hair coloring materials including … a syringe having a hollow body … with a measuring indicia and an elongate tapered needle.”** |
| **Does the method for utilizing the Accused Products use a container with “an air-tight re- closable seal” or special “means for engaging a container holder”?** | **No.**  **The Accused Products permit the contents of the containers to be exposed to air because the containers contain no hair dye, and there is no need to limit their exposure to air.** |
| **Does air flow into the bottles of the Accused Products after the syringe is removed from the orifice reducer?** | **Yes. In the Accused Products, when the syringe is removed from the orifice reducer after withdrawing some solution from the bottle, air will naturally flow into the hole to replace the space previously taken up by the removed solution. This is a desirable feature of the Accused Products—not one to be avoided at all costs.** |
| **What arguments does Metricolor make on appeal regarding its contributory or induced infringement theories?** | **Metricolor makes no attempt to defend its derivative contributory or induced infringement theories on appeal other than to reassert that it has plausibly pled direct infringement. OB 48. However, absent a plausible claim of direct infringement, Metricolor’s alternative infringement theories must also be dismissed. *Linear Tech.* at 1326 (“There can be no inducement or contributory infringement without an underlying act of direct infringement.”).** |

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| **Confidential Information Argument** | **Color** |
| **What is the basis of Metricolor’s claims for breach of contract, federal trade secret misappropriation, breach of confidence, and unfair competition?** | **These claims all rest on the assumption that Metricolor disclosed some confidential information or trade secrets during discussions with L’Oréal.** |
| **What confidential information or trade secrets did Metricolor disclose to L’Oréal?** | **None. Metricolor’s complaint is entirely devoid of plausible allegations that it disclosed any confidential information or trade secrets to L’Oréal, much less that L’Oréal used or misused any such information to develop the Accused Products.** |
| **What is required to succeed on a breach of contract claim under California law?** | **To succeed on a breach of contract claim under California law, Metricolor “must establish a contract, [Metricolor’s] performance or excuse for nonperformance, [L’Oréal’s] breach, and resulting damages to [Metricolor].” *Pyramid Techs.* at 818.** |
| **What is the basis of Metricolor’s breach of contract claim?** | **Metricolor’s breach of contract claim arises out of alleged violations of the Nondisclosure Agreement the parties signed during discussions.** |
| **What did the parties agree to in the NDA?** | **According to the NDA, both L’Oréal and Metricolor agreed to:**   * **“not use … Confidential Information,”** * **to “hold such Confidential Information in strict confidence,” and** * **to “not decompile, disassemble or reverse engineer all or any part of such Confidential Information” without [prior] written permission.** |
| **How does the NDA define “Confidential Information”?** | **The NDA defines “Confidential Information” as “all information disclosed … through any means … by or on behalf of one party … to or for the benefit of the other party … that relates to or is derived from a party’s scientific, technical, business, strategic, marketing or creative affairs.”** |
| **Does the NDA identify any exceptions to “Confidential Information”?** | **Yes. The NDA identifies several exceptions to “Confidential Information,” including all information which**   * **“is or becomes generally known or available to the public,”** * **“is or was developed independently by or for the Receiving Party, without use of or reference to any Confidential Information,” or** * **“was in the possession of the Receiving Party or any of its Affiliates prior to the time of disclosure.”** |
| **How does Metricolor assert that L’Oréal breached the NDA?** | **Metricolor asserts that L’Oréal breached the NDA by “copying, reproducing, decompiling and reverse-engineering the Metricolor System and creating knock-off brands which infringe the ’587 Patent.”** |
| **What confidential information does Metricolor allege it disclosed to L’Oréal?** | **Metricolor does not identify any confidential information it disclosed to L’Oréal. Instead, Metricolor relies on “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements” that the Supreme Court has cautioned “do not suffice” even at the motion to dismiss stage. *Iqbal* at 678; *see, e.g.*, *Pellerin* at 990 (dismissing suit where a party “has not pled what the ‘trade secrets and/or confidential information’ are or whether the confidential information falls within the terms of the agreements”).** |
| **Is the question of whether information is “confidential” a question of fact to be determined by the trier of fact?** | **[Explain.] OB 52.** |
| **In its brief on appeal, Metricolor has discussed two other patent infringement cases against L’Oréal—*Liqwd, Inc. and Olaplex LLC v. L’Oréal USA, Inc.* (N.D. Cal 2016), and *University of Massachusetts Medical School v. L’Oréal S.A.* (D. Del. 2017). How are those cases relevant to this case?** | **[Explain.] Metricolor argues that L’Oréal has a track record of coaxing this kind of information out of inventors under the guise of being interested in acquiring or licensing the products, for the sole purpose of copying their products. OB 52-53.** |
| **What was the status of Metricolor’s patent when the parties entered discussions regarding the Metricolor System?** | **The parties began discussions *after* the ’587 Patent was published.** |
| **What is the information that Metricolor alleges L’Oréal relied on in developing products that infringe the’587 Patent?** | **The information required to infringe on the patent was contained entirely in the ’587 Patent, which was publicly disclosed prior to the start of discussions. It was therefore expressly excluded from the definition of “Confidential Information.”** |
| **How does Metricolor argue that L’Oréal could have used confidential information from a patent that was already published?** | **Metricolor argues that “[r]eviewing a patent on paper is one thing; it is another concept entirely to have the creator of a patented invention bring prototypes … to demonstrate their implementation of a novel system in person.” OB 51.** |
| **What confidential information would L’Oréal have needed to figure out how to pair an off-the-shelf bottle with an off-the-shelf syringe for its unrelated product?** | **L’Oréal would not need any confidential information to figure out how to do this.** |
| **Besides the public patent, what else does Metricolor argue that it disclosed to L’Oréal?** | **In its brief on appeal, Metricolor argues that it disclosed:**  **(1) how D’Amico came up with the novel idea;**  **(2) why the invention would disrupt the industry (from the perspective of a master hairstylist);**  **(3) the System’s importance, value and marketability;**  **(4) the confidential manufacturing process; and**  **(5) details that are not included in the patent application.**  **OB 51.** |
| **Has Metricolor alleged that L’Oréal used any of the confidential information that was not included in its public patent?** | **No.**  **Metricolor has not, and cannot, plausibly allege that L’Oréal used confidential information in any manner prohibited by the NDA.** |
| **Do the Accused Products seek to remedy the problems that Metricolor identified in the existing market for hair coloring products?** | **No. The Accused Products reflect products and methods described in the prior art, including L’Oréal’s own prior patent application.** |
| **What does Metricolor allege regarding a conversation between its founder Stephen D’Amico and Scott Schienver, a Vice President at L’Oréal USA?** | **[Explain.] OB 52.** |
| **Should Stephen D’Amico’s affidavit be considered by this Court?** | **No. Metricolor introduced these new allegations through an affidavit submitted by D’Amico that was not before the district court when it ruled on the motion to dismiss. OB 52. The declaration is therefore inadmissible and irrelevant to this Court’s review. *Castro v. Terhune* at 1316 n.5 (“The** **declaration [appellant] offers was not part of the district court record and, therefore, is not properly part of the record on appeal.”).** |
| **What does Federal Circuit Rule 27(e) say?** | **Federal Circuit Rule 27(e) – Motions: “A motion to strike all or part of a brief, except to strike scandalous matter, is prohibited as long as the party seeking to strike has the right to file a responsive brief in which the objection could be made. A response, if any, in opposition to a motion to strike must be included in the responsive brief if one is authorized, or may be filed if leave is sought and obtained, or may be made at oral argument.”** |
| **What does the district court consider in deciding a motion to dismiss?** | **A court’s review of a motion to dismiss is generally limited to the allegations in the complaint. *Lee v. City of Los Angeles* at 688.** |
| **Why do you argue that Metricolor’s allegation that L’Oréal used Metricolor’s confidential information is implausible?** | **Metricolor alleges that L’Oréal executives had expressed “an intense interest in the orifice reducer Metricolor included within its prototype.” OB 52. However, once L’Oréal chose not to pursue a deal with Metricolor or introduce a product with a self-sealing orifice reducer to prevent hair dye oxidization, L’Oréal would have had no use for Metricolor’s allegedly confidential information.** |
| **What does Metricolor allege regarding L’Oréal’s misuse of other competitors’ confidential information?** | **To try to save its breach of contract claim, Metricolor relies on allegations made by L’Oréal’s competitors in other lawsuits and suggests that, because L’Oréal allegedly misused confidential information in those cases, it did the same in this case. OB 52-55.** |
| **Should this Court consider allegations made in other lawsuits against L’Oréal for misuse of confidential information?** | **No. Those other parties’ allegations have no bearing here. *Bonin v. Calderon* at 828-29 (“evidence that [an individual] may have erred or acted inappropriately in unrelated cases will normally have little, if any, probative value, and may therefore be properly excluded by the district court pursuant to Federal Rule of Evidence 403”).** |
| **What must a plaintiff allege to state a claim for trade secret misappropriation under 18 U.S.C. § 1836 — the Defend Trade Secrets Act?** | **To state a claim for trade secret misappropriation under 18 U.S.C. § 1836, the Defend Trade Secrets Act, a plaintiff must allege that:**  **(1) the plaintiff owned a trade secret;**  **(2) the defendant misappropriated the trade secret; and**  **(3) the defendant’s actions damaged the plaintiff.**  ***Space Data Corp.* at \*1.** |
| **What is the definition of a trade secret under 18 U.S.C. § 1836 — the Defend Trade Secrets Act?** | **A trade secret is defined as secret information that “derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.” 18 U.S.C. § 1839(3).** |
| **Why do you argue that Metricolor’s trade secret claim fails?** | **Metricolor’s trade secret misappropriation claim falters at both the first and second prong of the analysis:**  **(1) Metricolor never identifies what trade secret was disclosed.**  **(2) Metricolor does not plausibly allege how L’Oréal misused any trade secret.** |
| **What is the basis for Metricolor’s trade secret claim?** | **Metricolor’s entire theory rests on the bare assertion that L’Oréal “gain[ed] a complete working knowledge of Metricolor’s confidential and trade secret information” because, “[d]uring the[] negotiations, L’Oréal personnel … ask[ed] for sample products and demonstrations to allow them a better understanding of the product in which they had a supposed interest.”** |
| **Does Metricolor allege that it *provided* L’Oréal with any product samples?** | **No. Metricolor alleges only that during negotiations, L’Oréal personnel *asked* for sample products and demonstrations.** |
| **What does Metricolor allege that L’Oréal did with Metricolor’s trade secrets?** | **Metricolor asserts that L’Oréal “develop[ed] its [own] infringing products using Metricolor’s confidential information and trade secrets.”** |
| **What information does Metricolor say it provided to L’Oréal?** | **The information Metricolor says it provided is simply the information required to produce products that would infringe the ’587 Patent. But the workings of a system described in a patent cannot qualify as a trade secret. *Ultimax Cement Mfg. Corp.* at 1355.** |
| **Why don’t the workings of a system described in a patent qualify as a trade secret?** | **As this Court has explained, “disclosure of a trade secret in a patent places the information comprising the secret into the public domain. Once the information is in the public domain and the element of secrecy is gone, the trade secret is extinguished and the patentee’s only protection is that afforded under the patent law.” *Ultimax Cement Mfg. Corp.* at 1355.** |
| **What must a party allege in its complaint to maintain a trade secret claim?** | **Although a party does not have to spell out the details of the trade secret, it does need to “‘describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade ... and to permit the defendant to ascertain at least the boundaries within which the secret lies.’” *Nelson Bros.* at \*5.** |
| **Does a plaintiff need to plead all of its possible trade secrets with specificity?** | **[Explain.] “[B]ecause it is the defendant who knows what it misappropriated, a plaintiff should not be required to plead with specificity all of its possible trade secrets in order to proceed to discovery.” *Yeiser Research* at 1044. OB 58.** |
| **What trade secret information does Metricolor allege that its founder disclosed to L’Oréal during their discussions?** | **Metricolor asserts that its founder disclosed information about his market insights, confidential manufacturing process, and other undisclosed details. But these allegations were not in the record upon which the decision on appeal was based.** |
| **Why is the allegedly confidential information disclosed by Metricolor’s founder to L’Oréal irrelevant?** | **This information cannot save Metricolor’s trade secret misappropriation claim because L’Oréal is not selling a product that requires an understanding of any of the distinguishing features of the Metricolor System. It is undisputed that L’Oréal uses off-the-shelf bottles, orifice reducers, and syringes, so no confidential manufacturing information is required.** |
| **Metricolor argues that L’Oréal sought and the D’Amicos provided L’Oréal with all the confidential and trade secret information required to create a competing system. Is this correct?** | **[Explain.] OB 57.** |
| **What does Metricolor argue on appeal regarding its breach of confidence claim?** | **On appeal, Metricolor makes no attempt to independently defend this claim. Rather, Metricolor contends that because its “allegations meet the plausibility standard applicable to a trade secret claim,” the allegations “just as well meet the standard applicable to Metricolor’s breach of confidence claim.” OB 59-60. Because Metricolor has failed to plausibly allege claims for breach of contract or trade secret misappropriation, its breach of confidence claim must also fail.** |
| **Why do you argue that Metricolor’s breach of confidence claim must be dismissed?** | **Metricolor’s breach of confidence claim should be dismissed because a statutory trade secret claim “preempts state law claims that are ‘based on the same nucleus of facts as the misappropriation of trade secrets claim for relief.’” *Argo Grp.* at \*3. Because Metricolor’s complaint fails to identify any confidential information besides its alleged trade secrets as the basis of its breach of confidence claim, the breach of confidence claim is preempted.** |
| **What is required to maintain a breach of confidence claim?** | **A plaintiff must demonstrate that:**  **(1) plaintiff conveyed confidential and novel information to defendant;**  **(2) defendant knew the information was being disclosed in confidence;**  **(3) defendant understood the confidence was to be maintained; and**  **(4) there was a disclosure or use in violation of the understanding.**  ***Freidman* at 1006; OB 59.** |
| **How is unfair competition defined under California’s Unfair Competition Law (UCL)?** | **Under the UCL, unfair competition is defined as “any unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200.** |
| **What did the district court hold regarding Metricolor’s unfair competition claim?** | **The district court held that, because Metricolor’s claims for “patent infringement, breach of contract, trade secret misappropriation, and breach of confidence are insufficient to survive the … motion to dismiss,” its UCL claim must also fail.** |
| **What does Mertricolor argue on appeal regarding its unfair competition claim?** | **On appeal, Metricolor accepts that the viability of its UCL claim under the “unlawful” prong turns on the survival of the complaint’s predicate counts, but argues that it has adequately “alleged that L’Oréal violated a law with its valid claims under the [Defend Trade Secrets Act], as well as patent infringement.” OB 61. This is not the case, however, and Metricolor cannot bootstrap its UCL claims to these implausible causes of action.** |
| **What is required to maintain a claim of “unfair” conduct under the UCL?** | **To allege “unfair” conduct under the UCL, a plaintiff must allege that the conduct is “violative of a public policy ‘tethered to [a] specific constitutional, statutory, or regulatory provision[].’” *Pellerin* at 992.** |
| **On what basis does Metricolor contend that L’Oréal violated the “unfair” prong of the UCL?** | **Metricolor alleges that L’Oréal breached the NDA, misappropriated trade secrets, and infringed the ’587 patent. Because Metricolor has failed to plausibly state any of these claims, it cannot maintain its UCL claim.** |
| **How does Metricolor allege that L’Oréal engaged in unfair competition?** | **Metricolor asserts that “L’Oréal deceptively met with Metricolor’s founders under the guise of acquiring their company or licensing the patented product, for the ulterior motive of coaxing the most sensitive confidential information out of them, with the unfair intention of creating competing products.” OB 62.** |
| **Why do you argue that Metricolor’s unfair competition claim must fail?** | **Metricolor’s allegations do not state a UCL claim because they arise from the same nucleus of facts that comprise Metricolor’s trade secret misappropriation and patent infringement claims. *TMC Aerospace* at \*6 (UCL claims “based on the same nucleus of facts as the misappropriation of trade secrets claim” are preempted).** |
| **What does Metricolor argue regarding judicial estoppel and *L’Oréal USA v. Spatz Labs.* (C.D. Cal. 2016)?** | **Metricolor argues that, in *L’Oréal USA v. Spatz Labs.*, L’Oréal alleged a UCL violation based on deceptive conduct, just like Metricolor alleges in this case. OB 62. In other words, “L’Oréal’s admission that under the UCL, Spatz harmed L’Oréal by concocting ‘a plan to lure’ it into harm’s way, is an admission meriting judicial estoppel, making its contrary position that its own similar actions against Metricolor do not constitute violations of the UCL frivolous and without merit.” OB 63.** |
| **What does Metricolor argue regarding the district court’s denial of leave to amend its complaint?** | **Metricolor argues that the district court abused its discretion by denying it leave to amend the complaint “particularly where plaintiff had not previously filed an amended complaint.” OB 28.** |
| **What does Rule 15 of the Federal Rules of Civil Procedure say about amendments to a complaint?** | **As a general matter, a court “should freely give leave” to amend the complaint “when justice so requires.” Fed. R. Civ. P. 15(a)(2).** |
| **What did the Supreme Court say in *Foman v. Davis*?** | **In *Foman v. Davis*, the Supreme Court explained that a court should generally grant leave to amend the complaint absent any “apparent or declared reason—such as undue delay, … undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.” *Id.* at 182.** |
| **Why do you argue that the district court correctly denied Metricolor leave to amend its complaint?** | **A plaintiff is not entitled to an amendment where the “complaint could not be saved by amendment.” *Eminence Capital* at 1052. Even the cases relied upon by Metricolor recognize this. OB 28-30.** |
| **When did Metricolor request leave to amend its complaint in the district court?** | **Metricolor made a passing request for leave to amend for the first time as part of its opposition to L’Oréal’s motion to dismiss.** |
| **What did the district court decide regarding Metricolor’s request for leave to amend its complaint?** | **The district court held that all of Metricolor’s claims fail and declined to grant leave to amend.** |
| **Did the district court clearly indicate why it denied Metricolor leave to amend its complaint?** | **[Explain.] OB 28.** |
| **Did the district court make written findings in denying Metricolor leave to amend its complaint?** | **[Explain.] OB 28.** |
| **What is the issue on appeal regarding whether Metricolor should have been given leave to amend its complaint?** | **The key question on appeal is whether Metricolor has shown that any attempt to amend would not be futile. *Klamath-Lake Pharm. Ass’n* at 1293 (holding that “futile amendments should not be permitted” and affirming the district court’s rejection of a motion for leave to amend where “[i]t is clear that the district court believed that amendment on these lines could not affect the outcome of this lawsuit”).** |
| **Didn’t the district court in *Klamath-Lake* deny leave to amend the complaint after summary judgment? Isn’t that distinguishable from this case, which was at the initial pleading stage when leave to amend was denied?** | **[Explain.] RB 16-19; *Klamath-Lake* at 1292-93.** |
| **Under Rule 15, Fed. R. Civ. P., shouldn’t leave to amend a complaint be freely given?** | **[Explain.] OB 28.** |
| **Did the district court discuss any of the *Foman* factors in denying Metricolor leave to amend the complaint?** | **[Explain.] OB 29.** |
| **Did the district court explain that it was denying Metricolor leave to amend its complaint based on futility?** | **[Explain.] OB 30-31.** |
| **Did the district court identify any prejudice if Metricolor were granted leave to amend its complaint?** | **[Explain.] RB 1.** |
| **Would L’Oréal suffer any prejudice if Metricolor were granted leave to amend its complaint?** | **[Explain.] RB 1, 13.** |
| **In *Eminence Capital*, didn’t the 9th Circuit state that “[a] simple denial of leave to amend [the complaint] without any explanation by the district court is subject to reversal” because it constitutes an abuse of discretion?** | **[Explain.] RB 13-14; *Eminence Capital* at 1052.** |
| **Had Metricolor been granted any prior leave to amend its complaint by the district court?** | **[Explain.] OB 29.** |
| **Why do you argue that any amendment of Metricolor’s complaint would be futile?** | **[Explain.] OB 29.** |
| **Are you arguing that Metricolor would not be able to cure the defects in its pleadings regarding patent infringement, even if it included more details?** | **[Explain.] OB 30.** |
| **What did the 9th Circuit say in *Bowles v. Reade* about the district court’s discretion in deciding whether to grant leave to amend a complaint?** | **[Explain.] “The law is settled that refusal of leave to amend without any justifying reason appearing for the denial is not an exercise of discretion and supports reversal.” RB 2 (citing *Bowles v. Reade*, 198 F.3d 752, 758-59 (9th Cir. 1999)).** |
| **Did the district court abuse its discretion by interpreting the photos and videos referenced in the complaint on a motion to dismiss?** | **[Explain.] RB 2.** |
| **Did the district court err by concluding that the Accused Products do not have an air-tight seal because there was “an open hole at the base of the bottle.” Appx19.** | **[Explain.] RB 5.** |
| **The district court held that Metricolor had not alleged sufficient details to maintain causes of action for trade secret misappropriation and breach of confidence. Appx21-22. Why shouldn’t Metricolor be allowed to amend its complaint to include more details?** | **[Explain.] OB 31-32.** |
| **Did the district court provide any reasons why Metricolor should not be given an opportunity to amend its complaint?** | **[Explain.] OB 31.** |
| **Why shouldn’t Metricolor be granted an opportunity to amend its complaint to include a doctrine of equivalence claim?** | **[Explain.] OB 33.** |
| **Personal Jurisdiction Argument** | **Color** |
| **Why do you argue that the district court properly dismissed L’Oréal S.A. for lack of personal jurisdiction?** | **Metricolor bore the burden of establishing a basis for jurisdiction, and its allegations in this case fell well short of the mark. *Celgard* at 1378 (“[P]laintiff bears the burden of affirmatively establishing … minimum contacts.”).** |
| **What is required to exercise personal jurisdiction over a nonresident defendant under California law?** | **Under California law, which is coextensive with federal due process standards, “[f]or a court to exercise personal jurisdiction over a nonresident defendant, that defendant must have at least minimum contacts with the relevant forum such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice.” *Fred Martin Motor Co.* at 801.** |
| **Can the due process requirements to exercise personal jurisdiction over a nonresident defendant be met by establishing *either* general or specific jurisdiction?** | **Yes.** |
| **When does general jurisdiction over a foreign corporation exist?** | **General jurisdiction over a foreign corporation exists “only if the corporation’s connections to the forum state are so continuous and systematic as to render it essentially at home in the forum State.” *Williams* at 1020.** |
| **Where is a corporate defendant “at home” for purposes of establishing general jurisdiction?** | **A corporate defendant is “at home” where it is incorporated or has its principal place of business. *Daimler AG* at 138-39.** |
| **Where is L’Oréal S.A. incorporated?** | **L’Oréal S.A. is a French corporation, headquartered in France.** |
| **Does L’Oréal S.A. have any physical presence in California?** | **No. L’Oréal S.A. does not own, rent, or lease any facilities in California; does not directly develop, sell, or market to consumers in California any of the products at issue in this lawsuit; and does not maintain any inventory in California.** |
| **What does Metricolor allege regarding L’Oréal S.A.’s California contacts?** | **Metricolor’s sole allegation is that it spoke with two executives from “L’Oréal Group France” and that those executives asked it for ten** **samples of the Metricolor System. This is insufficient to show that L’Oréal S.A.’s contacts in California are “so continuous and systematic as to render it essentially at home” in California. *Williams* at 1020. Metricolor does not and cannot assert that those executives were in California or even that it provided L’Oréal samples of its product.** |
| **What does Metricolor argue to support the exercise of general jurisdiction over L’Oréal S.A.?** | **Metricolor argues that “as a large conglomerate with major control of its subsidiaries” and “based upon its active involvement in the negotiations with Plaintiff, L’Oréal S.A. should be deemed subject to general jurisdiction.” OB 35.** |
| **What did the Supreme Court hold in *Daimler* regarding whether a parent can be subject to general jurisdiction based on a subsidiary’s presence in that jurisdiction?** | **The Supreme Court held that a subsidiary’s presence in a forum is insufficient to render the parent subject to general jurisdiction in that forum. *Daimler* at 136 (despite the presence of a subsidiary in California, “there would still be no basis to subject [the foreign parent company] to general jurisdiction in California, for [its] slim contacts with the State hardly render it at home there”).** |
| **What must a plaintiff show to establish specific jurisdiction?** | **To establish specific jurisdiction, a plaintiff needs to show:**  **“(1) the defendant must either purposefully** **direct his activities toward the forum or purposefully avail himself of the privileges of conducting activities in the forum”;**  **(2) “the claim must be one which arises out of or relates to the defendant’s forum-related activities”; and**  **(3) “the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.”**  ***Axiom Foods* at 1068.** |
| **What should be the focus of the specific jurisdiction inquiry?** | **This is a “defendant-focused” inquiry that assesses “the relationship among the defendant, the forum, and the litigation” and demands that “the defendant’s suit-related conduct” be what “create[s] a substantial connection with the forum State.” *Walden* at 284.** |
| **Can the plaintiff be the sole link between the defendant and the forum for purposes of specific jurisdiction?** | **No. Because the analysis focuses on *defendant’s contacts with the forum*—“not the defendant’s contacts with the persons who reside there”—“the plaintiff cannot be the only link between the defendant and the forum.” *Walden* at 285.** |
| **What is the basis of Metricolor’s theory of specific jurisdiction?** | **Metricolor’s entire theory of specific jurisdiction rests on the assertion that L’Oréal S.A. “expressed a strong interest in the Metricolor System” and that two executives from France requested product samples. OB 35.** |
| **Can Metricolor’s allegation that two executives from France expressed interest in the Metricolor System and requested product samples support the exercise of specific jurisdiction?** | **This single interaction, which is not even alleged to have occurred in California, cannot support the exercise of specific jurisdiction. As the district court correctly concluded, one interaction with a California resident “fails the purposeful direction test because the conduct is not ‘expressly aimed’ at the forum State.”** |
| **Which corporate executives from L’Oréal Group France allegedly requested ten samples of the Metricolor system from the D’Amicos?** | **Anne DeBouge and Anne Alcoloumbre. OB 35.** |
| **What jurisdictional discovery did Metricolor request to take?** | **Metricolor requested leave to take expedited discovery regarding: (1) whether L’Oréal S.A. currently employs any persons in California; (2) how often L’Oréal S.A. executives travel to California; (3) whether any L’Oréal S.A. executives live in California (or spend more than six months per year in California); (4) whether L’Oréal S.A. has offices in California; (5) how many agreements L’Oréal S.A. has entered into in California over the last three years; (6) how much revenue L’Oréal S.A. derives from California; and (7) whether L’Oréal S.A. sells any products in California. OB 36.** |
| **What “purposeful direction” is required to support the exercise of specific jurisdiction?** | **“Purposeful direction ‘requires that the defendant have**  **(1) committed an intentional act,**  **(2) expressly aimed at the forum state,**  **(3) causing harm that the defendant knows is likely to be suffered in the forum state.’”**  ***Morrill* at 1142.** |
| **Can engaging with a plaintiff that happens to live in California create “purposeful direction”?** | **No. Numerous courts have explained that engaging with a plaintiff that happens to live in California cannot, alone, create purposeful availment. *Walden* at 285; *Hatset* at 402 (affirming dismissal for lack of specific personal jurisdiction in similar circumstances)**; ***Artec Grp.* at \*5 (same, even where breached agreement between the parties contained California choice-of-law clause).** |
| **What must Metricolor show to carry its burden on specific jurisdiction?** | **Metricolor must plausibly show that L’Oréal S.A. has “create[d] a substantial connection with the forum State.” *Walden* at 284.** |
| **Why do you argue that Metricolor has failed to carry its burden on specific jurisdiction?** | **Metricolor’s allegations do not establish a connection between L’Oréal S.A. and California:**  **(1) Metricolor initially reached out to L’Oréal USA (Patrick Parenty) outside California.**  **(2) When discussions stalled, Metricolor repeatedly made inquiries with its L’OréalUSA contacts.**  **(3) Metricolor held its meetings in New York.**  **(4) L’Oréal S.A. was not a party to the NDA.** |
| **What did the Supreme Court say about specific jurisdiction in *Burger King Corp. v. Rudzewicz* (1985)?** | **A plaintiff cannot ““hale[] [defendant] into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.” *Burger King Corp.* at 475.** |
| **What is required to obtain jurisdictional discovery in the district court?** | **“In order to obtain discovery on jurisdictional facts, the plaintiff must at least make a ‘colorable’ showing that the Court can exercise personal jurisdiction over the defendant.” *Mitan* at 1119.** |
| **When are requests to conduct jurisdictional discovery properly denied?** | **Requests to conduct jurisdictional discovery are properly denied where:**  **(1) “a plaintiff’s claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by the defendants,” *Pebble Beach* at 1160; or**  **(2) “it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction,” *Laub* at 1093.** |
| **Why do you argue that jurisdictional discovery was not warranted in the district court?** | **Metricolor wants to go on a fishing expedition to uncover “to what extent L’Oréal S.A. maintains continuous and systematic dealings with California.” OB 37. Metricolor made the same request before the district court. The district court did not abuse its discretion given Metricolor’s failure to establish “a reasonable probability that the outcome would have been different had discovery been allowed.” *Laub* at 1093.** |
| **Did the district court address Metricolor’s request to conduct jurisdictional discovery?** | **[Explain.] OB 34.** |
| **Was the district court’s failure to address Metricolor’s request to conduct jurisdictional discovery an abuse of discretion?** | **[Explain.] OB 34.** |
| **Metricolor relies on *Brainerd v. Governors of the University of Alberta* to support its request for jurisdictional discovery in this case. Does that case support jurisdictional discovery of L’Oréal S.A.’s activities in California?** | **[Explain.] RB 19-21; *Brainerd v. Governors of the Univ. of Alberta* at 1259-60.** |