

UNITED STATES PATENT AND TRADEMARK OFFICE  
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RSC

April 22, 2024

Opposition No. 91284465

*Strands Hair Care, Inc.*

*v.*

*Straand Pty Ltd*

**Rebecca Stempien Coyle, Interlocutory Attorney:**

This proceeding now comes before the Board on Opposer's January 26, 2024 renewed motion to compel supplemental responses discovery responses from Applicant. The motion is fully briefed.<sup>1</sup>

**I. Background**

As set forth in the Board's prior order, the record reflects that Opposer served its first set of interrogatories and requests for production on June 28, 2023. After Opposer declined to grant an extension of time, Applicant served its written responses on July 28, 2023, although it did not produce any documents at the time. While the parties exchanged some correspondence regarding Applicant's alleged deficiencies and Opposer's request for supplemental responses as well as the

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<sup>1</sup> For purposes of this order, the Board presumes the parties' familiarity with the arguments and evidence submitted with respect to the motion, and does not recount them here, except as necessary to explain this decision. *See Guess? IP Holder LP v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015)

production of responsive documents, on November 14, 2023 the Board denied Opposer's first motion to compel without prejudice for lack of the required good faith effort to resolve the dispute.<sup>2</sup>

Counsel for the parties subsequently exchanged several communications and ultimately held a telephone call to discuss Opposer's motion on November 28, 2023.<sup>3</sup> Opposer states, and Applicant does not contest, that during the call counsel for the parties stipulated to amending Interrogatory Nos. 1 through 6 such that the phrase "all facts" was replaced with "principal material facts", and Request for Production Nos. 44 through 46 such that the phrase "all documents" was replaced with "documents".<sup>4</sup>

Opposer's counsel sent an email to Applicant's counsel on December 8, 2023, confirming their prior conversation.<sup>5</sup> Opposer's counsel sent a follow-up email on December 18, 2023 requesting information on when Applicant would be supplementing its responses and producing documents, to which Applicant's counsel replied on December 19, 2023, stating Applicant would supplement its discovery responses by January 8, 2024.<sup>6</sup> Although Opposer's counsel responded, contesting the length of time before the supplementation, no further responses from Applicant's

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<sup>2</sup> 9 TTABVUE.

<sup>3</sup> Burke Decl., ¶¶ 10-16 (12 TTABVUE 17-18); *see also* 12 TTABVUE 112-117.

<sup>4</sup> Burke Decl., ¶ 18 (12 TTABVUE 19); *see also* 12 TTABVUE 122-123.

<sup>5</sup> 12 TTABVUE 121.

<sup>6</sup> *Id.* at 120.

counsel are of record.<sup>7</sup> No supplemental responses, production, or privilege log were received on January 8, 2023 and Opposer's motion followed.<sup>8</sup>

Through its motion to compel Opposer seeks an order requiring Applicant to serve:

- (1) Supplemental responses to Interrogatory Nos. 1 through 6, as amended by the parties;
- (2) The documents relied upon, pursuant to Fed. R. Civ. P. 33(d), in Applicant's response to Interrogatory Nos. 7 and 8;
- (3) A verification of Applicant's interrogatory responses;
- (4) Amended written responses to Opposer's document requests "that comply with the Federal Rules as set forth in the Board's Discovery Order and TBMP 406.04(c)";
- (5) Documents in response to Opposer's document requests;
- (6) Supplemental written responses to Request for Production Nos. 44 through 49, as amended by the parties; and
- (7) A privilege log for documents withheld on the basis of privilege.

Subsequently, on February 12, 2024, Applicant served supplemental responses to Opposer's first set of interrogatories and documents requests, and produced documents.<sup>9</sup>

## **II. Opposer's Motion to Compel**

A motion to compel must be filed prior to the deadline for plaintiff's pretrial disclosures for the first testimony period as originally set or as reset. *See* Trademark Rules 2.120(f)(1). Pursuant to the most recent scheduling order, those disclosures were not due until April 28, 2024. Accordingly, Opposer's motion is timely.

Trademark Rule 2.120(f)(1) and Fed. R. Civ. P. 37(a)(1) also require that a motion to compel discovery be supported by a written statement from the moving party that it has made a good faith effort, by conference or correspondence, to resolve with the

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<sup>7</sup> *Id.* at 119-120.

<sup>8</sup> Burke Decl., ¶¶ 18-19 (12 TTABVUE 20).

<sup>9</sup> 14 TTABVUE 6-43, 45.

other party the issues presented in its motion, and that it has been unable to reach an agreement. *See also Hot Tamale Mama...and More, LLC v. SF Invs., Inc.*, 110 USPQ2d 1080, 1081 (TTAB 2014); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 523.02 (2023). The record demonstrates that prior to bringing its motion, Opposer’s counsel exchanged several emails, and had one telephone conference, with Applicant regarding the issues raised in its motion. The Board finds, under the circumstances in this proceeding, that Opposer has satisfied the good faith effort requirement prior to the filing of its motion to compel. The Board next turns to the merits of the discovery dispute.

Applicant contends the issues raised in Opposer’s motion are now moot in view of its supplemental responses and production. In reply, Opposer contends that Applicant’s responses remain deficient because:

- (1) the scant production indicates Applicant did undertake a good faith search for documents;
- (2) the supplemental responses to the document requests still do not clearly articulate what documents exist and what is being withheld on the basis of any objections;
- (3) the interrogatory responses remain unverified; and
- (4) Applicant has not served a privilege log despite maintaining a general objection on the grounds of privilege.

Although Opposer only identifies the above as outstanding issues, it does not clearly withdraw any portion of its motion to compel. Upon careful review of the materials submitted to the Board, the Board finds that several of the issues originally raised in the motion are impacted by Applicant’s supplemental responses. In particular, it appears that Applicant’s February 12, 2024 responses included supplemental answers to the amended Interrogatory Nos. 1 through 6 and amended

Request for Production Nos. 44 through 49, as well as the production of documents relied upon in Applicant's Fed. R. Civ. P. 33(d) response to Interrogatory Nos. 7 and 8. Moreover, Opposer's motion sought the production of documents, and Applicant did produce documents after the filing of the motion.

Accordingly, Opposer's motion to compel is **denied without prejudice** as moot with respect to the supplemental responses to amended Interrogatory Nos. 1 through 6 and amended Request for Production Nos. 44 through 49; production of documents relied upon for Applicant's Fed. R. Civ. P. 33(d) response to Interrogatory Nos. 7 and 8; and the production of documents. *See Luehrmann v. Kwik Kopy Corp.*, 2 USPQ2d 1303, 1304 (TTAB 1987).

In its reply brief, Opposer questions the completeness of Applicant's document production. Because Applicant's production of documents altered the alleged deficiency initially raised by Opposer (an entire lack of production), Opposer's meet and confer efforts prior to February 12, 2024 are insufficient for the relief sought in Opposer's reply brief (the completeness or sufficiency of the production). Nor is there any indication in the record that Opposer has met and conferred with Applicant regarding the sufficiency of its February 12, 2024 production. Under these circumstances, Opposer has not discharged its obligation as to its dispute regarding the completeness or sufficiency of Applicant's production of documents. *See Hot Tamale Mama*, 110 USPQ2d at 1081; *see also Sentrol, Inc. v. Sentex Sys., Inc.*, 231 USPQ 666, 667 (TTAB 1986). Accordingly, to the extent Opposer asserts the February 12, 2024 production is insufficient, and seeks further supplementation, Opposer's

motion is **denied without prejudice**. Opposer may, if appropriate, bring a motion for supplemental production after it engages in further communications with Applicant subsequent to the resumption of these proceedings. The Board expects **both parties** to engage in good faith in any further meet and confer efforts, including timely responding to the other side's communications regarding any discovery dispute.<sup>10</sup>

Opposer's motion contends Applicant's original responses to Request for Production Nos. 1-31 and 35-42 are ambiguous and fail to comply with the Applicant's obligations because they include various objections and state "subject to the foregoing objections and after a reasonable search, Applicant will produce ..."<sup>11</sup> In its reply brief Opposer maintains Applicant's amended responses continue to be vague and unclear as to the existence of responsive documents. The Board, however, disagrees.

A review of the February 12, 2024, amended responses reveal Applicant removed the "will produce" language (as well as some specific objections). Although several of Applicant's supplemental responses maintain specific objections and state: "subject to the foregoing objections and after a reasonable research, Applicant produces documents Bates Numbers ...",<sup>12</sup> such response clearly states Applicant's response is subject to its specified objections, it completed a reasonable search and the identified

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<sup>10</sup> Although the moving party has a duty to try to resolve its disputes before filing its motion, it is "not required to wait indefinitely for further communication" from the opposing party. *Hot Tamale Mama*, 110 USPQ2d at 1082; *see also Amazon Techs., Inc. v. Wax*, 93 USPQ2d 1702, 1705 (TTAB 2009) ("While it was initially applicant's obligation to confer with opposer prior to filing his motion [to compel], opposer was under an equal obligation to participate in good faith in applicant's efforts to resolve the matter.").

<sup>11</sup> 12 TTABVUE 14.

<sup>12</sup> *See* 14 TTABVUE 16-42.

specific documents are responsive to the request.<sup>13</sup> Accordingly, Opposer's motion is **denied without prejudice** as moot as to its request for amended document request responses "that comply with the Federal Rules".<sup>14</sup>

The Board now turns to the two remaining issues raised in Opposer's motion that do not appear to have been addressed by Applicant's supplemental responses: Applicant's verification of its interrogatory responses and privilege log for any documents withheld on a claim of privilege.

Interrogatories must be answered by the party served,<sup>15</sup> with the responses signed by the person making them and the objections signed by the attorney making them. Fed. R. Civ. P. 33(b); *see also* TBMP § 405.04(c). Applicant did not serve a verification with either its original or supplemental responses to the interrogatories, nor does Applicant offer any explanation for its failure or indicate a verification was forthcoming.

In regard to the privilege log, Applicant's supplemental responses to Opposer's first set of requests for production do not include any specific objections based on privilege. Rather, Applicant maintains a general objection on the basis of privilege which "applies" into each of its responses.<sup>16</sup> This reliance on a general, boilerplate

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<sup>13</sup> Although Applicant's amended responses maintained specific objections, there is no indication that the parties met and conferred regarding the sufficiency of these objections and Opposer's motion does not request the objections be overruled.

<sup>14</sup> Again, nothing in the record indicates the parties met and conferred regarding any new issues raised by Applicant's February 12, 2024 responses.

<sup>15</sup> When the party served is a corporation, partnership, or association, the requests must be answered by an officer, partner, or agent. The "agent" may be an attorney, however the attorney's answers must contain the information available to the party served. TBMP § 405.04(c).

<sup>16</sup> 14 TTABVUE 14, 16.

objection is improper. “Any claim that otherwise responsive documents are privileged requires a **particularized explanation** of the privilege relied on, and a description of the documents which, without revealing the privileged information, is sufficient to allow the inquiring party to assess the applicability of privilege.” *No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1556 (TTAB 2000) (emphasis added). *See also Meditronic, Inc. v. Pacesetter Sys., Inc.*, 222 USPQ 80, 83 (TTAB 1984) (party must articulate objections with particularity); *Amazon Techs., Inc. v. Wax*, 93 USPQ2d 1702, 1706; Fed. R. Civ. P. 34(b)(2)(C). A party withholding responsive information on the basis of a claim of privilege, including the attorney-client privilege and/or work product doctrine, must describe the nature of information withheld to enable the other party to assess the claim of privilege. Fed. R. Civ. P. 26(b)(5); *see also* TBMP § 406.04(c).

Accordingly, Applicant’s general objection claiming privilege is **overruled**. Applicant must further supplement its responses to the requests for documents in which Applicant may include specific objections to individual document requests on the basis of privilege. If Applicant maintains its objections based on the attorney-client privilege or attorney work product doctrine, or any other privilege, Applicant must provide Opposer, at the same time as its supplemental responses, with a privilege log pursuant to Fed. R. Civ. P. 26(b)(5)(A)(i)–(ii). *See also Amazon Techs.*, 93 USPQ2d at 1706 n.6.

In view of the foregoing, Opposer’s motion to compel is **granted in part** as to Applicant’s verification of its interrogatory responses and privilege log.

Opposer is allowed **TWENTY DAYS** from the date of this order to:

- Serve a signed verification of its responses to Opposer’s interrogatories;
- Served amended written responses to Opposer’s requests for production of documents without the general objection on the basis of privilege as overruled herein; and
- Provide Opposer with a privilege log that complies with Fed. R. Civ. P. 26(b)(5), to the extent Applicant claims privilege in response to any Opposer’s requests for production.

### III. Schedule

Proceedings herein are **resumed**. Dates are reset as follows.

Expert Disclosures Due	5/23/2024
Discovery Closes	6/22/2024
Plaintiff’s Pretrial Disclosures Due	8/6/2024
Plaintiff’s 30-day Trial Period Ends	9/20/2024
Defendant’s Pretrial Disclosures Due	10/5/2024
Defendant’s 30-day Trial Period Ends	11/19/2024
Plaintiff’s Rebuttal Disclosures Due	12/4/2024
Plaintiff’s 15-day Rebuttal Period Ends	1/3/2025
Plaintiff’s Opening Brief Due	3/4/2025
Defendant’s Brief Due	4/3/2025
Plaintiff’s Reply Brief Due	4/18/2025
Request for Oral Hearing (optional) Due	4/28/2025

### IMPORTANT TRIAL AND BRIEFING INSTRUCTIONS

Generally, the Federal Rules of Evidence generally apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for

submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Such briefs should utilize citations to the TTABVUE record created during trial, to facilitate the Board's review of the evidence at final hearing. *See* TBMP § 801.03. Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

### **TIPS FOR FILING EVIDENCE, TESTIMONY, OR LARGE DOCUMENTS**

The Board requires each submission to meet the following criteria before it will be considered: 1) pages must be legible and easily read on a computer screen; 2) page orientation should be determined by its ease of viewing relevant text or evidence, for example, there should be no sideways or upside-down pages; 3) pages must appear in their proper order; 4) depositions and exhibits must be clearly labeled and numbered – use separator pages between exhibits and clearly label each exhibit using sequential letters or numbers; and 5) the entire submission should be text-searchable. Additionally, submissions must be compliant with Trademark Rules 2.119 and 2.126. Submissions failing to meet all of the criteria above may require re-filing. **Note:** Parties are strongly encouraged to check the entire document before filing.<sup>17</sup> The Board will not extend or reset proceeding schedule dates or other deadlines to allow time to re-file documents. For more tips and helpful filing information, please visit the [ESTTA help](#) webpage.

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<sup>17</sup> To facilitate accuracy, ESTTA provides thumbnails to view each page before submitting.

