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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

T.R.P. COMPANY, INC.  
  
Plaintiff,  
  
v.  
  
SIMILASAN AG AND SIMILASAN  
CORPORATION,  
  
Defendants.

Case No.: 2:17-cv-02197-JCM-CWH

**~~PROPOSED~~ ORDER GRANTING IN  
PART AND DENYING IN PART  
SIMILASAN CORPORATION'S  
MOTION TO COMPEL (ECF NO. 86)**

The Court has considered Defendant Similasan Corporation's ("Similasan Corp.") Motion to Compel (ECF No. 86), the Opposition of Plaintiff T.R.P. Company, Inc. ("TRP") (ECF No. 88), and Similasan Corp.'s Reply (ECF No. 92), as well as the declarations, deposition testimony and evidence submitted therewith, and the argument of counsel at the April 2, 2019 hearing.<sup>1</sup> As the Court noted in the Minute Order (ECF No. 100) and at the hearing (ECF No. 101), the Motion to Compel is granted in part and denied in part as follows.

1. The Motion to Compel is granted on the issue of express waiver of the attorney-client privilege, and TRP is ordered to produce the documents identified as numbers 14, 121-125 and 127 in its privilege log (ECF No. 87-3, Exhibit 2), and any other documents in its possession, custody, or control that relate to or reflect privileged communications between

<sup>1</sup> The confidential and sealed versions of Similasan Corporation's Motion to Compel and Reply are reflected in the docket at ECF No.'s 87 and 93. These and the other related confidential filings were considered by the Court as well.

1 attorney John Long and TRP concerning trademark rights to, the application for, and  
2 supplemental registration of "PinkEye Relief." With respect to the supplementation of TRP's  
3 responses to Similasan Corp.'s interrogatories identified in the Motion, the Court reserves ruling  
4 on such further discovery requests at this time and orders the parties to meet and confer on this  
5 subject, if appropriate, after Similasan Corp. has reviewed TRP's production pursuant to this  
6 Order.  
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8 The Court finds that the express waiver occurred on pages 71-72 of the deposition  
9 transcript of TRP's President Mr. Pominville (ECF No. 87-6, Ex. 5, p. 9) and in TRP's response  
10 to Similasan Corp.'s Interrogatory No. 16 that was verified by Mr. Pominville (ECF No. 87-17,  
11 Ex. 16, pp. 6-7).

12 2. The Motion to Compel is denied at this time on the issue of implied waiver of  
13 the attorney-client privilege as to communications between attorney John Long and TRP (or  
14 TRP communications reflecting Mr. Long's advice), concerning TRP's application and  
15 supplemental registration for PinkEye Relief, Earache Relief and Allergy Eyes Relief. The  
16 Court is not persuaded that there is an assertion of an advice of counsel defense by TRP in  
17 response to Similasan Corp's claims of fraud on the United States Patent and Trademark Office.  
18 The Court finds that an advice of counsel defense has to be the foundation for the basis of an  
19 implied waiver. The Court's finding as to a lack of implied waiver does not conflict with the  
20 Court's order as to an express waiver concerning the PinkEye Relief communications identified  
21 in paragraph 1 above. The Court simply finds that there has not been a waiver as to the  
22 PinkEye Relief communications on the additional grounds of implied waiver.  
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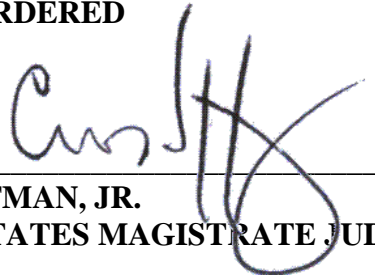
25 3. The Motion to Compel is denied as to a waiver of the attorney-client privilege  
26 through communications that involved advice from attorneys John Long or Jack Hanifan, and  
27 were directed to or included Susan Hanson, Ray Hanson and/or Brian Banks. Susan Hanson is  
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the sister of Tom Pominville and Ray Hanson is his brother in law. Neither Ms. Hanson, Mr. Hanson, nor Brian Banks was an employee of TRP during the timeframes of the communications that have been identified in TRP's privilege log. ECF No. 87-3, Exhibit 2. However, the Court finds that each of these individuals were "functional equivalents" of TRP employees based upon their title(s), responsibilities, roles in the operation of TRP and/or familial relationship with Mr. Pominville in the relevant timeframes based on the affidavits from Ms. Hanson, Mr. Hanson, and Mr. Pominville, and other evidence TRP submitted. ECF Nos. 88-3, 88-4, 88-5. Their communications with attorneys Long and Hanifan, or concerning their advice, were therefore privileged communications between TRP and these attorneys.

DATED: April 23, 2019

**IT IS SO ORDERED**



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**C.W. HOFFMAN, JR.**  
**UNITED STATES MAGISTRATE JUDGE**

1 Respectfully submitted by:

2 Dated: April 16, 2019

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