



November 27, but nothing responsive to RFP No. 2. *Id.* at 3. Plaintiffs' response to RFP No. 2 asserted that (1) all potentially responsive documents were "created in consultation with litigation counsel and are therefore privileged," (2) "[a]ny other documents responsive to this request precede the engagement of expert patent counsel and are the advisory opinion of such expert patent counsel," and (3) a privileged log would be provided. *Id.* Plaintiffs never provided a privilege log. Def.'s Mem. [DE-56] at 4. In correspondence between opposing counsel on the issue, Plaintiffs asserted that "there is no additional information responsive to your discovery requests. What you are seeking does not exist. When I told you that I would provide everything I did so." [DE-56-4] at 3. Defendant sought to clarify whether Plaintiffs meant they were not withholding any documents on the basis of privilege, and Plaintiffs did not respond. *Id.* at 1; Def.'s Mem. [DE-56] at 4.

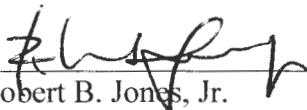
Plaintiffs in response to the motion to compel assert that Defendant seeks information that does not exist or is not discoverable. Pls.' Resp. [DE-58] at 1. Plaintiffs state that "[a] second full review of the documents available has confirmed that there [are] no documents sought that have not already been provided to and/or [are] in the possession of Defendant." *Id.* Plaintiffs also contend that the documents sought fall outside the scope of discovery, which is limited to the issue of claim interpretation. *Id.* Plaintiffs reiterated that all responsive information had been produced. *Id.* at 4. Defendant in reply questions why Plaintiffs are asserting substantive arguments against disclosure if there is nothing responsive to produce. Def.'s Reply [DE-59-1] at 2-3.

At the court's February 1, 2024 Claim Construction Hearing, the parties discussed the pending motion to compel. Hr'g Tr. [DE-64] at 72:25-75:24. Plaintiffs again asserted (1) that there was no responsive information that was properly discoverable or disclosable, and (2) that there is nothing responsive. *Id.* at 75:2-12.

Defendant’s reluctance to accept at face value Plaintiffs’ statement that there is nothing responsive to produce is understandable given that Plaintiffs’ discovery response to RFP No. 2 referenced responsive documents, asserted privilege, and stated a privilege log would be forthcoming. [DE-56-3] at 3. However, given Plaintiffs’ subsequent statements—the last of which was made during a hearing with the district court—that there is nothing responsive to produce, the court denies the motion to compel. *See Georgia-Pac. Corp. v. Von Drehle Corp.*, 2007 WL 9637134, at \*1– 2 (E.D.N.C. Aug. 17, 2007) (finding that absent evidence to the contrary, “[t]he court must take [a party’s] word that it has produced all responsive discoverable documents if [the party] says that it has.”). Notwithstanding, given the ambiguity created by Plaintiffs’ response to RFP No. 2 and their subsequent clarification that what Defendants sought did not exist and there are no responsive documents, Def.’s Mem. [DE-56] at 4, Plaintiffs shall provide Defendant with a supplemental response to RFP No. 2 within seven (7) days.

Accordingly, the motion to compel is denied and the motion for leave to file a reply is allowed.

So ordered, the 26 day of March 2024.

  
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Robert B. Jones, Jr.  
United States Magistrate Judge