

ESTTA Tracking number: **ESTTA485440**

Filing date: **07/25/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92052150
Party	Defendant Patrick Gilles AKA Wonderbread 5 and/or Wonderbread Five
Correspondence Address	MATTHEW H. SWYERS THE TRADEMARK COMPANY PLLC 344 MAPLE AVENUE WEST, SUITE 151 VIENNA, VA 22180 UNITED STATES mswyers@TheTrademarkCompany.com
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Date	07/25/2012
Attachments	Reply to Opp to Mot to Compel.pdf ( 39 pages )(1943905 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**The Trademark Trial and Appeal Board**

In the matter of Trademark Registration No. 3691948  
For the mark WONDERBREAD 5,

Wonderbread 5,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No. 92052150
	:	
Patrick Gilles,	:	
	:	
Registrant.	:	

**REPLY TO THE OPPOSITION TO**  
**CROSS-MOTION FOR SANCTIONS AND/OR MOTION TO COMPEL**

COMES NOW, the Registrant, Patrick Gilles (hereinafter “Registrant”), by and through counsel, The Trademark Company, PLLC, and files the instant *Reply to The Opposition to Cross-Motion for Sanctions and/or Motion to Compel*. For the reasons and on the grounds more fully set forth below, Registrant respectfully continues to request that the Board deny *Petitioner’s Motion for Sanctions* and Registrant’s *Cross-Motion for Sanctions* but grant Registrant’s *Motion to Compel* full and complete answers to Registrant’s discovery.

**PARTIAL WITHDRAWAL OF MOTION**

On June 15, 2012 Registrant filed the instant *Cross-Motion for Sanctions and/or Motion to Compel* seeking an order for sanctions and/or to compel Petitioner Wonderbread 5 (hereinafter “Petitioner”) to respond to discovery submitted to it in 2010 and, specifically Registrant’s interrogatories nos. 1, 4-9, 15, and 17-18 as well as requests for production of documents 1-5, 7-11, and 13. On June 25, 2012, following the filing of the instant *Cross-Motion for Sanctions and/or Motion to Compel*, counsel for Registrant was contacted by counsel for Petitioner stating that they had mailed a copy of Petitioner’s answers to Registrant’s interrogatories nos. 1, 4-9, 15, and 17-18 as well as requests for production of documents 1-5, 7-11, and 13 on May 31, 2012. Petitioner’s counsel also provided Registrant’s counsel

with a courtesy copy thereof via electronic mail. *See* Exhibits A, B, and C attached hereto. Counsel for Registrant did not receive the copies of the same sent via U.S. mail.

Nevertheless, having now reviewed the Petitioner's responses Registrant withdraws its *Motion to Compel* in regard to the following discovery requests:

Interrogatories: 1, 4, 6, 8, 9, 17, and 18.

Request for Production of Documents: 1, 2, 7, 10, 11, and 13.

The *Motion to Compel* is maintained in regard to the following discovery requests:

Interrogatories: 5, 7, and 15.

Request for Production of Documents: 3-5, and 8-9.

#### **REPLY TO OPPOSITION TO MOTION TO COMPEL**

From a threshold issue, counsel for Petitioner contends that Registrant's *Motion to Compel*, or to compel those interrogatories and request for production of documents that remain, should be denied due to Registrant's counsel's purported failure to meet and confer with counsel for Petitioner prior to filing, and/or maintaining, the instant motion. As the record has already established, nothing could be further from the truth.

To recap, on March 29, 2012 the undersigned, Registrant's counsel, sent a letter to Petitioner's counsel in a good faith effort to encourage and establish a deadline for the remainder of Petitioner's now severely overdue responses to Registrant's original discovery submitted on July 12, 2010 which were not responded to or addressed in the Board's May 20, 2011 *Order*. *See Opposition to Petitioner's Motion for Sanctions and Cross-Motion for Sanctions and/or Motion to Compel* Exhibit 1. In early April Registrant's counsel contacted Petitioner's counsel to discuss the outstanding discovery issues including, but not limited to, the deposition of the Registrant as well as the Petitioner's now long overdue discovery responses. During the conversation it was decided that (1) Registrant's deposition would be re-noted, by agreement, for a date in the future

and (2) Petitioner's counsel would determine what additional discovery responses they needed to provide to Registrant's original discovery issued on July 12, 2010.

Both of these decisions were memorialized by Petitioner's counsel in her email dated April 19, 2012. *See* Petitioner's counsel's email to Registrant's counsel dated April 19, 2012 at 3:17 p.m. attached as Exhibit E to *Petitioner's Motion for Sanctions*. However, Petitioner's counsel forgot that she had agreed or otherwise decided to ignore that she was to finally provide full responses to Registrant's discovery submitted in 2010 and, on April 30, 2012, re-noted Registrant's deposition for May 16, 2012 without further consideration, comment, or acknowledgment of her past-due discovery obligations. *Petitioner's Motion for Sanctions*, Exhibit G.

Upon receiving the *Amended Notice of Deposition of Patrick Gilles* Registrant's counsel sent an additional email to Petitioner's counsel, again in an ongoing good faith effort to resolve the discovery dispute in this matter. *Petitioner's Motion for Sanctions*, Exhibit H.

In response, Petitioner's counsel changed their documented position in the matter now only stating that she would "look into" and get back to our office concerning their outstanding discovery and then we would discuss the date of the deposition and the outstanding discovery, prior to moving forward with either. *Petitioner's Motion for Sanctions*, Exhibit E, I.

On May 18, 2012 the issues all appeared to be resolved. On that day Petitioner's counsel emailed Registrant's counsel stating that they would provide full answers and requests for production of documents to the interrogatories and request for production of documents issued by Registrant on July 12, 2010. *Petitioner's Motion for Sanctions*, Exhibit K.

As set forth above, Registrant has now had the opportunity to review the discovery responses received after the filing of the instant motion. To that end it has withdrawn a

significant number of interrogatories and requests for production of documents from the instant motion. However, as set forth below, many remain.

As such, Petitioner's contention, in essence, is that their severely delinquent responses to Registrant's discovery resets Registrant's obligation to attempt to resolve this discovery dispute outside of the instant motion. That is simply not the case. Petitioner is under an obligation to provide full and complete responses to Registrant's discovery. The fact that they have finally provided partial responses to the same does not reset the good faith efforts of the undersigned in their entirety. As such, Registrant's motion as to those enumerated deficiencies should continue to be heard.

### **Interrogatories**

Registrant has withdrawn his *Motion to Compel* for all but three interrogatories: 5, 7, and 15. Below is provided the interrogatory, the response, and Registrant's brief argument as to each interrogatory as to why an Order compelling a more full answer should be issued:

#### Interrogatory No.5:

With respect to each good and/or service identified in your response to Interrogatory No. 3, state the annual sales in units and dollars from the date of first use of each good and/or service.

#### Response to Interrogatory No. 5:

Petitioner objects to this Interrogatory on the grounds that it is overbroad, compound, unduly burdensome and harassing, it seeks irrelevant information, and it seeks to invade the privacy rights of Petitioner and/or its members.

#### Argument in Support of an Order Compelling a Response to Interrogatory No. 5.

Registrant seeks the instant information to verify that Petitioners are, in fact, using the service mark as they contend to be. This is a routine request which is reasonably calculated to lead to the discovery of admissible evidence at trial and, in particular, the *du Pont* factors and the issue of use and priority of use in this matter. Accordingly, the Registrant should be compelled to provide the requested information.

Interrogatory No.7:

For each medium identified in the preceding interrogatory, state the annual expenditure for advertising and promotion since inception.

Response to Interrogatory No.7:

Petitioner objects to this Interrogatory on the grounds that it is vague and ambiguous, and it seeks irrelevant information, and it seeks to invade the privacy rights of Petitioner and/or its members. Subject to the foregoing and general objections, Petitioner responds: Not applicable.

Argument in Support of an Order Compelling a Response to Interrogatory No. 7.

Petitioner admittedly operates a web site as well as alleges to advertise in other mediums. However, it has stated "Not Applicable." Registrant seeks the instant information to verify that Petitioners are, in fact, using the service mark as alleged. Again, this is a routine request and goes directly to the marketing channels factor under the *du Pont* analysis. The request is reasonably calculated to lead to the discovery of admissible evidence at trial. Accordingly, the Registrant should be compelled to provide the requested information.

Interrogatory No. 15:

Describe in detail the process during which the name of the band "Wonderbread 5" was selected.

Response to Interrogatory No. 15:

Petitioner objects to this Interrogatory on the grounds that it is unduly burdensome and harassing in that the information sought is equally available to Registrant, and it seeks irrelevant information. Subject to the foregoing and general objections, Petitioner responds: Please see documents WB5 027-028, served herewith.

Argument in Support of an Order Compelling a Response to Interrogatory No. 15.

Petitioner incorporates, by reference, an excerpt from the Registrant's deposition taken in a civil matter. *See Exhibit C.* In this regard, Petitioner has not set forth its contentions as to how the name was selected but is attempted to avoid the same by inserting Registration's version thereof. The selection of the name and Petitioner's view thereof, under oath, is reasonably calculated to lead to the discovery of admissible evidence at trial. Accordingly, the Registrant should be compelled to provide the requested information.

## Requests for Production of Documents

Registrant has withdrawn his *Motion to Compel* for all but five document requests: 3-5, and 8-9.

Below is provided the request, the response, and Registrant's brief argument as to the requests as to why an Order compelling a more complete production issued:

### Request No.3:

A copy of San Francisco Superior Court's stamped and dated "Defendant's Answer to Complaint for Damages and Equitable Relief: Constructive Fraud, Case No. CGC-09-487573."

### Response to Request No.3:

Petitioner objects to this Request on the grounds that it is vague and ambiguous with respect to the phrases "San Francisco Superior Court's" and "stamped and dated." Subject to the foregoing and general objections, and assuming the Request is intended as a request for a filed-endorsed copy of a document filed with the San Francisco Superior Court, Petitioner responds as follows: No responsive documents exist.

### Request No. 4:

A copy of San Francisco Superior Court's stamped and dated "Defendant's Offer to Compromise, Case No. CGC-09-487573."

### Response to Request No. 4:

Petitioner objects to this Request on the grounds that it is vague and ambiguous with respect to the phrases "San Francisco Superior Court's" and "stamped and dated." Subject to the foregoing and general objections, and assuming the Request is intended as a request for a filed endorsed copy of a document filed with the San Francisco Superior Court, Petitioner responds as follows: No responsive documents exist.

### Request No. 5:

A copy of San Francisco Superior Court's stamped and dated "Notice of Deposition of Plaintiff Patrick Gilles," Case No. CGC-09-487573."

### Response to Request No.5:

Petitioner objects to this Request on the grounds that it is vague and ambiguous with respect to the phrases "San Francisco Superior Court's" and "stamped and dated." Subject to the foregoing and general objections, and assuming the Request is intended as a request for a filed endorsed copy of a document filed with the San Francisco Superior Court, Petitioner responds as follows: No responsive documents exist.

Request No. 8:

A copy of San Francisco's [sic] Superior Court's stamped and dated copy of the "Offer to Compromise CA CORPORATION CODE 16701 (G) (1) (2) (3) (4)." Case No. CGC-09-487573.

Response to Request No. 8:

Petitioner objects to this Request on the grounds that it is unintelligible, vague and ambiguous with respect to the phrases "San Francisco's Superior Court's" and "stamped and dated."

Argument in Support of an Order Compelling a Response to Requests Nos. 3-5, 8.

Throughout this proceeding Petitioner has contended that Registrant was once a member of the Petitioner's band, that the band is the owner of the service mark at issue, and that this separate civil action is dispositive of the instant matter as Petitioner alleges a settlement agreement between Petitioner and Registrant resolved all trademark issues at issue in this matter to conclude this related civil matter. However, as shown above, when Registrant simply attempts to discover the documents upon which Petitioner will rely to prove this claim they refuse to produce the same. Minor semantical battles aside, Registrant clearly ask for the documents that Petitioner contends supports their case. To this end, Petitioner once again is stonewalling these requests. The documents requested in Request Nos. 3-5, and 8 go to the heart of Petitioner's claim as more fully set forth in their failed *Motion for Summary Judgment*. In this regard, document requests aimed at discovering such information are reasonably calculated to lead to the discovery of admissible evidence at trial. Accordingly, the Registrant should be compelled to provide the requested information.

Request No. 9:

All Documents pertaining to Wonderbread 5's advertising and marketing materials posted online or distributed by Petitioner after October 22, 2009, including but not limited to hand bills, flyers, posters, and guitar picks containing Registrant's photo Image, video image, phone number, or address.

Response to Request No.9:

Petitioner objects to this Request on the grounds that it is vague, ambiguous, overbroad, unduly burdensome and harassing, and it seeks irrelevant information. Subject to the foregoing and general objections, and assuming the Request is limited to only materials bearing Registrant's photo image, video image, phone number, or address, Petitioner responds as follows: No responsive documents exist.

Argument in Support of an Order Compelling a Response to Request No. 9.

Petitioner inserts an invalid assumption ("assuming the Request is limited to only materials bearing Registrant's photo image, video image, phone number, or address") to avoid responding to this request. First, Petitioner did not respond to the request served upon it but rather changed the request. Second, the actual request seeks information to verify that Petitioners are, in fact, using the service mark as alleged. Again, this is a routine request and goes directly to the marketing channels factor

under the *du Pont* analysis. The request is reasonably calculated to lead to the discovery of admissible evidence at trial. Accordingly, the Registrant should be compelled to provide the requested information.

## CONCLUSION

Registrant's *Motion to Compel* was filed, and maintained, insofar as Petitioner, nearly two years following the submission of Registrant's discovery, had failed to provide Registrant with complete responses to Registrant's interrogatories nos. 1, 4-9, 15, and 17-18 as well as requests for production of documents 1-5, 7-11, and 13. As is the pattern in this case each time Registrant has attempted discovery Petitioner has objected through various motions or otherwise. There is absolutely no dispute as to any of the following facts.

Registrant served its initial discovery in 2010. In response Petitioner filed a *Motion for Summary Judgment*.

Registrant, handicapped by the inability to have some discovery completed prior to responding to the motion, filed a *Motion for Rule 56(f) Discovery*.

Petitioner Opposed Registrant's *Motion for Rule 56(f) Discovery*. The Board sided with the Registrant ordering Petitioner to respond to specified interrogatories and requests for production of documents relevant to the *Motion for Summary Judgment*. Only under order did the Petition participate in discovery.

Later, the Board denied Petitioner's *Motion for Summary Judgment*. Thereafter the Petitioner took no action to respond to the remain properly served discovery by Registrant originally served in 2010, namely, interrogatories nos. 1, 4-9, 15, and 17-18 as well as requests for production of documents 1-5, 7-11, and 13.

Registrant contacted Petitioner's counsel to resolve the issue. Petitioner's counsel stated she would "look into" the matter and get back to counsel for Registrant. But repeated efforts to have Registrant simply comply and participate in discovery were fruitless.

Rather than provide answers to the aforementioned discovery, Petitioner began noting, and in some cases spontaneously taking off, the deposition of Registrant still refusing, implicitly or explicitly, to respond to interrogatories nos. 1, 4-9, 15, and 17-18 as well as requests for production of documents 1-5, 7-11, and 13.

Attempting in good faith to resolve all discovery issues without so burdening the Board yet again with these issues Registrant tried to work out a schedule with the Petitioner through which Petitioner would finally take part in providing answers to discovery and all parties could then conduct equally discovery of one another.

But once again the Petitioner deemed it better to begin its motions practice trying to sidestep its discovery obligations under its latest trumped up fallacy. Not until after it filed its motion for sanctions did it provide its own discovery responses to interrogatories nos. 1, 4-9, 15, and 17-18 as well as requests for production of documents 1-5, 7-11, and 13. And in good faith Registrant has now withdrawn a majority of its motion to compel.

Given the totality of the circumstances involved it is respectfully requested that the Board see through these scorched-earth tactics of the Petitioner, make them participate in discovery bilaterally, and do not sanction this continued wasteful motions practice with the entry of an Order favoring anything set forth or requested by the Petitioner.

WHEREFORE the Registrant, Patrick Gilles, respectfully moves the Board for an Order granting, in part, his *Motion to Compel* as to the requested interrogatories and requests for production of documents as well as an Order denying all sanctions in the motions currently pending before this tribunal.

Respectfully submitted this 25<sup>th</sup> day of July, 2012.

THE TRADEMARK COMPANY, PLLC

/Matthew H. Swyers/

Matthew H. Swyers, Esquire  
344 Maple Avenue West, Suite 151  
Vienna, VA 22180  
Telephone (800) 906-8626 ext. 100  
mswyers@TheTrademarkCompany.com  
Attorney for Registrant Patrick Gilles

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
The Trademark Trial and Appeal Board**

In the matter of Trademark Registration No. 3691948  
For the mark WONDERBREAD 5,

Wonderbread 5,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No. 92052150
	:	
Patrick Gilles,	:	
	:	
Registrant.	:	

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I caused a copy of the foregoing motion this 25<sup>th</sup> day of July, 2012, to  
be served, via first class mail, postage prepaid, upon:

David M. Given  
Cari A. Cohorn  
Phillips, Erlewine & Given LLP  
50 California Street, 35th Floor  
San Francisco, CA 94111

/Matthew H. Swyers  
Matthew H. Swyers

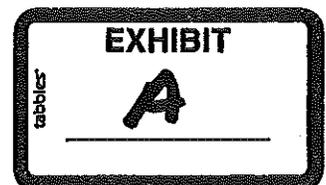
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE  
TRADEMARK TRIAL AND APPEAL BOARD

In re Registration No. 3691948 for the Word Mark WONDERBREAD 5  
(Registered on October 6, 2009)

WONDERBREAD 5,	)	
	)	
Petitioner,	)	Cancellation No. 92052150
	)	
v.	)	
	)	
PATRICK GILLES,	)	
	)	
Registrant.	)	
	)	

**PETITIONER'S FURTHER RESPONSES TO REGISTRANT'S FIRST SET OF  
INTERROGATORIES**

Petitioner Wonderbread 5 ("Petitioner") supplements its responses as follows to the First Set of Interrogatories propounded by Registrant Patrick Gilles ("Registrant"):



## GENERAL RESPONSE AND OBJECTIONS

Petitioner's responses herein are based on discovery, investigation and information ascertained to date, and on documents which are presently available to and specifically known to Petitioner, and Petitioner reserves the right to amend, delete, modify or expand upon said responses in light of further discovery and investigation.

In responding to these interrogatories, Petitioner is furnishing to Registrant such information as is presently available to Petitioner. Such information may include hearsay and other forms of information which are neither reliable nor admissible in evidence. Petitioner reserves all objections relating to the inadmissibility of evidence, and reserves the right to introduce at trial evidence which is presently unknown to Petitioner and/or is discovered after the date of these responses.

Petitioner objects to each interrogatory to the extent it seeks information which is not relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence. In particular, Petitioner objects to each request to the extent it seeks information concerning the selection and adoption of the Mark. Petitioner objects to each interrogatory to the extent it seeks information which would violate the attorney-client privilege or the work product rule.

Subject to the foregoing general objections, Petitioner responds to the specific requests as follows:

## SPECIFIC RESPONSES AND OBJECTIONS

### Interrogatory No. 1:

State in detail the nature of the business, operations, and activities conducted by Petitioner.

### Response to Interrogatory No. 1:

Petitioner objects to this Interrogatory on the grounds that it is vague, ambiguous, compound, overbroad, unduly burdensome and harassing. Subject to the foregoing and general objections, Petitioner responds: Petitioner's business activities consist primarily of live music performances. At various times, Petitioner has promoted itself by distributing DVDs including video footage of the band, T-shirts, stickers, pins, and temporary tattoos. Petitioner also maintains a website featuring active members of the band; it has done so using the name "Wonderbread 5" and the URL [www.wonderbread5.com](http://www.wonderbread5.com) since approximately June 20, 1999.

### Interrogatory No. 4:

Describes [*sic*] any periods since Petitioner's alleged date of first use, as set forth in the preceding paragraph, during which Petitioner did not make use of Petitioner's Claimed Mark.

### Response to Interrogatory No. 4:

Subject to the foregoing general objections, Petitioner responds as follows: Not applicable. At all times since the formation of the band and its first live performance in November 1996 to the present, Petitioner has used the Mark.

### Interrogatory No. 5:

With respect to each good and/or service identified in your response to Interrogatory No. 3, state the annual sales in units and dollars from the date of first use of each good and/or service.

**Response to Interrogatory No. 5:**

Petitioner objects to this Interrogatory on the grounds that it is overbroad, compound, unduly burdensome and harassing, it seeks irrelevant information, and it seeks to invade the privacy rights of Petitioner and/or its members.

**Interrogatory No. 6:**

With respect to each good and/or service identified in your response to Interrogatory No. 3, describe in detail the manner in which Petitioner's Claimed Mark is promoted in the United States, including but not limited to the media and mode of any marketing efforts as well as the geographic regions in which said promotions are conducted. Further identify who has been responsible for the promotion of Petitioner's Claimed Mark from the alleged date of first use to the present.

**Response to Interrogatory No. 6:**

Petitioner objects to this Interrogatory on the grounds that it is vague and ambiguous (particularly with regard to the terms "media," "mode" and "marketing efforts"), compound, overbroad, unduly burdensome and harassing. Subject to the foregoing and general objections, Petitioner responds as follows: Please see Petitioner's Response to Interrogatory No. 3.

**Interrogatory No. 7:**

For each medium identified in the preceding interrogatory, state the annual expenditure for advertising and promotion since inception.

**Response to Interrogatory No. 7:**

Petitioner objects to this Interrogatory on the grounds that it is vague and ambiguous, and it seeks irrelevant information, and it seeks to invade the privacy rights of Petitioner and/or its members. Subject to the foregoing and general objections, Petitioner responds: Not applicable.

**Interrogatory No. 8:**

Identify the person or persons who, from the date of Petitioner's claimed first use(s) of Petitioner's Claimed Mark to the present, have been responsible for the marketing and/or promotion of Petitioner's goods and services under Petitioner's Claimed Mark indicating the period during which each person was so responsible.

**Response to Interrogatory No. 8:**

Petitioner objects to this Interrogatory on the grounds that it is vague, ambiguous, compound, overbroad, unduly burdensome and harassing. Subject to the foregoing and general objections, Petitioner responds as follows: Please see Petitioner's Response to Interrogatory No. 3.

**Interrogatory No. 9:**

Identify all advertising agencies, public relations agencies or market research agencies that Petitioner has used, participated with or cooperated with in advertising, marketing or promoting the goods/services identified in response to Interrogatory No. 3, and indicate the time period(s) during which such activities were conducted.

**Response to Interrogatory No. 9:**

Petitioner objects to this Interrogatory on the grounds that it is vague, ambiguous, and compound, and it seeks irrelevant information. Subject to the foregoing and general objections, Petitioner responds: Not applicable.

**Interrogatory No. 15:**

Describe in detail the process during which the name of the band "Wonderbread 5" was selected.

**Response to Interrogatory No. 15:**

Petitioner objects to this Interrogatory on the grounds that it is unduly burdensome and harassing in that the information sought is equally available to Registrant, and it seeks irrelevant information. Subject to the foregoing and general objections, Petitioner responds: Please see documents WB5 027-028, served herewith.

**Interrogatory No. 17:**

Describe in detail the civil litigation dispute between Registrant and Petitioner, including the details of any settlement agreement between Registrant and Petitioner.

**Response to Interrogatory No. 17:**

Petitioner objects to this Interrogatory on the grounds that it is unduly burdensome and harassing in that, as the plaintiff in San Francisco Superior Court Case No. CGC-09-489573, Registrant is fully aware of and/or has access to information concerning that dispute, including the claims and defenses asserted in the action and the resolution thereof. Subject to the foregoing and general objections, Petitioner responds: Shortly after being terminated from Petitioner, Registrant filed a complaint in San Francisco Superior Court against Petitioner (as a general partnership), each of its members, and its agent and manager, alleging ten causes of action for, *inter alia*, breach of contract, intentional interference with prospective economic advantage, and violations of the California Corporations Code.

The thrust of Registrant's allegations was that he was wrongfully expelled from the general partnership. The primary remedy Registrant sought was a buyout of his "interest" in Petitioner's assets, including "its service mark name." (*See, e.g.*, document WB5 007.)

Nowhere in his 37-page complaint did Registrant allege that he had ever used the Mark in commerce, apart from his activities with Petitioner. Nor did he claim in the complaint that he owned the Mark.

In the course of discovery in the civil action, Registrant concealed the fact that – after his termination and without Petitioner's knowledge or consent – he registered the Mark "WONDERBREAD 5." Registrant concealed his conduct despite having been questioned under oath at deposition and served with document requests that, had he complied with his discovery obligations, would have revealed the registration.

On September 3, 2009, Petitioner served Registrant with an Offer to Compromise, pursuant to California Code of Civil Procedure section 998. Section 998 is a statute, similar to Federal Rule of Civil Procedure 68, which promotes settlement by allowing a party to make an offer to compromise before trial. Following service of that Offer, counsel for Petitioner informed counsel for Registrant, in writing, that the Offer constituted "the band's offer to pay for your client's 'interest' in the band."

Registrant accepted Petitioner's Offer to Compromise on October 1, 2009. Petitioner remitted payment to Registrant on October 8, 2009, and Registrant dismissed his complaint, with prejudice, on October 22, 2009, thereby releasing all claims in and to Petitioner and its assets.

Only after settlement of the litigation did Petitioner discover that Registrant had registered the domain name [www.thewonderbread5.com](http://www.thewonderbread5.com). It appears that the domain name was registered in April 2009. The website consists of a single page, bearing a photograph of

Registrant performing as a member of Petitioner and a photograph of the trademark certificate at issue in the current cancellation proceeding. The trademark certificate predates both Registrant's deposition and his responses to document requests in the San Francisco Superior Court action.

**Interrogatory No. 18:**

Identify any and all persons and/or parties who signed any settlement agreement for the civil litigation dispute referenced in Interrogatory No. 17.

**Response to Interrogatory No. 18:**

Petitioner objects to this Interrogatory on the grounds that it is vague and ambiguous. Subject to the foregoing and general objections, and assuming the phrase "settlement agreement" is intended to refer to the Offer to Compromise executed in connection with San Francisco Superior Court Case No. CGC-09-487573, Petitioner responds as follows: The Offer to Compromise was signed by Douglas B. Wroan, counsel for Registrant, and David M. Given, counsel for Petitioner, its members, and its manager/agent.

Dated: May 31, 2012

PHILLIPS, ERLEWINE & GIVEN LLP

By:     /s/ Cari A. Cohorn      
David M. Given  
Cari A. Cohorn  
Phillips, Erlewine & Given LLP  
50 California Street, 35<sup>th</sup> Floor  
San Francisco, CA 94111  
Telephone: (415) 398-0900  
Facsimile: (415) 398-0911  
Email: dmng@phillaw.com  
      cac@phillaw.com  
Attorneys for Petitioner

VERIFICATION

Tommy Rickard declares:

I am a member of the Wonderbread 5 general partnership. I am authorized to make this verification on behalf of Wonderbread 5, the Petitioner in this action. I have read **PETITIONER'S FURTHER RESPONSES TO REGISTRANT'S FIRST SET OF INTERROGATORIES** and know the contents thereof. I have personal knowledge that the contents of the responses are true, except as to the matters which are herein stated upon information or belief and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed the 31 day of May, 2012 at San Francisco, California.



**CERTIFICATE OF SERVICE**

I, Cari A. Cohorn, Esq., certify that on this 31<sup>st</sup> day of May, 2012, a true and correct copy of **PETITIONER'S FURTHER RESPONSES TO REGISTRANT'S FIRST SET OF INTERROGATORIES** was sent by U.S. Mail to:

Matthew H. Swyers, Esq.  
The Trademark Company  
344 Maple Avenue West, Suite 151  
Vienna, VA 22180

Dated: May 31, 2012

PHILLIPS, ERLEWINE & GIVEN LLP

By:     /s/ Cari A. Cohorn    

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Email: [dmg@phillaw.com](mailto:dmg@phillaw.com)  
[cac@phillaw.com](mailto:cac@phillaw.com)  
Attorneys for Petitioner

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE  
TRADEMARK TRIAL AND APPEAL BOARD

In re Registration No. 3691948 for the Word Mark WONDERBREAD 5  
(Registered on October 6, 2009)

WONDERBREAD 5,	)	
	)	
Petitioner,	)	Cancellation No. 92052150
	)	
v.	)	
	)	
PATRICK GILLES,	)	
	)	
Registrant.	)	

**PETITIONER'S FURTHER RESPONSES TO REGISTRANT'S FIRST SET OF  
REQUESTS FOR PRODUCTION OF DOCUMENTS**

Petitioner Wonderbread 5 ("Petitioner") supplements its responses as follows to the First Set of Requests for Production of Documents propounded by Registrant Patrick Gilles ("Registrant"):



## GENERAL RESPONSE AND OBJECTIONS

Petitioner's responses herein are based on discovery, investigation and information ascertained to date, and on documents which are presently available to and specifically known to Petitioner, and Petitioner reserves the right to amend, delete, modify or expand upon said responses in light of further discovery and investigation.

In responding to these requests, Petitioner is furnishing to defendant such information as is presently available to Petitioner. Such information may include hearsay and other forms of information which are neither reliable nor admissible in evidence. Petitioner reserves all objections relating to the inadmissibility of evidence, and reserves the right to introduce at trial evidence which is presently unknown to Petitioner and/or is discovered after the date of these responses.

Petitioner objects to each request to the extent it seeks information which is not relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence. In particular, Petitioner objects to each request to the extent it seeks information concerning the selection and adoption of the Mark. Petitioner objects to each request to the extent it seeks information which would violate the attorney-client privilege or the work product rule.

Subject to the foregoing general objections, Petitioner responds to the specific requests as follows:

## SPECIFIC RESPONSES AND OBJECTIONS

### Request No. 1:

All Documents evidencing, referring, or relating to the selection or adoption by Petitioner of Petitioner's claimed mark.

**Response to Request No. 1:**

Petitioner objects to this Request on the grounds that it is vague, ambiguous, overbroad unduly burdensome and harassing, and it seeks irrelevant information. Subject to the foregoing general objections, Petitioner responds as follows: Petitioner produces herewith all non-privileged documents in its possession, custody or control describing the selection of the band name "Wonderbread 5."

**Request No. 2:**

Documents sufficient to identify each Person who participated or was involved in the selection of Petitioner's Claimed Mark, and with respect to each Person so identified, the nature and scope of his or her involvement.

**Response to Request No. 2:**

Petitioner objects to this Request on the grounds that it is vague, ambiguous, overbroad unduly burdensome and harassing, and it seeks irrelevant information. Subject to the foregoing general objections, Petitioner responds as follows: Petitioner produces herewith all non-privileged documents in its possession, custody or control describing the selection of the band name "Wonderbread 5."

**Request No. 3:**

A copy of San Francisco Superior Court's stamped and dated "Defendant's Answer to Complaint for Damages and Equitable Relief: Constructive Fraud, Case No. CGC-09-487573."

**Response to Request No. 3:**

Petitioner objects to this Request on the grounds that it is vague and ambiguous with respect to the phrases "San Francisco Superior Court's" and "stamped and dated." Subject to the foregoing and general objections, and assuming the Request is intended as a request for a filed-

endorsed copy of a document filed with the San Francisco Superior Court, Petitioner responds as follows: No responsive documents exist.

**Request No. 4:**

A copy of San Francisco Superior Court's stamped and dated "Defendant's Offer to Compromise, Case No. CGC-09-487573."

**Response to Request No. 4:**

Petitioner objects to this Request on the grounds that it is vague and ambiguous with respect to the phrases "San Francisco Superior Court's" and "stamped and dated." Subject to the foregoing and general objections, and assuming the Request is intended as a request for a filed-endorsed copy of a document filed with the San Francisco Superior Court, Petitioner responds as follows: No responsive documents exist.

**Request No. 5:**

A copy of San Francisco Superior Court's stamped and dated "Notice of Deposition of Plaintiff Patrick Gilles," Case No. CGC-09-487573."

**Response to Request No. 5:**

Petitioner objects to this Request on the grounds that it is vague and ambiguous with respect to the phrases "San Francisco Superior Court's" and "stamped and dated." Subject to the foregoing and general objections, and assuming the Request is intended as a request for a filed-endorsed copy of a document filed with the San Francisco Superior Court, Petitioner responds as follows: No responsive documents exist.

**Request No. 7:**

A copy of the letter Document from Mr. David M. Given to Douglas B. Wroan dated September 15, 2009 which states in part “as previously discussed, the band has no assets (known), liabilities (and therefore no liquidation value), and no balance sheet or income statement available.”

**Response to Request No. 7:**

Subject to the foregoing general objections, Petitioner produces herewith a copy of the requested letter.

**Request No. 8:**

A copy of San Francisco’s [sic] Superior Court’s stamped and dated copy of the “Offer to Compromise CA CORPORATION CODE 16701 (G) (1) (2) (3) (4).” Case No. CGC-09-487573.

**Response to Request No. 8:**

Petitioner objects to this Request on the grounds that it is unintelligible, vague and ambiguous with respect to the phrases “San Francisco’s Superior Court’s” and “stamped and dated.”

**Request No. 9:**

All Documents pertaining to Wonderbread 5’s advertising and marketing materials posted online or distributed by Petitioner after October 22, 2009, including but not limited to hand bills, flyers, posters, and guitar picks containing Registrant’s photo image, video image, phone number, or address.

**Response to Request No. 9:**

Petitioner objects to this Request on the grounds that it is vague, ambiguous, overbroad, unduly burdensome and harassing, and it seeks irrelevant information. Subject to the foregoing and general objections, and assuming the Request is limited to only materials bearing Registrant's photo image, video image, phone number, or address, Petitioner responds as follows: No responsive documents exist.

**Request No. 10:**

The Document sent electronically by David M. Given to Douglas Wroan on Thursday, October 1, 2009 at 4:46 pm which states in part "I do not want to put the client to the expense of spending the appearance fees. I believe we can transact the remainder of this matter without the formality of filing the 998 with the court."

**Response to Request No. 10:**

Subject to the foregoing general objections, Petitioner produces herewith the requested document.

**Request No. 11:**

Any and all Documents evidencing actual confusion as noted in the Petition to Cancel when Petitioner claims, "the Band received many calls and emails from fans and clients inquiring as to why Registrant appeared to be operating under the Wonderbread 5 name."

**Response to Request No. 11:**

Subject to the foregoing general objections, Petitioner responds as follows: Petitioner produces herewith all responsive documents that it has been able to locate through a reasonable and diligent search. Petitioner will supplement this response if additional responsive documents can be located.

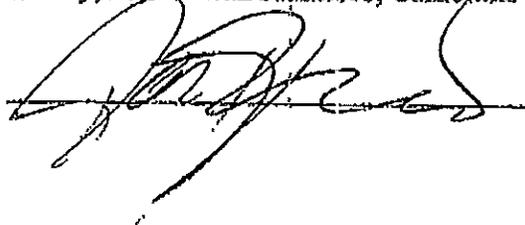


VERIFICATION

Tommy Rickard declares:

I am a member of the Wonderbread 5 general partnership. I am authorized to make this verification on behalf of Wonderbread 5, the Petitioner in this action. I have read **PETITIONER'S FURTHER RESPONSES TO REGISTRANT'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS** and know the contents thereof. I have personal knowledge that the contents of the responses are true, except as to the matters which are herein stated upon information of belief and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed the 31 day of May, 2012 at San Francisco, California.



**CERTIFICATE OF SERVICE**

I, Cari A. Cohorn, Esq., certify that on this 31<sup>st</sup> day of May, 2012, true and correct copies of **PETITIONER'S FURTHER RESPONSES TO REGISTRANT'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**, as well as **DOCUMENTS BATES NUMBERED WB5 019-028** were sent by U.S. Mail to:

Matthew H. Swyers, Esq.  
The Trademark Company  
344 Maple Avenue West, Suite 151  
Vienna, VA 22180

Dated: May 31, 2012

PHILLIPS, ERLEWINE & GIVEN LLP

By:       /s/ Cari A. Cohorn      

David M. Given  
Cari A. Cohorn  
50 California Street, 35<sup>th</sup> Floor  
San Francisco, CA 94111  
Telephone: (415) 398-0900  
Facsimile: (415) 398-0911  
Email: [dmg@phillaw.com](mailto:dmg@phillaw.com)  
[cac@phillaw.com](mailto:cac@phillaw.com)  
Attorneys for Petitioner

PHILLIPS, ERLEWINE & GIVEN LLP

ATTORNEYS AT LAW  
50 CALIFORNIA STREET, 35TH FLOOR  
SAN FRANCISCO, CALIFORNIA 94111  
TELEPHONE (415) 398-0900  
FAX (415) 398-0911  
WWW.PHELAW.COM

DAVID M. GIVEN  
dmg@phillaw.com

September 15, 2009

Douglas B. Wroan, Esq.  
The Wroan Law Firm, Inc.  
5155 West Roseblans Avenue, Suite 229  
Los Angeles, CA 90020

Re: Giles v. Wendenbread S, et al  
S.F. Superior Court Case No. CGC-09-489573

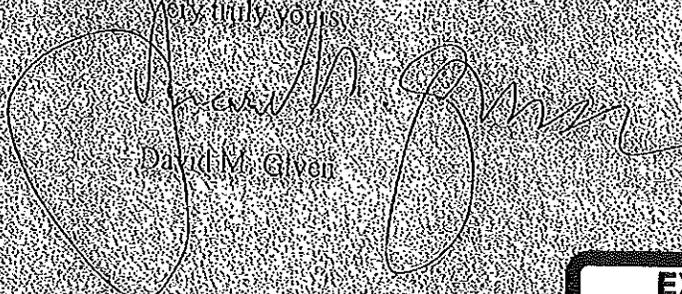
Dear Mr. Wroan:

I understand our clients' Offer of Compromise has reached you.

To the extent Corporations Code § 16701 applies to this case, this letter shall serve as the band's offer to pay for your client's "interest" in the band. The band is ready, willing and able to pay this amount forthwith, in settlement of all your client's claims and subject to dismissal of your client's legal action with prejudice.

Our August 25<sup>th</sup> letter together with the enclosed serves as an explanation of how the amount contained in the Offer of Compromise was reached. As previously discussed, the band has no assets or (known) liabilities (and therefore no liquidation value) and no balance sheet or income statement is available. Notwithstanding the enclosed, the band disputes it owes your client anything and reserves all rights on this subject, including without limitation on any damages incurred by it as a result of your client's actions.

Very truly yours,

  
David M. Given

DMG:hs  
Encl

EXHIBIT

C

tabbles

GILLES v. WONDERBREAD 5  
S.F. Superior Court Case No. CGC-09-489573

C.C.P. §998 Offer of Compromise

Data:

Gilles Annual WB5 Gross Income  
(per 1099s - rounded to nearest dollar)

2004 - \$51,754

2005 - \$57,755

2006 - \$68,787

2007 - \$56,904

2008 - \$59,308

Average = \$58,902

Assumptions:

Multiplier = 1

Replacement Allocation Reduction = 1/3

Value of Share before Setoffs = \$18,875

Setoffs:

Severance Payment Received = (\$5,000)

Pro Rata Share of Transaction Costs to Band = (\$4,000 est.)

Damages to Band Caused by Gilles = TBD

Total Est. Value:

Rounded to \$30,000

END

Re: [SPAM] Acceptance of 998 offer

Subject: Re: [SPAM] Acceptance of 998 offer  
From: "David M. Given" <dmg@phillaw.com>  
Date: 10/1/2009 5:33 PM  
To: Douglas Wroan <DWroan@Wroanlawfirm.com>  
CC: 'Jay siegan' <jay@jaysieganpresents.com>

We'll do it that way then.

Douglas Wroan wrote:

Please make check payable to:  
The Wroan Law Firm, Inc. Client Trust  
Reference: P. Giles  
Thank you.

---

From: David M. Given [mailto:dmg@phillaw.com]  
Sent: Thursday, October 01, 2009 5:16 PM  
To: Douglas Wroan  
Cc: Jay siegan  
Subject: Re: [SPAM] Acceptance of 998 offer

Check payable to "Patrick Giles and his attorney of record, Douglas Wroan"?

Please confirm via reply all so that Jay is aware of how you want the check.

Douglas Wroan wrote:

Yes, agreed. I will file the dismissal after the funds are received not prior to or contemporaneously therewith. For obvious reasons I don't want to put my client to the expense of refiling and reserving etc. in the event the funds for whatever reason do not arrive.

Doug

---

From: David M. Given [mailto:dmg@phillaw.com]  
Sent: Thursday, October 01, 2009 4:46 PM  
To: Douglas Wroan  
Subject: Re: [SPAM] Acceptance of 998 offer

Sorry. I will proceed to assemble ready funds and will transmit to you. In return, please confirm that upon receipt of those funds you will file a dismissal with prejudice of your client's complaint.

I do not want to put the client to the expense of spending the appearance fees. I believe we can transact the remainder of this matter without the formality of filing the 998 with the court.

Douglas Wroan wrote:  
October 1, 2009

Mr. David Given  
Phillips, Eriewine & Given LLP  
60 California Street, 35<sup>th</sup> Floor  
San Francisco, CA 94111

Re: Giles v. Fletcher et al. Case No. CGC-09-489573

David,

In furtherance of our phone conversation this afternoon, please find the attached executed acceptance of your 998 offer in the above referenced case. I spoke with my attorney service who talked to the court clerk who advised that the court would NOT accept the filing of the offer without the payment of the Defendant's first appearance fees in this case in the amount of \$2,960.00.

I am accepting your representation over the phone that you will pay these fees and file the offer. You and I can finalize payment and the dismissal, of course, next week.

Thank you for your work on this matter.

Respectfully,

*Douglas B. Wroan*  
The Wroan Law Firm, Inc.  
A Professional Law Corporation  
5155 West Rosecrans Avenue, Suite 229  
Los Angeles, CA 90250  
Telephone (310) 973-4291  
Facsimile (310) 973-4287  
[www.WroanLawFirm.com](http://www.WroanLawFirm.com)

--  
David M. Given  
Phillips, Eriewine & Given LLP  
60 California Street, 35th Flr.  
San Francisco, CA 94111

v. 415.398.0900  
f. 415.398.0911  
dmg@phillaw.com

Re: [SPAM] Acceptance of 998 offer

[www.phillaw.com](http://www.phillaw.com)

PRIVILEGED COMMUNICATION AND CONFIDENTIALITY NOTICE: This communication with its contents, materials, and attachments contains confidential information.

--

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**From:** Jeffrey Fletcher <[jeffreyafletcher@me.com](mailto:jeffreyafletcher@me.com)>  
**Subject:** Pat Craigslist  
**Date:** October 16, 2009 6:26:06 PM PDT  
**To:** Tommy Rickard <[tommy@tommyrickard.com](mailto:tommy@tommyrickard.com)>, Jay Siegan <[jay@jaysieganpresents.com](mailto:jay@jaysieganpresents.com)>, Chip Adams <[chip@wonderbread5.com](mailto:chip@wonderbread5.com)>, John Mc Dill <[jmcdill@mac.com](mailto:jmcdill@mac.com)>, Michael Phillip Taylor <[acksonjackson@gmail.com](mailto:acksonjackson@gmail.com)>

Everyone flag this post by clicking prohibited like jay said. Be sure to do it from your computer and your phone since they're on different networks. Hope fully that will get it taken down.

Sent from my iPhone

Begin forwarded message:

**From:** Jeffrey Fletcher <[jeffreyafletcher@me.com](mailto:jeffreyafletcher@me.com)>  
**Date:** October 16, 2009 6:05:43 PM PDT  
**To:** Jeffrey Fletcher <[jeffreyafletcher@me.com](mailto:jeffreyafletcher@me.com)>

SF bay area craigslist > (san francisco) > community > musicians

please flag with care:

miscategorized  
prohibited  
spam/overpost  
best of craigslist

## Wonderbread 5 ® seeking musicians for busy coverband (nob hill)

---

Date: 2009-10-16, 10:41AM PDT

Reply to: [comm-cyafk-1424251548@craigslist.org](mailto:comm-cyafk-1424251548@craigslist.org) [Errors when replying to ads?]

---

The revitalized Wonderbread 5® is seeking the following musicians to round out the group:

- 1 Keyboard player w/vocals
- 1 Drummer w/vocals

All applicants should be prepared to provide audio or video demo of their skills and experience upon request.

This gig is for a Coverband, so you must be prepared to play any and all genres and wear costume. Primarily disco, dance, hip hop and rock.

Serious players only. Must be capable, dependable and on-time. No drugs, over-indulgences, or general flakiness.

Please email me via the link above and I will get back to you as I am able. Serious replies only please. I am a founding member and plan on replicating this model in multiple cities, so your region will be primarily in Northern Calif.

The Wonderbead5® is a Trademark name (77-689,156 reg.3,691,948) and is used with permission only.

- it's NOT ok to contact this poster with services or other commercial interests

PostingID: 1424251548

- 
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## Drummer - North California

Craig Manrique December 9 at 9:59am

You guys once had an ad for drummer. What ever became of that?

Craig

Jeff Wonder December 9 at 11:37am

Hi Craig,

Sorry you had to see that ad. Here's what became of that. We kicked our guitar player out and he unsuccessfully tried to sue us for a million dollars and then when that didn't work out, he tried to steal the WB5 name and our lawyer put a stop to that and the craigslist ad.

Sorry for the confusion.  
Jeff

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SAN FRANCISCO

3

4

5 PATRICK GILLES, an individual,  
on behalf of himself,

6

Plaintiff,

7

vs.

No. CGC-09-489573

8

JEFFREY FLETCHER, an  
9 individual; JOHN MCDILL, an  
individual; THOMAS RICKARD,  
10 an individual; MICHAEL TAYLOR,  
an individual; JAY SIEGAN, an  
11 individual; JAY SIEGAN  
PRESENTS, an unknown business  
12 entity; and WONDERBREAD 5, a  
California general partnership;  
13 and DOES 1-10, inclusive,

14

Defendants.

15

Deposition of

16 PATRICK E. GILLES

17 Tuesday, August 11, 2009

18 Volume I

19

20

21 REPORTED BY: CINDY TUGAW, CSR #4805

22

23 NOGARA REPORTING SERVICE  
130 Battery Street, Suite 580  
24 San Francisco, California 94111  
(415) 398-1889

25

1 songs. And it happened very organically.

2 Q. Where did you rehearse?

3 A. I remember rehearsing at 900 Simmons Lane,  
4 the first house I owned in Novato where I built a  
5 soundproof room in my garage.

6 Q. And how long before the band performed  
7 live in front of an audience?

8 A. Very difficult for me to speculate or  
9 estimate. I would say within four months. I think  
10 our first show was a Thanksgiving in 2006 (sic) at  
11 the Faulkline.

12 Q. And who came up with the name Wonderbread  
13 S?

14 A. That's in the complaint, but I can  
15 reiterate it. My recollection was the name -- I  
16 presented the name Whitebread 5 -- not 5, Whitebread  
17 because it was ironic that we were a Caucasian,  
18 Jackson 5 tribute wearing Afros, and I thought the  
19 absurdity of it should be self-deprecating and  
20 brought out to light.

21 At some point, John McDill, and I'm only  
22 speculating, best of my memory, brought the name  
23 Wonderbread out. Well, I don't know who to give  
24 credit to the number 5 to, but I recall it being  
25 associated with the Jackson 5 -- you know, we were

1 really modelling this around the Jackson 5 and their  
2 very unique logo of the 5 with a heart around it.  
3 So somewhere along the line, and this  
4 happened sort of how you mentioned earlier, in a  
5 group setting with a lot of ideas being put in, and  
6 it happened very organically. So to say where the  
7 genesis or credit lies, if that's the goal to find  
8 out, I can't tell you. But it was very organic and  
9 hard to deconstruct.

10 Q. At that first public performance at the  
11 Faultline on Thanksgiving in 1996, were you featured  
12 as Wonderbread 5? Was that the name you were using?

13 A. I think so. I recall saying -- I can't  
14 imagine we ever went by a different name. I don't  
15 recall.

16 Q. Who booked that first show?

17 A. My recollection is Jeff, or through  
18 myself. I want to say Jeff made a contact to Robert  
19 or Jeff, the other Jeff who owned the Faultline at  
20 the time who I was friends with, we'd like to play  
21 there. But they had prior knowledge of what I was  
22 doing in this Wonderbread 5 because my band was very  
23 popular there and made them a lot of money. The  
24 Flesh Weapons did very well there. And after the  
25 Flesh Weapons broke up, I would attend there and,