

ESTTA Tracking number: **ESTTA1082347**

Filing date: **09/16/2020**

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

Proceeding	91235518
Party	Plaintiff Birds Eye Foods LLC
Correspondence Address	MICHELLE ALVEY HUSCH BLACKWELL LLP 190 CARONDELET PLAZA SUITE 600 ST LOUIS, MO 63105 UNITED STATES Primary Email: Michelle.Alvey@huschblackwell.com Secondary Email(s): Alan.Nemes@huschblackwell.com, Mike.Tolles@huschblackwell.com pto-sl@huschblackwell.com (314) 480-1500
Submission	Motion to Compel Discovery or Disclosure
Filer's Name	Mike Tolles
Filer's email	mike.tolles@huschblackwell.com, pto-sl@huschblackwell.com, Michelle.Alvey@huschblackwell.com, Nicole.Anderson@huschblackwell.com
Signature	/s/ Mike Tolles
Date	09/16/2020
Attachments	9_16_20_Motion_to_Compel_Document_Production_and_Responses_to_Discovery.pdf(145053 bytes ) 9_16_20_EXHIBIT_A.pdf(174489 bytes ) 9_16_20_EXHIBIT_B.pdf(207962 bytes ) 9_16_20_EXHIBIT_C.pdf(213266 bytes ) 9_16_20_EXHIBIT_D.pdf(302960 bytes ) 9_16_20_EXHIBIT_E.pdf(70214 bytes ) 9_16_20_EXHIBIT_F.pdf(94278 bytes )

CERTIFICATE OF MAILING VIA ELECTRONIC TRANSMISSION

I hereby certify that this correspondence is being filed with the United States Patent and Trademark Office via the Electronic System for Trademark Trials and Appeals on September 16, 2019.

/Mike Tolles/

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

BIRDS EYE FOODS, LLC,	)	
	)	
Opposer.	)	
	)	Proceeding No. 91235518
v.	)	
	)	
ROBERT WALLACE	)	
DBA DEL RIO VINEYARDS, LLC	)	
	)	
Applicant.	)	

**BIRDS EYE FOODS’ MOTION TO COMPEL DOCUMENT PRODUCTION AND  
RESPONSES TO DISCOVERY REQUESTS AND  
REQUEST FOR SUSPENSION OF PROCEEDINGS**

Opposer Birds Eye Foods LLC (“Opposer” or “Birds Eye Foods”), pursuant to Federal Rule of Procedure 37 and Section 523.01 *et seq.* of the Trademark Trial and Appeal Board Manual of Procedure, moves to compel Robert Wallace d/b/a Del Rio Vineyards, LLC (“Applicant” or “Del Rio”) to comply with its discovery obligations.

Opposer has made multiple, good-faith attempts to obtain necessary documents and materials from Applicant essential to the claims and defenses in this matter. Despite these attempts, which have included multiple written follow-up requests from Opposer for document production, as well as working constructively with Applicant to extend pending deadlines in an effort to conserve the litigants’ resources and those of the Board in light of the parties settlement discussions, Applicant has failed to make adequate production and submit full and complete answers to Opposer’s written discovery

requests. In fact, to date, Applicant has produced no documents responsive to Opposer's Requests for Production and has declined to consent to extend upcoming deadlines. Applicant's lack of production is hindering Opposer in its efforts to prepare required disclosures and make other necessary preparations in connection with this matter. This has necessitated filing the present motion.

The parties are currently in the settlement discussions and have exchanged drafts of a written settlement agreement, but at the present time do not have a final, executed agreement. In light of Opposer's efforts to obtain necessary documents from Applicant, the absence of any document production by Applicant, and in addition to Opposer's request that the Board compel Applicant's production and responses, Opposer respectfully requests that all proceedings and deadlines in this matter be suspended until such time as the Board has had adequate time to rule on the present motion.

In support of its Motion, Opposer states as follows:

### **FACTUAL BACKGROUND**

On November 12, 2017 Opposer filed its Notice of Opposition to Application Serial No. 87208811 for the mark "BIRDSEYE" ("Applicant's Mark" or the "Mark"). *See Notice of Opposition.* Opposer is extensively engaged in the business of manufacturing, marketing and selling a broad range of food products under the name "Birds Eye" and is the owner of multiple registrations for the mark "BIRDS EYE" in connection with same, as well as the related marks "BIRDS EYE AND DESIGN", "THE BIRDS EYES PROMISE", in addition to common law rights in and to these Marks. Opposer submitted its Notice of Opposition on the belief, among other reasons, that consumers are likely to be confused as to the source of Applicant's and Opposer's similar

goods and services and specifically that consumers may be led to believe that Applicant's and Opposer's goods emanate from the same source.

Opposer originally submitted its First Set of Requests for Production, First Set of Interrogatories, and First Set of Requests for Admissions (collectively, Discovery Requests) to Applicant on December 17, 2019. Over the next several months, Applicant was granted multiple extensions to respond to the Discovery Requests. Despite these extensions, when Applicant did eventually submit responses to the Discovery Requests, it produced no responsive documents and submitted only partial and incomplete written responses.

The Parties have been engaged in settlement discussions for several months. During this time, Opposer has refrained from taking additional steps to press Applicant on its discovery obligations, in the hope that additional and sufficient discovery would be obviated in the event the parties were able to finalize the settlement agreement. The parties have made progress on their settlement discussions, which remain open and ongoing, and have exchanged a written draft agreement. At present, however, the parties have not finalized a settlement agreement and Applicant has refused to consent to a further extension of the deadlines, necessitating the resumption of active litigation, including the need for sufficient discovery responses from Applicant and the production of responsive documents. Applicant's inadequate responses and the lack of document production has required Opposer to file the present motion.

A summary of Opposer's proactive efforts to resolve the parties' discovery dispute and Applicant's failure to make adequate production is set forth below.

## **OPPOSER'S GOOD FAITH EFFORTS TO RESOLVE THE DISCOVERY DISPUTE**

A summary of Opposer's good-faith efforts to resolve the present discovery dispute is set forth as follows:

- On December 17, 2019 Opposer<sup>1</sup> served its Discovery Requests on Applicant, placing Applicant's original due date to submit its responses to the Discovery Requests on January 16, 2020. A true and correct copy of Opposer's cover e-mail (without attachments), is attached hereto as Exhibit A.<sup>2</sup>
- On January 15, 2020, Applicant requested additional time to respond to the Discovery Requests, which request was granted and re-set Applicant's response deadline to February 10, 2020. A true and correct copy of Applicant's correspondence is attached hereto as Exhibit B.
- Over the next several weeks, the parties exchanged a settlement proposal and counter-proposal. During this time the parties mutually consented to the extension of discovery and other Board deadlines in an effort to work towards a full and final settlement.
- On February 14, 2020 Applicant sent an additional e-mail to Opposer in which Applicant stated it was considering certain proposed revised settlement terms and requested additional time to respond to Opposer's Discovery Requests. Applicant consented to this request for additional time. A true and correct copy of the correspondence reflecting this exchange is attached hereto as Exhibit C.
- On March 26, 2020 Applicant provided written responses to Opposer's Discovery Requests. Many of these responses, however, were incomplete, partial, or otherwise defective. In addition, although Applicant agreed that documents responsive to Opposer's Requests for Production would be forthcoming, Applicant produced no documents with the responses. True and correct copies of Applicant's Responses to Opposer's First Set of Requests for Production, First Set of Interrogatories, and First Set of Requests for Admissions are attached hereto as Exhibit D.
- For the next several months, the parties conferred with their respective clients regarding proposed additions and revisions to the parties proposed

---

<sup>1</sup> For ease of reference, this list will make reference to letters or e-mails sent by counsel for Opposer as simply "Opposer" and will make reference to letters or e-mails sent by counsel for Applicant as simply "Applicant".

<sup>2</sup> All referenced Exhibits are attached to the Declaration of Michael J. Tolles, submitted concurrently with this Motion.

settlement terms. On May 5, 2020, counsel Applicant and Opposer held a telephone conference regarding the status of the matter and the need to produce documents in the event settlement talks could not be concluded. A true and correct copy of Opposer's May 5, 2020 correspondence to Applicant requesting that Applicant produce responsive documents and following-up on the parties' telephone conference from earlier that day is attached hereto as Exhibit E.

- On May 7, 2020 counsel for Applicant wrote to counsel for Opposer confirming progress on the parties settlement discussions, requesting clarification as to a particular proposed term of the proposed settlement agreement, and consenting to an extension of pending Board deadlines in order to allow the parties to work on their settlement.
- On June 2, 2020 Opposer sent Applicant a proposed settlement agreement for review and consideration. On August 4, 2020 Applicant sent Opposer proposed modifications to the draft agreement.
- On September 1, 2020 Opposer sent Applicant a request to extend pending Board deadlines while Opposer reviewed and considered Applicant's proposed modifications. On September 10, 2020 Applicant informed Opposer that it declined to consent to further extensions of pending deadlines, notwithstanding the parties' ongoing settlement discussions and efforts to finalize a written agreement.
- On September 11, 2020, counsel for Opposer provided Opposer's comments and proposed revisions to the last draft of the settlement agreement.
- On September 12, 2020 counsel for Opposer sent counsel for Applicant a letter stating that, in light of Applicant's decision to decline to consent to a further extension while the parties' continued their settlement discussions and worked to finalize the written agreement, Applicant would therefore need to make production of its responsive documents and respond to Opposer's Discovery Responses with full and complete answers in order to allow Opposer to proceed with preparing its disclosures. A copy of Opposer's September 12, 2020 letter is attached hereto as Exhibit F.
- As of the date on this Motion, Applicant has not produced any documents, nor responded to Opposer's September 12, 2020 correspondence.

## ARGUMENT

“The purpose of discovery is to allow a broad search for facts...or any other matters which may aid a party in the preparation of presentation of his case.” *Kansas City Power & Light Co. v. United States*, 132 Fed. Cl., 28, 32 (2017) (quoting FRCP 26). Opposer is entitled to reasonable discovery “that is relevant any party’s claim or defense...” *Id.* Applicant’s discovery production to-date is inadequate and does not conform with minimum obligations. Specifically, Applicant has produced no documents in response to Opposer’s Requests for Production. Without full, adequate document production from Application, Opposer is unable to fully and adequately prepare its case for further proceedings.

In addition to the absence of any document production, Applicant’s responses to several of Opposer’s Interrogatories and at least one key Request for Admission are incomplete and inadequate and sometimes evasive and/or non-responsive to requests for basic and straightforward information. The refusal to provide full and complete responses to the Interrogatories and Request for Admission prevents Opposer from obtaining the necessary information it needs to support its case. This is unacceptable under any plain reading of the discovery rules. *See, e.g., Hardy v. United States*, 130 Fed. Cl. 406, 408 (2017) (“Responding parties must provide true, explicit, responsive, complete, and candid answers....directly and without evasion in accordance with information that such party possesses after due inquiry.”).

Accordingly, Applicant should be compelled to provide full and complete responses to Opposer’s Discovery Requests.

Given the pending disclosure deadline, Applicant's failure to make adequate production or to provide full and complete responses to the Discovery Requests, Opposer has been prejudiced and will continue to be prejudiced by Applicant's failure to comply with its discovery obligations. For this reason, Opposer is forced to file the present Motion to Compel.

### **APPLICANT'S DEFECTIVE DISCOVERY RESPONSES**

A list of the defects in Applicant's responses to Opposer's Discovery Requests is more fully set forth in Opposer's September 12, 2020 correspondence. *See Exhibit F.* With respect to Opposer's Requests for Production, Applicant has previously agreed to produce documents in response to Requests Nos. 2, 3, 4,5, 6, 7,8, 10, 11, 12,13, 14, 16, 17, 19, 20, 21, 22, 23, 24, and 30. To date, Opposer has received no documents. Applicant must produce responsive documents. In addition, Opposer notes that Applicant has submitted inadequate and/or incomplete responses to the following Requests for Production: Requests Nos. 9, 15, 18, 25, 27, 28 and 29. The responses to these Requests must be supplemented and/or amended.

Applicant's written responses to Opposer's First Set of Interrogatories are also substantively lacking, as many responses are either evasive, incomplete, or both. Specifically, Applicant's defective Interrogatory responses include the following: Interrogatories 1, 2, 6, 7, 9, 16, 20, 22, 24, 25, 28, 29 and 30. These Interrogatories must be fully answered in order for Opposer to make meaningful preparations and disclosures as part of its case.

In addition, Opposer has not received a sufficient response to Opposer's Request for Admission No. 8, which requests Applicant acknowledge that the spelling of

Applicant's mark and Opposer's marks are the same except for capitalization and a space. This Request is relevant to the likelihood of confusion analysis regarding the parties' respective marks and deserves a full and complete response.

**REQUEST FOR RELIEF**

Despite multiple requests, Applicant has not provided meaningful and full responses to the Discovery Requests and has produced no documents to date. Accordingly, Opposer respectfully moves this Board for an Order compelling Applicant, within ten (10) days from the date of the Order, to fully and completely respond to Opposer's First Set of Requests for Production, including producing documents responsive to same, as well as Opposer's First Set of Interrogatories and First Set of Requests for Admissions as more particularly identified above, or be prevented from introducing information responsive to same, or alleged references to same, into evidence.

Opposer further moves for an Order immediately suspending the proceedings and deadlines in this matter until such time as Opposer's Motion is resolved.

WHEREFORE, Opposer Birds Eye Foods LLC respectfully requests that the Trademark Trial and Appeal Board grant its Motion to Compel and grant such other and further relief as it deems appropriate.

Dated: September 16, 2020

Respectfully submitted,

By: /Mike Tolles/  
Michelle Alvey  
Mike Tolles  
Alan Nemes  
HUSCH BLACKWELL LLP  
190 Carondelet Plaza, Ste. 600  
St. Louis, MO 63105  
Telephone: (314) 345-6000

*Attorneys for Opposer Birds Eye  
Foods LLC*

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

BIRDS EYE FOOD LLC	)	
	)	
Opposer,	)	
	)	Opposition No. 91235518
v.	)	
	)	
ROBERT WALLACE	)	
DBA DEL RIO VINEYARDS, LLC	)	
	)	
Applicant.	)	

**DECLARATION OF MICHAEL J. TOLLES  
IN SUPPORT OF OPPOSER’S MOTION TO COMPEL**

I, Michael J. Tolles, declare and state as follows:

1. I am an attorney with the law firm Husch Blackwell LLP and one of the attorneys representing Opposer Birds Eye Foods LLC (“Opposer”) in the above-captioned cancellation proceeding. I submit this Declaration for the purpose of setting forth certain facts and identifying documentary exhibits in support of Opposer’s Motion to Compel.

2. Attached to this Declaration are true and correct copies of Exhibits submitted in support of Opposer’s Motion to Compel, each of which pertains to Opposer’s written discovery requests to Applicant, Applicant’s responses, and/or follow-up correspondence between the parties related to same and described in greater detail in the Motion:

- Exhibit A: E-mail correspondence transmitting Opposer’s First Set of Requests for Production, First Set of Interrogatories and First Set of Requests for Admission directed to Applicant (without attachments) dated December 17, 2020.
- Exhibit B: A copy of Applicant’s January 15, 2020 correspondence in which Applicant requested and was granted additional time to respond to Opposer’s written discovery requests.

- Exhibit C: A copy of the parties' February 14, 2020 correspondence in which the parties agreed to additional time to respond to written discovery requests.
- Exhibit D: True and correct copies of Applicant's Responses to Opposer's First Set of Requests for Production, First Set of Interrogatories and First Set of Requests for Admission directed to Applicant dated March 26, 2020
- Exhibit E: Opposer's May 5, 2020 correspondence requesting Applicant produce documents responsive to Opposer's Discovery Requests.
- Exhibit F: Opposer's September 12, 2020 containing a detailed description of Opposer's outstanding Discovery Requests and Applicant's defective responses to same.

3. Pursuant to Section 523.02 of the Trademark Trial and Appeal Board

Manual of Procedure, I have attempted to make a good-faith effort to resolve Opposer's discovery concerns noted in the accompanying Motion to Compel, which efforts are more fully described in the Motion.

Pursuant to 28 U.S.C. § 1746, I, Michael J. Tolles, declare under penalty of perjury that the foregoing statements are made of my own knowledge and are true and correct to the best of my knowledge and ability.

Dated: September 16, 2020

/s/ Michael J. Tolles

Michael J. Tolles

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Motion to Compel Document Production and Responses to Discovery Requests has been duly served on the Applicant by electronic mail on this 16<sup>th</sup> day of September, 2020 to:

Kevin M. Hayes  
Klarquist Sparkman LLP  
One World Trade Center, Suite 1600  
121 SW Salmon Street  
Portland, OR 97204

[Kevin.Hayes@klarquist.com](mailto:Kevin.Hayes@klarquist.com); [Jennifer@delriovineyards.com](mailto:Jennifer@delriovineyards.com);  
[debra@delriovineyards.com](mailto:debra@delriovineyards.com); [joleew@delriovineyards.com](mailto:joleew@delriovineyards.com); [rob@delriovineyards.com](mailto:rob@delriovineyards.com)

*/Mike Tolles/*

# **EXHIBIT A**

---

**From:** Tolles, Mike  
**Sent:** Tuesday, December 17, 2019 1:47 PM  
**To:** Kevin M. Hayes  
**Cc:** Alvey, Michelle; Jennifer@delriovineyards.com; debra@delriovineyards.com; Joleew@delriovineyards.com; rob@delriovineyards.com  
**Subject:** Birds Eye Foods LLC v. Robert Wallace dba Del Rio Vineyards, LLC; Opposition No. 91235518  
**Attachments:** BIRDSEYEDELRIO Opposer's Initial Disclosures.pdf; BIRDSEYEDELRIO First Request for Production directed to Applicant.pdf; BIRDSEYEDELRIO First Set of Interrogatories directed to Applicant.pdf; BIRDSEYEDELRIO First Set of Request for Admissions directed to Applicant....pdf; 4811-9167-5567.1 BIRDSEYEDELRIO First Set of Request for Production dire....docx; 4837-4279-5439.1 BIRDSEYEDELRIO First Set of Interrogatories directed to....docx; 4831-3580-1007.1 BIRDSEYEDELRIO First Set of Request for Admissions dire....docx

Kevin,

Attached please find the following documents propounded by Opposer Birds Eyes Foods, LLC ("Opposer") to Applicant Robert Wallace dba Del Rio Vineyards ("Applicant") in connection with the above-referenced proceeding:

- 1) Opposer's Initial Disclosures;
- 2) Opposer's First Set of Requests for Production Directed to Applicant;
- 3) Opposer's First Set of Interrogatories Directed to Applicant;
- 4) Opposer's First Set of Requests for Admissions Directed to Applicant.

Regards,

**Mike Tolles**  
**Attorney**

**HUSCH BLACKWELL LLP**  
190 Carondelet Plaza, Suite 600  
St. Louis, MO 63105-3433  
Direct: 314.480.1858  
Fax: 314.480.1505  
[Mike.Tolles@huschblackwell.com](mailto:Mike.Tolles@huschblackwell.com)  
[huschblackwell.com](http://huschblackwell.com)  
[View Bio](#) | [View VCard](#)

*Named a first-tier national real estate law firm by U.S. News-Best Lawyers*

# **EXHIBIT B**

---

**From:** Kevin M. Hayes <kevin.hayes@klarquist.com>  
**Sent:** Wednesday, January 15, 2020 4:58 PM  
**To:** Tolles, Mike  
**Cc:** Alvey, Michelle  
**Subject:** RE: Birds Eye Foods LLC v. Robert Wallace dba Del Rio Vineyards, LLC; Opposition No. 91235518

[EXTERNAL EMAIL]

Dear Mr. Tolles:

In view of the extension of time to file Birds Eye's response in the summary judgment to February 10, and indication on the 3<sup>rd</sup> that a revised settlement proposal should be here soon, we would appreciate if Birds Eye Foods would grant an extension of time to respond to its first set of discovery requests from January 16 to February 10. Please let me know if that is acceptable. Best regards, Kevin

---

**From:** Tolles, Mike <Mike.Tolles@huschblackwell.com>  
**Sent:** Tuesday, December 17, 2019 11:47 AM  
**To:** Kevin M. Hayes <kevin.hayes@klarquist.com>  
**Cc:** Alvey, Michelle <Michelle.Alvey@huschblackwell.com>; Jennifer@delriovineyards.com; debra@delriovineyards.com; Joleew@delriovineyards.com; rob@delriovineyards.com  
**Subject:** Birds Eye Foods LLC v. Robert Wallace dba Del Rio Vineyards, LLC; Opposition No. 91235518

[EXTERNAL]

---

Kevin,

Attached please find the following documents propounded by Opposer Birds Eyes Foods, LLC ("Opposer") to Applicant Robert Wallace dba Del Rio Vineyards ("Applicant") in connection with the above-referenced proceeding:

- 1) Opposer's Initial Disclosures;
- 2) Opposer's First Set of Requests for Production Directed to Applicant;
- 3) Opposer's First Set of Interrogatories Directed to Applicant;
- 4) Opposer's First Set of Requests for Admissions Directed to Applicant.

Regards,

**Mike Tolles**  
**Attorney**

**HUSCH BLACKWELL LLP**  
190 Carondelet Plaza, Suite 600  
St. Louis, MO 63105-3433  
Direct: 314.480.1858  
Fax: 314.480.1505  
[Mike.Tolles@huschblackwell.com](mailto:Mike.Tolles@huschblackwell.com)  
[huschblackwell.com](http://huschblackwell.com)  
[View Bio](#) | [View VCard](#)

***Named a first-tier national real estate law firm by U.S. News-Best Lawyers***

# **EXHIBIT C**

---

**From:** Tolles, Mike  
**Sent:** Friday, February 14, 2020 1:22 PM  
**To:** Kevin M. Hayes  
**Cc:** Alvey, Michelle; Heidi N. Van Baalen  
**Subject:** RE: Birds Eye Foods LLC v. Robert Wallace dba Del Rio Vineyards, LLC; Opposition No. 91235518

Kevin,

We consent to your proposed extensions and dates below and look forward to your additional comments on the proposed settlement agreement.

**Mike Tolles**  
**Attorney**  
Direct: 314.480.1858  
[Mike.Tolles@huschblackwell.com](mailto:Mike.Tolles@huschblackwell.com)

---

**From:** Kevin M. Hayes [mailto:kevin.hayes@klarquist.com]  
**Sent:** Friday, February 14, 2020 12:31 PM  
**To:** Tolles, Mike <Mike.Tolles@huschblackwell.com>  
**Cc:** Alvey, Michelle <Michelle.Alvey@huschblackwell.com>; Heidi N. Van Baalen <heidi.vanbaalen@klarquist.com>  
**Subject:** RE: Birds Eye Foods LLC v. Robert Wallace dba Del Rio Vineyards, LLC; Opposition No. 91235518

[EXTERNAL EMAIL]

Dear Mr. Tolles:

We are considering the proposed, revised, settlement terms. In view of that, we request an extension for 30 days to respond to:

- 1) Opposer's First Set of Requests for Production Directed to Applicant;
- 2) Opposer's First Set of Interrogatories Directed to Applicant;
- 3) Opposer's First Set of Requests for Admissions Directed to Applicant.

Mr. Wallace dba Del Rio Vineyards would also agree to an extension of 30 days to answer its discovery requests served 12/23 in opposition 91235518.

So we are all on the same page, that should make Mr. Wallace dba Del Rio Vineyards discovery responses due March 16 and Birds Eye Foods/Conagra's due March 22.

Best regards, Kevin



**Klarquist**

**Kevin M. Hayes | Attorney**  
P. [503.595.5300](tel:503.595.5300) D. [503.473.0863](tel:503.473.0863)  
A. 121 SW Salmon St., Suite 1600, Portland, OR 97204 USA

The information contained in this e-mail is confidential and may be legally privileged. It is intended solely for the addressee. Access to this e-mail by anyone else is not authorized. If you are not the intended recipient, any disclosure, copying, distribution, use, or any action you take or fail to take in reliance on it, is prohibited and may be unlawful. Please immediately notify us by telephone (collect) or return e-mail, destroy the original message, and retain no copy - on your system or otherwise.

# **EXHIBIT D**



terms or provisions as characterized by Applicant any definition, instruction or request are accurate, but is merely an indication that Applicant will produce such documents if they are within its possession, custody, or control and located after a reasonable search.

### **GENERAL OBJECTIONS**

Applicant makes the following General Objections, whether or not separately set forth in response to each request, definition, or instruction. The failure to refer specifically to a General Objection should not be construed as a waiver of that General Objection.

1. Applicant objects to these requests to the extent they request information not relevant to the trademark application presently opposed. Such requests are overbroad, unduly burdensome, and seek documents that are irrelevant and immaterial to Applicant's presently-opposed trademark application.

2. Applicant objects to these requests to the extent that they attempt to impose an obligation on Applicant different from, inconsistent with, or greater than that required by the Federal Rules of Civil Procedure and/or the Trademark Trial and Appeal Board's Rules of Practice.

3. Applicant objects to any document request to the extent it is vague, ambiguous, irrelevant, overbroad or unduly burdensome or seeks information not reasonably calculated to lead to the discovery of admissible evidence; which is unreasonably cumulative or duplicative, or obtainable from some other source that is more convenient, less burdensome or less expensive; or which Opposer had ample opportunity to obtain from other sources.

4. Applicant objects to these requests to the extent they seek discovery of documents protected by the attorney-client privilege, the work-product doctrine, and/or any other privilege or immunity. Unless specifically agreed to the contrary in writing, Applicant

will not produce anything protected by the work-product, attorney-client, or any other privilege or immunity.

5. Applicant objects to these requests to the extent that they seek documents not in the possession, custody, or control of Applicant, or that are equally or more readily available to Opposer.

6. Applicant objects to each request to the extent it is duplicative of any other request propounded by Opposer.

Without waiving the foregoing objections and incorporating said objections into each specific response below, Applicant responds to Opposer' First Set Of Requests For Production as follows:

## **REQUESTS FOR PRODUCTION**

### **REQUEST FOR PRODUCTION NO. 1:**

All documents and electronically stored information identified in Applicant's Initial Disclosures and all supplements thereto served by Applicant in this proceeding.

#### **Response to Request for Production No. 1:**

Without waiving and subject to the General Objections, Applicant objects to this request as failing to identify the requested documents with reasonable particularity, as is required. Applicant further objects to this request as cumulative. Applicant also objects as this request seeks things served by Applicant in this proceeding, which is redundant.

### **REQUEST FOR PRODUCTION NO.2:**

Representative samples or documents sufficient to identify each good and/or service with which Applicant has used or intends to use Applicant's Mark.

#### **Response to Request for Production No. 2:**

Without waiving and subject to the General Objections, Applicant will produce requested documents to the extent that they exist and can be located with a reasonable search.

### **REQUEST FOR PRODUCTION NO. 3:**

Documents and electronically stored information sufficient to identify the first use of Applicant's Mark on or in connection with each good set forth in Application Serial No. 87208811.

#### **Response to Request for Production No. 3:**

Without waiving and subject to the General Objections, Applicant will produce requested

documents to the extent that they exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 4:**

Documents and electronically stored information sufficient to identify the person responsible for the conception and selection of Applicant's Mark and the reason(s) for selection of such mark.

**Response to Request for Production No. 4:**

In addition to the General Objections, Applicant further objects to this request to the extent that it seeks documents sufficient to identify a person responsible for something as being vague and ambiguous. It is unclear how a document could identify a person responsible for something. Without waiving and subject to the General Objections, Applicant will produce requested documents to the extent that they exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 5:**

Documents and electronically stored information that identifies or references the classes of consumers for Applicant's goods and services bearing Applicant's Mark.

**Response to Request for Production No. 5:**

Without waiving and subject to the General Objections, Applicant will produce any requested documents to the extent any exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 6:**

Documents and electronically stored information that identifies or references the channels of trade for Applicant's goods and services bearing Applicant's Mark.

**Response to Request for Production No. 6:**

Without waiving and subject to the General Objections, Applicant will produce requested

documents to the extent that they exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 7:**

Documents and electronically stored information sufficient to identify the type of purchaser (i.e., information regarding age, education level, sophistication, socioeconomic status) who purchases and/or uses the goods and services used or intended to be used under Applicant's Mark.

**Response to Request for Production No. 7:**

Without waiving and subject to the General Objections, Applicant will produce requested documents to the extent any exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 8:**

Documents and electronically stored information that identifies any advertising agency that Applicant has engaged to advertise and/or promote the goods and services sold under Applicant's Mark.

**Response to Request for Production No. 8:**

Without waiving and subject to the General Objections, Applicant will produce requested documents to the extent any exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 9:**

Representative samples of documents and electronically stored information relating to or reflecting advertisement or promotion by or on behalf of Applicant, including but not limited to, newsletters, social media promotions, blogs, advertisements in newspapers and magazines, hand bills, promotion based flyers and advertisements on radio or television or other media.

**Response to Request for Production No. 9:**

In addition to the General Objections, Applicant further objects to this request to the extent that it seeks documents that merely relate to a fact as being vague, and ambiguous. It is unclear how to determine whether a document might relate to a fact, the degree of relation needed before a document would be considered to relate to a fact, or how a document that merely relates to a fact would be likely to be relevant in this matter.

Applicant further objects to this request as being overbroad, unduly burdensome and not proportionate to the needs of the case for seeking documents and electronically stored information relating to or reflecting advertisement or promotion by or on behalf of Applicant since the request is not limited to the mark at issue in this case, or at all.

**REQUEST FOR PRODUCTION NO. 10:**

Representative samples of brochures, newsletters, social media promotions, mailing pieces, selling sheets or other items of promotional material displaying or which may display Applicant's Mark used or distributed by Applicant.

**Response to Request for Production No. 10:**

Without waiving and subject to the General Objections, Applicant will produce requested documents to the extent that they exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 11:**

Representative samples of packaging, tags or labels that are used or intended to be used by or on behalf of Applicant, or any licensee of Applicant, in connection with the offer for sale of goods and services branded with Applicant's Mark.

**Response to Request for Production No. 11:**

Without waiving and subject to the General Objections, Applicant will produce requested

documents to the extent any exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 12:**

Documents sufficient to identify the approximate dollar expenditure by Applicant or budgeted expenditure for advertising or promoting goods or services under Applicant's Mark.

**Response to Request for Production No. 12:**

Without waiving and subject to the General Objections, Applicant will produce requested documents to the extent any exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 13:**

Documents sufficient to show the retail price, or intended retail price, of all goods or services sold or intended to be offered for sale under Applicant's Mark.

**Response to Request for Production No. 13:**

Without waiving and subject to the General Objections, Applicant will produce requested documents to the extent any exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 14:**

Documents sufficient to identify the number or dollar value of sales or revenues generated by Applicant from the goods or services offered under Applicant's Mark for the years 2015 through the date of Your responses to these Requests.

**Response to Request for Production No. 14:**

Without waiving and subject to the General Objections, Applicant will produce requested documents to the extent that they exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 15:**

All documents and electronically stored information relating to or reflecting any inquiry or instance of confusion or mistake involving the source, origin or sponsorship of goods or services offered by Applicant under Applicant's Mark, including any inquiry regarding whether any of Applicant's goods or services were sponsored by or otherwise connected with Opposer or any goods or services of Opposer.

**Response to Request for Production No. 15:**

Without waiving and subject to the General Objections, Applicant objects to this request as being overly broad and unduly burdensome and not proportional to the needs of this case for seeking "[a]ll documents and electronically stored information." The unlimited nature of the request impairs or destroys exactitude required so that the custodian of the records is not reasonably apprised of what it must produce since the use of "all documents" that so broadens the request that it is not reasonably particular.

Applicant further objects to this request to the extent that it seeks documents that merely relate to a fact as being vague, and ambiguous. It is unclear how to determine whether a document might relate to a fact, the degree of relation needed before a document would be considered to relate to a fact, or how a document that merely relates to a fact would be likely to be relevant in this matter.

In addition, Applicant objects to the request for any inquiry or instance of confusion or mistake involving the source, origin or sponsorship of goods or services offered by Applicant under Applicant's Mark, as being vague or ambiguous. It is unclear what documents Opposer is requesting.

Subject to the foregoing, Applicant will produce any inquiry regarding whether any of Applicant's goods or services offered under the mark of Application 87208811 were sponsored by or otherwise connected with Opposer or any goods or services of Opposer, to the extent that they exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 16:**

Documents relating to or reflecting any third party's use or registration of a mark containing or including the terms "BIRD" or "BIRDS" in combination with "EYE" or "EYES" in connection with food or beverage products or services related thereto.

**Response to Request for Production No. 16:**

Subject to the General Objections, including attorney/client privilege, Applicant objects to this request concerning registrations as being overly broad and unduly burdensome. To the extent there may be discoverable documents, these documents are readily available to Opposer via the U.S. Patent and Trademark Office database and Applicant also objects on the basis that the document are equally available to Applicant.

Subject to the foregoing, Applicant will produce documents in its possession prior to this matter reflecting any third party's use of a mark containing or including the terms "BIRD" or "BIRDS" in combination with "EYE" or "EYES" in connection with food or beverage products or services related thereto, to the extent that they exist and can be located with a reasonable search

**REQUEST FOR PRODUCTION NO. 17:**

Documents relating to or reflecting any survey, report, market study, poll or other investigation conducted by or on behalf of Applicant or relating to Applicant's Mark.

**Response to Request for Production No. 17:**

Without waiving and subject to the General Objections, Applicant objects to this request as seeking attorney-client privileged and work product immune documents.

In addition, Applicant objects to this request as premature to the extent it seeks expert reports, which will be produced under the Board's scheduling order.

Subject to the foregoing, Applicant will produce requested documents to the extent any exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 18:**

Documents relating to or reflecting any trademark search, clearance or investigation concerning the availability of the term "BIRDSEYE" for use as a trademark for Applicant's goods or services, including but not limited to any search of the United States Patent and Trademark Office records, state trademark/service mark records, trademark or other trade publications, business directories, telephone directories or any records of any trademark service organization.

**Response to Request for Production No. 18:**

Without waiving and subject to the General Objections, Applicant objects to this request as seeks attorney-client privileged and work product immune documents. Applicant further objects to this request to the extent that it seeks documents that merely relate to a fact as being vague, and ambiguous. It is unclear how to determine whether a document might relate to a fact, the degree of relation needed before a document would be considered to relate to a fact, or how a document that merely relates to a fact would be likely to be relevant in this matter.

Subject to the foregoing, Applicant will produce the results (not including any

privileged opinion) of any formal search that Applicant conducted to determine if Applicant's Mark was available for use and/or registration to the extent any exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 19:**

All documents that comprise an agreement to license Applicant's Mark.

**Response to Request for Production No. 19:**

Without waiving and subject to the General Objections, Applicant objects to this request as seeks attorney-client privileged and work product immune documents.

Applicant objects to this request as being overly broad and unduly burdensome and not proportional to the needs of this case for seeking "[a]ll documents." The unlimited nature of the request impairs or destroys exactitude required so that the custodian of the records is not reasonably apprised of what it must produce since the use of "all documents" that so broadens the request that it is not reasonably particular.

Subject to the foregoing, Applicant will produce any license to use Applicant's Mark.

**REQUEST FOR PRODUCTION NO. 20:**

All documents relating to or reflecting any assignment of Applicant's Mark, either to or by Applicant.

**Response to Request for Production No. 20:**

Without waiving and subject to the General Objections, Applicant objects to this request as seeks attorney-client privileged and work product immune documents.

Applicant further objects to this request to the extent that it seeks documents that merely

relate to a fact as being vague, and ambiguous. It is unclear how to determine whether a document might relate to a fact, the degree of relation needed before a document would be considered to relate to a fact, or how a document that merely relates to a fact would be likely to be relevant in this matter.

Applicant objects to this request as being overly broad and unduly burdensome and not proportional to the needs of this case for seeking “[a]ll documents.” The unlimited nature of the request impairs or destroys exactitude required so that the custodian of the records is not reasonably apprised of what it must produce since the use of “all documents” that so broadens the request that it is not reasonably particular.

Subject to the foregoing, Applicant will produce any assignment of Applicant’s Mark.

**REQUEST FOR PRODUCTION NO. 21:**

All documents relating to or reflecting demand letter(s) sent to the owner of any trademark or service mark containing the term “BIRDSEYE” or the owner of any other trademark or service mark that Applicant claims infringes or dilutes Applicant’s Mark.

**Response to Request for Production No. 21:**

Without waiving and subject to the General Objections, Applicant objects to this request as being overly broad and unduly burdensome and not proportional to the needs of this case for seeking “[a]ll documents and electronically stored information.” The unlimited nature of the request impairs or destroys exactitude required so that the custodian of the records is not reasonably apprised of what it must produce since the use of “all documents” that so broadens the request that it is not reasonably particular.

Subject to the foregoing, Applicant will produce requested documents to the extent any exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 22:**

Documents sufficient to identify Applicant's current business locations.

**Response to Request for Production No. 22:**

Without waiving and subject to the General Objections, Applicant will produce requested documents to the extent any exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 23:**

Documents sufficient to identify Applicant's business organization structure, including relationships with related companies.

**Response to Request for Production No. 23:**

Without waiving and subject to the General Objections, Applicant will produce requested documents to the extent any exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 24:**

Documents reflecting Newsletters or other promotional materials where Applicant has included recipes for meals.

**Response to Request for Production No. 24:**

Without waiving and subject to the General Objections, Applicant will produce requested documents to the extent that they exist and can be located with a reasonable search.

**REQUEST FOR PRODUCTION NO. 25:**

Documents sufficient to identify any plans for business expansion that Applicant has for new products or services.

**Response to Request for Production No. 25:**

Without waiving and subject to the General Objections, Applicant objects to this request as being overly broad and unduly burdensome and not proportional to the needs of this case for seeking business expansion plans without any relation to the opposed mark or nature of business.

**REQUEST FOR PRODUCTION NO. 26:**

Documents sufficient to identify any claim or defense asserted by you in Applicant's Answer to the Notice of Opposition filed in connection with this matter.

**Response to Request for Production No. 26:**

Without waiving and subject to the General Objections, Applicant objects to this request as seeking documents equally available to Opposer. Opposer already has the answer in this case and can determine the requested information from it.

**REQUEST FOR PRODUCTION NO. 27:**

All documents supporting Applicant's contention that registration of Applicant's Mark is not likely to cause confusion with Opposer's Marks.

**Response to Request for Production No. 27:**

Without waiving and subject to the General Objections, especially including privilege, Applicant objects to this request as failing to identify the requested documents with reasonable particularity, as is required. Applicant also objects to this request as being overly broad and unduly burdensome and not proportional to the needs of this case for seeking "[a]ll documents." The unlimited nature of the request impairs or destroys exactitude required so that the custodian of the records is not reasonably apprised of what it must produce since the use of "all documents" so broadens the request that it is not

reasonably particular.

**REQUEST FOR PRODUCTION NO. 28:**

Documents relating to or reflecting all communications, oral or written, between Applicant and any known supplier or customer of Opposer.

**Response to Request for Production No. 28:**

Without waiving and subject to the General Objections, Applicant objects to this request as overly broad, unduly burdensome and not being likely to lead to the discovery of admissible evidence.

Applicant further objects to this request as being overly broad and unduly burdensome and not proportional to the needs of this case for seeking documents relating or referring to communications etc. with a known supplier of opposer. Without cabining its request to relevant issues, Opposers request is too broad and irrelevant.

**REQUEST FOR PRODUCTION NO. 29:**

Documents sufficient to identify all non-retail wholesalers, distributors or others to whom Applicant sells goods and services bearing Applicant's Mark.

**Response to Request for Production No. 29:**

Without waiving and subject to the General Objections, Applicant objects to this request as being overly broad and unduly burdensome and not proportional to the needs of this case.

**REQUEST FOR PRODUCTION NO. 30:**

Documents reflecting Newsletters or other promotional materials where Applicant has recommended food pairings in connection with the wines offered for sale by Applicant.

**Response to Request for Production No. 30:**

Without waiving and subject to the General Objections, Applicant will produce requested documents to the extent that they exist and can be located with a reasonable search.

Dated: March 26, 2020

By:



---

Kevin M. Hayes, OSB #012801  
KLARQUIST SPARKMAN, LLP  
One World Trade Center, Suite 1600  
121 S.W. Salmon Street  
Portland, Oregon 97204  
Telephone: (503) 595-5300  
Fax: (503) 595-5301

Of Attorneys for Applicant  
Robert Wallace dba Del Rio Vineyards, LLC

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 26, 2020, the foregoing APPLICANT'S RESPONSE TO OPPOSER'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS, was served on Opposer's Attorneys by email, to:

Michelle Alvey  
Alan Nemes  
Mike Tolles  
HUSCH BLACKWELL LLP  
The Plaza in Clayton Office Tower  
190 Carondelet Plaza, Suite 600  
St. Louis, MO 63105

  
Kevin M. Hayes

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

Birds Eye Foods LLC,	)	
v.	)	APPLICANT’S RESPONSE TO
Opposer,	)	OPPOSER’S FIRST SET OF
Robert Wallace dba Del Rio Vineyards, LLC,	)	INTERROGATORIES
Applicant.	)	Opposition No.: 91235518
	)	Application No. 87208811

**APPLICANT’S RESPONSE TO OPPOSER’S  
FIRST SET OF INTERROGATORIES**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Applicant Robert Wallace dba Del Rio Vineyards, LLC (“Applicant”) responds to Opposer T Birds Eye Foods LLC’s (“Opposer”) First Set Of Interrogatories as follows.

**GENERAL OBJECTIONS**

Applicant makes the following General Objections, whether or not separately set forth in response to each request, definition, or instruction. The failure to refer specifically to a General Objection should not be construed as a waiver of that General Objection.

1. Applicant objects to these requests to the extent they request information not relevant to the subject application of this opposition, Application Serial No. 87208811. Such requests are overbroad, unduly burdensome, and seek documents that are irrelevant and immaterial to Applicant’s presently-opposed trademark application.

2. Applicant objects to these requests to the extent that they attempt to impose an obligation on Applicant different from, inconsistent with, or greater than that required by the Federal Rules of Civil Procedure and/or the Trademark Trial and Appeal Board’s Rules of Practice.

3. Applicant objects to these requests to the extent they seek discovery of information protected by the attorney-client privilege, the work-product doctrine, and/or any other privilege or immunity. Applicant further objects to the requests seeking privileged information to the extent they attempt to require additional information or actions beyond those necessary to properly assert a claim of privilege or other limitation from discovery.

4. Applicant objects to these requests to the extent that they seek information not in the possession, custody, or control of Applicant, or that is equally or more readily available to Opposer.

5. Applicant objects to each request to the extent it is duplicative of any other request propounded by Opposer.

6. Applicant objects to Opposer's use of the term "goods" as it relates to Applicant's goods as being vague and ambiguous because the definition makes no reference to any goods or services, which of course what a trademark is, a word or device etc. for goods and/or services.

Without waiving the foregoing objections and incorporating said objections into each specific response below, Applicant responds to Opposer's First Set Of Interrogatories as follows:

### **INTERROGATORIES**

#### **INTERROGATORY NO. 1:**

Identify each person having knowledge concerning the factual basis for each of Applicant's allegations and defenses set forth in the Answer to the Notice of Opposition submitted in connection with this matter.

#### **Response to Interrogatory No. 1:**

Subject to the General Objections, including privilege, Applicant objects to this request as cumulative of information produced in Applicant's initial disclosures.

**INTERROGATORY NO. 2:**

Identify each person who participated in the conception and decision to apply for Applicant's Mark.

**Response to Interrogatory No. 2:**

Subject to the General Objections, Applicant objects to this request as cumulative of information produced in Applicant's initial disclosures.

**INTERROGATORY NO. 3:**

Identify the specific type(s) of goods or services with which Applicant has used Applicant's Mark in commerce.

**Response to Interrogatory No. 3:**

Subject to the General Objections, especially including privilege, Applicant answers that is has not yet used the mark for the identified goods, namely wine, yet in commerce.

**INTERROGATORY NO. 4:**

Identify any other type(s) of goods or services with which Applicant intends to use Applicant's Mark in commerce.

**Response to Interrogatory No. 4:**

Subject to the General Objections, especially including privilege: Vineyard and winery services, namely, the cultivation of grapes for others.

**INTERROGATORY NO. 5:**

Describe the demographic market targeted or that will be targeted by Applicant in offering goods using Applicant's Mark.

**Response to Interrogatory No. 5:**

Subject to the General Objections, especially including privilege: people likely to drink

wine, i.e. adults over 21.

**INTERROGATORY NO. 6:**

Identify all places or locations where Applicant, or a party acting on behalf of Applicant, intends to offer goods or related services under Applicant's Mark.

**Response to Interrogatory No. 6:**

Subject to the General Objections, Applicant objects to this request as being overly broad and unduly burdensome for seeking each and every geographic area in which Applicant intends to offer its goods or related services. Subject to the foregoing, where people buy wine.

**INTERROGATORY NO. 7:**

Identify all wholesalers or distributors to whom or through whom Applicant intends to offer Applicant's goods under Applicant's Mark.

**Response to Interrogatory No. 7:**

Subject to the General Objections, especially including privilege, Applicant's investigation is continuing and Applicant reserves the right to supplement this response.

**INTERROGATORY NO. 8:**

Identify all manufacturers and suppliers of Applicant's goods or services offered under Applicant's Mark.

**Response to Interrogatory No. 8:**

Subject to the General Objections, especially including privilege, as Applicant has not yet offered wine under its mark, none.

**INTERROGATORY NO. 9:**

Identify the channels of trade in which Applicant's goods or services will be offered.

**Response to Interrogatory No. 9:**

Subject to the General Objections, especially including privilege, any channels of trade in which wine is sold would be under consideration.

**INTERROGATORY NO. 10:**

Identify any advertising agency or department, including internal operations, which Applicant has engaged to advertise and/or promote the goods or services offered under Applicant's Mark.

**Response to Interrogatory No. 10:**

Subject to the General Objections, none yet.

**INTERROGATORY NO. 11:**

Describe in detail the method of marketing and advertising that will be used by Applicant with respect to each good or service offered for sale under Applicant's Mark.

**Response to Interrogatory No. 11:**

Subject to the General Objections, until the methods of marketing and advertising are decided upon, the possible methods of marketing and advertising include all that make sense and cannot be described in detail as requested. Applicant does intend to offer the wine from its winery to the extent that is a method of marketing and advertising.

**INTERROGATORY NO. 12:**

For each good or service offered under Applicant's Mark, identify the date(s) during which each such good and/or service has been offered under Applicant's Mark.

**Response to Interrogatory No. 12:**

Subject to the General Objections, Applicant has not yet offered wine under Applicant's mark.

**INTERROGATORY NO. 13:**

Identify the date of first use for each good set forth in Application No. 87208811.

**Response to Interrogatory No. 13:**

Subject to the General Objections, Applicant has not yet offered wine under Applicant's mark.

**INTERROGATORY NO. 14:**

Identify the sales, gross revenues, and net revenues generated by Applicant in connection with each of the goods or services offered under Applicant's Mark for the years 2015 through the date of Your responses to these Interrogatories.

**Response to Interrogatory No. 14:**

Subject to the General Objections, Applicant has not yet offered wine under Applicant's mark.

**INTERROGATORY NO. 15:**

Identify the amount of money expended by Applicant or budgeted to be expended in connection with the advertisement or promotion of each of the goods or services offered under Applicant's Mark for the years 2015 through the date of Your responses to these Interrogatories.

**Response to Interrogatory No. 15:**

Subject to the General Objections, Subject to the General Objections, Applicant has not yet offered wine under Applicant's mark nor determined a budget to advertise or promote the wine of Applicant's mark.

**INTERROGATORY NO. 16:**

Identify the intended retail price and the intended wholesale price of each good offered under Applicant's Mark.

**Response to Interrogatory No. 16:**

Subject to the General Objections, Applicant has not yet determined the retail price and the intended wholesale price of the wine.

**INTERROGATORY NO. 17:**

Identify the person responsible for supervising the quality of the goods to be offered under or in connection with Applicant's Mark.

**Response to Interrogatory No. 17:**

Subject to the General Objections, Applicant has not yet offered wine under Applicant's mark, thus there is no person yet responsible for supervising the quality of the wine.

**INTERROGATORY NO. 18:**

Identify the persons with knowledge about the sale and/or distribution of each good offered under Applicant's Mark.

**Response to Interrogatory No. 18:**

Subject to the General Objections, Applicant has not yet offered wine under Applicant's mark, thus there is no person yet knowledge about the sale and/or distribution of the wine.

**INTERROGATORY NO. 19:**

State whether Applicant has ever entered into a licensing agreement involving Applicant's Mark. If yes, identify all licensees of Applicant's Mark.

**Response to Interrogatory No. 19:**

Subject to the General Objections, no.

**INTERROGATORY NO. 20:**

Identify any other person or entity, other than Applicant, who has ever used Applicant's Mark.

**Response to Interrogatory No. 20:**

Subject to the General Objections, especially including privilege, it is not known if any other person has ever used Applicant's Mark.

**INTERROGATORY NO. 21:**

Identify any searches conducted by or for Applicant to determine the availability of Applicant's Mark and identify all documents and electronically stored information relating to such searches.

**Response to Interrogatory No. 21:**

Subject to the General Objections, especially including privilege, none.

**INTERROGATORY NO. 22:**

State whether Applicant is aware of any third-party use of a trademark or service mark containing the terms "BIRD" or "BIRDS" and "EYE" or "EYES" used in conjunction with food or beverage products or related services.

**Response to Interrogatory No. 22:**

Subject to the General Objections, especially including privilege, this request is so broad as to be irrelevant and not proportional to the needs of this case. Applicant is aware that Opposer uses the different mark BIRD'S EYE in connection with the significantly different good, frozen food.

**INTERROGATORY NO. 23:**

State whether Applicant has taken action, including a demand letter, against the owner of any trademark or service mark containing the term "BIRDSEYE" or the owner of any other trademark or service mark that Applicant claims infringes or dilutes Applicant's Mark.

**Response to Interrogatory No. 23:**

Subject to the General Objections, no.

**INTERROGATORY NO. 24:**

Identify the URL (name) of each website on which Applicant's goods or services are sold or offered for sale.

**Response to Interrogatory No. 24:**

Subject to the General Objections, Applicant objects to identifying each website on which Applicant's goods or services are sold or offered for sale as such request is not proportional to the needs of this case. Further Applicant's goods are defined by Opposer as "goods which have been, are intended to be, or currently are offered by or for Applicant in connection with Applicant's Mark." As Applicant has not yet offered wine under Applicant's mark, but "Applicant's goods" is used to refer to wine offered under Applicant's mark, there are no Applicant's goods.

**INTERROGATORY NO. 25:**

State whether Applicant has plans for expansion for any business locations or websites other than those currently operated by Applicant:

**Response to Interrogatory No. 25:**

Subject to the General Objections, Applicant objects to this request as being overly broad and unduly burdensome for seeking each and every business location or website in or on which Applicant intends to offer its goods. Applicant's investigation is continuing and Applicant reserves the right to supplement this response.

**INTERROGATORY NO. 26:**

Identify all persons with knowledge and all documents Applicant intends to rely on or will rely on in support of the defenses set forth in the Answer submitted in connection with this proceeding

**Response to Interrogatory No. 26:**

Subject to the General Objections, Applicant objects to this request as being premature as the Rules set forth when this information is to be produced, and as cumulative of information produced in Applicant's initial disclosures.

**INTERROGATORY NO. 27:**

Identify each instance in of confusion or mistake involving the source, origin or sponsorship of goods or services offered by Applicant under Applicant's Mark, including any inquiry regarding whether any of Applicant's goods or services were sponsored by or otherwise connected with Opposer or any goods or services of Opposer.

**Response to Interrogatory No. 27:**

Subject to the General Objections, especially including privilege, none.

**INTERROGATORY NO. 28:**

Identify any surveys or other market research studies (including focus groups or brand recognition studies) conducted by or on behalf of Applicant in connection with the Applicant's Mark.

**Response to Interrogatory No. 28:**

Subject to the General Objections, especially including privilege, Applicant's investigation is continuing, and Applicant reserves the right to supplement this response.

**INTERROGATORY NO. 29:**

Identify all persons with knowledge and all documents supporting Applicant's contention that Applicant's Mark is not likely to cause confusion with Opposer's Mark.

**Response to Interrogatory No. 29:**

Subject to the General Objections, Applicant objects to this request as being overly broad and unduly burdensome. Applicant's investigation is continuing, and Applicant reserves the right to supplement this response.

**INTERROGATORY NO. 30:**

Identify all persons with knowledge and all documents and electronically stored information relating to Applicant's use of Applicant's mark in connection with the goods set forth in Application Serial No. 87208811.

**Response to Interrogatory No. 30:**

Subject to the General Objections, Applicant objects to this request as being overly broad and unduly burdensome. Applicant also objects to this request as cumulative of information produced in Applicant's initial disclosures.

**INTERROGATORY NO. 31:**

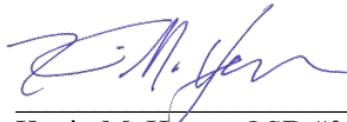
Identify each witness that you intend to call to testify in this proceeding and state the subject matter on which the witness is expected to testify.

**Response to Interrogatory No. 31:**

Subject to the General Objections, Applicant objects to this request as cumulative of information produced in Applicant's initial disclosures. Applicant also objects to this request as being premature as the Rules set forth when this information is to be produced.

Dated: March 26, 2020

By:



---

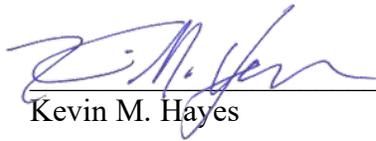
Kevin M. Hayes, OSB #012801  
KLARQUIST SPARKMAN, LLP  
One World Trade Center, Suite 1600  
121 S.W. Salmon Street  
Portland, Oregon 97204  
Telephone: (503) 595-5300  
Fax: (503) 595-5301

Of Attorneys for Applicant  
Robert Wallace dba Del Rio Vineyards, LLC

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 26, 2020, the foregoing APPLICANT'S RESPONSE TO OPPOSER'S FIRST SET OF INTERROGATORIES, was served on Opposer's Attorneys by email, to:

Michelle Alvey  
Alan Nemes  
Mike Tolles  
HUSCH BLACKWELL LLP  
The Plaza in Clayton Office Tower  
190 Carondelet Plaza, Suite 600  
St. Louis, MO 63105



---

Kevin M. Hayes



4. Applicant objects to these requests to the extent that they seek information not in the possession, custody, or control of Applicant, or that is equally or more readily available to Opposer.

5. Applicant objects to each request to the extent it is duplicative of any other request propounded by Opposer.

6. Applicant objects to Opposer's use of the term "goods" as it relates to Applicant's goods as being vague and ambiguous because the definition makes no reference to any goods or services, which of course what a trademark is, a word or device etc. for goods and/or services

Without waiving the foregoing objections and incorporating said objections into each specific response below, Applicant responds to Opposer's First Set Of Requests for Admissions as follows:

## RESPONSE

### **ADMISSION REQUEST NO. 1:**

Admit that Applicant promotes food items in connection with wines offered for sale by Applicant.

### **RESPONSE:**

Denied.

### **ADMISSION REQUEST NO. 2:**

Admit that Applicant suggests food pairings in connection with wines offered for sale by Applicant.

### **RESPONSE:**

Admitted, though Applicant does not offer food under any mark in connection with such suggestions.

### **ADMISSION REQUEST NO. 3:**

Admit that Applicant provides recipes for meals in Applicant's Newsletters.

### **RESPONSE:**

Admitted, though Applicant does not offer food under any mark in such recipes.

### **ADMISSION REQUEST NO. 4:**

Admit that Applicant's Newsletters are available online via Applicant's website at <https://www.delriovineyards.com>.

### **RESPONSE:**

Admitted.

### **ADMISSION REQUEST NO. 5:**

Admit that Applicant includes food recipes in connection with its advertisement or promotion of Applicant's wines.

### **RESPONSE:**

Admitted, though Applicant does not offer food under any mark in such recipes.

### **ADMISSION REQUEST NO. 6:**

Admit that the recipes included in Applicant's Newsletters are included as suggested food pairings with Applicant's branded goods.

### **RESPONSE:**

Admitted, though Applicant does not offer food under any mark in such recipes..

### **ADMISSION REQUEST NO. 7:**

Admit that the phonetic pronunciations of "Birdseye" and "Birds Eye" are identical.

**RESPONSE:**

Denied.

**ADMISSION REQUEST NO. 8:**

Admit that, apart from capitalization issues and the space between the words “Birds” and “Eye”, the words “Birds Eye” have the same spelling as the word “Birdseye”.

**RESPONSE:**

Applicant objects to this request as being vague and ambiguous as it is unclear what Opposer means by “capitalization issues.” The request is also objected to as being irrelevant. Whether words have the same spelling or not is an objective fact, not something that should be subject of a request for admission.

Dated: March 26, 2020

By:



---

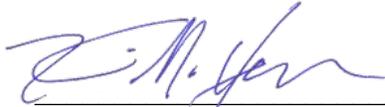
Kevin M. Hayes, OSB #012801  
KLARQUIST SPARKMAN, LLP  
One World Trade Center, Suite 1600  
121 S.W. Salmon Street  
Portland, Oregon 97204  
Telephone: (503) 595-5300  
Fax: (503) 595-5301

Of Attorneys for Applicant  
Robert Wallace dba Del Rio Vineyards, LLC

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 26, 2020, the foregoing APPLICANT'S RESPONSE TO OPPOSER'S FIRST SET OF REQUESTS FOR ADMISSIONS, was served on Opposer's Attorneys by email, to:

Michelle Alvey  
Alan Nemes  
Mike Tolles  
HUSCH BLACKWELL LLP  
The Plaza in Clayton Office Tower  
190 Carondelet Plaza, Suite 600  
St. Louis, MO 63105



---

Kevin M. Hayes

# **EXHIBIT E**

Michael J. Tolles  
Partner

190 Carondelet Plaza, Suite 600  
St. Louis, MO 63105  
Direct: 314.480.1858  
Fax: 314.480.1505  
mike.tolles@huschblackwell.com

May 5, 2020

**VIA E-MAIL**

Kevin Hayes  
Klarquist  
121 SW Salmon Street, Suite 1600  
Portland, OR 97204  
kevin.hayes@klarquist.com

Re: Birds Eye Foods LLC (“Opposer”) v. Robert Wallace d/b/a Del Rio Vineyards,  
LLC (“Applicant”)  
Trademark Trial and Appeal Board - Opposition No. 91235518  
Discovery Status and Production of Documents

Dear Kevin:

This letter will follow up on our telephone conversation from earlier this afternoon regarding the above-captioned matter.

As I stated during our call, Opposer will make its document production to you later this week. In light of the issues in this matter and pending Board deadlines, it is critical that we receive your client’s document production. I therefore request that Applicant make its document production as soon as possible and provide an update on the status of its production by the end of this week.

Thank you for your attention to this matter.

Very truly yours,

/s/ Michael J. Tolles

Michael J. Tolles

cc: Ms. Michelle Alvey, Esq. (via e-mail)

# **EXHIBIT F**

Michael J. Tolles  
Partner

190 Carondelet Plaza, Suite 600  
St. Louis, MO 63105  
Direct: 314.480.1858  
Fax: 314.480.1505  
mike.tolles@huschblackwell.com

September 12, 2020

**VIA E-MAIL**

Kevin Hayes  
Klarquist  
121 SW Salmon Street, Suite 1600  
Portland, OR 97204  
kevin.hayes@klarquist.com

Re: Birds Eye Foods LLC (“Opposer”) v. Robert Wallace d/b/a Del Rio Vineyards,  
LLC (“Applicant”)  
Trademark Trial and Appeal Board - Opposition No. 91235518  
Discovery Status and Production of Documents

Dear Kevin:

I was surprised to receive your correspondence yesterday stating that your client has declined to consent to further extensions of the Board deadlines in the above-captioned matter, particularly given the substantial progress the parties have made to date on their settlement talks. In light of your client’s decision, and notwithstanding the parties’ ongoing settlement efforts, we are forced to move forward with discovery and trial preparations.

Accordingly, please allow this letter to serve as Opposer’s renewed demand that Applicant make immediate production of responsive documents in connection with this matter and fully respond to Opposer’s outstanding discovery requests, as set forth more fully below.

It is critical that Opposer receive document production and adequate, full responses to its outstanding written discovery requests. Given the deadlines on the horizon, and the absence of any production of documents by Applicant to date, **please produce responsive documents and supplemented written discovery responses by no later than 5 p.m. CST on Tuesday, September 15, 2020.**

### **Requests for Document Production**

We have not received sufficient answers to Opposer's Requests for Document Production numbered 9, 15, 18, 25, 27, 28, and 29. The smaller scope of what you propose to produce in response to Requests for Document Production 15 and 18 is not acceptable or responsive to each request.

Request for Document Production 9 relates to promotional materials, which are relevant at least to the likelihood of confusion factors involving channels of trade, conditions under which and buyers to whom sales are made, and the market interface between Applicant and Opposer.

Request for Document Production 15 relates to the likelihood of confusion factors (at least to "The nature and extent of any actual confusion"), and therefore is reasonably likely to lead to the discovery of admissible evidence. Applicant's proposed smaller scope of "any inquiry regarding . . ." is not acceptable as it is not fully responsive to the Request.

Applicant has not sufficiently responded to Request for Document Production 18 concerning searches in connection with Applicant's Mark. Such information is relevant to show Applicant's knowledge and intent prior to applying for Applicant's Mark, and therefore is reasonably likely to lead to the discovery of admissible evidence. Applicant's proposed smaller scope of "any formal search that Applicant conducted to determine if Applicant's Mark was available for use and/or registration . . ." is not acceptable as it is not fully responsive to the Request.

Requests for Document Production 25, 28, and 29 concern the likelihood of confusion factors (at least the factor "The similarity or dissimilarity of established, likely-to-continue trade channels") and therefore are reasonably likely to lead to the discovery of admissible evidence.

Finally, we have not received any documents that you agreed to produce in response to Requests for Document Production #2-8, 10-14, 16-17, 19-24, and 30. Please produce responsive materials as soon as possible.

### **Requests for Admission**

We have also not received a sufficient answer to Opposer's Request for Admission No. 8. Request for Admission 8, acknowledging that the spelling of Applicant's mark and Opposer's marks are the same except for capitalization and a space, is relevant to the likelihood of confusion factors (at least "The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression") at the heart of this case.

### **Interrogatories**

Similarly, we have not received a sufficient answer to Interrogatories numbered 1, 2, 6, 7, 9, 16, 20, 22, 24, 25, 28, 29, and 30. For these Interrogatories, Applicant has provided no responsive information, aside from providing objections in most cases.

Interrogatories 1, 2, 29, and 30 concern people involved in the mark selection and claims and defenses at issue and accordingly would have relevant knowledge and information reasonably likely to lead to the discovery of admissible evidence.

Interrogatories 6, 7, 9, 24, 25 relate to channels of trade and locations or methods of sale for Applicant's goods. Such details are relevant to the likelihood of confusion factors (at least the factor "The similarity or dissimilarity of established, likely-to-continue trade channels") and analyzing the conflict between Applicant's goods and Opposer's goods, and therefore are reasonably likely to lead to the discovery of admissible evidence.

Interrogatory 16 relates to price, which is relevant at least to the likelihood of confusion factors in terms of sophistication of the purchasers ("The conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing"), and therefore is reasonably likely to lead to the discovery of admissible evidence.

Applicant has not fully responded to Interrogatory 20 because the responses states "it is not known" rather than whether Applicant has knowledge.

Applicant's response to Interrogatory 22 is insufficient because it fails to respond to the question of third-party use and refers instead only to Opposer's use. Third-party use is relevant to the likelihood of confusion factors (at least to "The number and nature of similar marks in use on similar goods"), and therefore is reasonably likely to lead to the discovery of admissible evidence.

Applicant also has not sufficiently responded to Interrogatory 28 concerning surveys or other research studies in connection with Applicant's Mark. Such information is relevant to show Applicant's knowledge and intent prior to applying for Applicant's Mark, and therefore is reasonably likely to lead to the discovery of admissible evidence.

Thank you for your prompt attention to this important matter. We look forward to your response.

Very truly yours,

/s/ Michael J. Tolles

Michael J. Tolles

cc: Ms. Michelle Alvey, Esq. (via e-mail)