

ESTTA Tracking number: **ESTTA1090794**

Filing date: **10/23/2020**

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	Reply in Support of Motion
Filer's Name	Mike Tolles
Filer's email	Mike.Tolles@huschblackwell.com, pto-sl@huschblackwell.com, Nicole.Anderson@huschblackwell.com
Signature	/Mike Tolles/
Date	10/23/2020
Attachments	Reply_Memorandum_Support_of_its_Motion_to_Compel.pdf(138377 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 October 23, 2020.

/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, LLC’S REPLY MEMORANDUM IN SUPPORT OF ITS  
MOTION TO COMPEL APPLICANT’S DOCUMENT PRODUCTION  
AND RESPONSES TO OPPOSER’S DISCOVERY REQUESTS**

Opposer Birds Eye Foods LLC (“Opposer” or “Birds Eye Foods”), pursuant to Federal Rule of Procedure 37 and Sections 502.02(b) and 523.01 *et seq.* of the Trademark Trial and Appeal Board Manual of Procedure, submits this Reply Memorandum in support of its Motion to Compel Robert Wallace d/b/a Del Rio Vineyards, LLC (“Applicant” or “Del Rio”) to comply with its discovery obligations.

1. Applicant, in its response memorandum (“Response”) to Opposer’s Motion to Compel does not dispute that it has produced no documents in connection with this matter. Rather, Applicant presents a short list of manufactured excuses for its failure to comply with basic discovery rules. Applicant’s Response is woefully inadequate.

2. Applicant has now been in possession of Opposer’s written discovery requests for more than ten (10) months. *See Opposer’s Motion to Compel, Tolles*

*Declaration, Exhibit A.* The parties' meet-and-confer, and Opposer's original follow-up letter to Applicant seeking full and adequate responses to Applicant's discovery responses, was sent nearly six (6) months ago. *Tolles Declaration, Exhibit E.* Applicant has had more than adequate time to produce responsive documents and provide full and adequate written responses. Applicant's suggestions to the contrary are simply false.

3. Opposer's substantial outreach efforts and attempts to resolve the present discovery issues, outlined in more detail in Opposer's Motion to Compel, unfortunately, have not been reciprocated. Despite Opposer's multiple follow-up requests for document production, Applicant has failed to follow through, supplement its defective responses, or produce any documents whatsoever.

4. Applicant's complaints are belied by the its own actions. Prior to filing its Motion to Compel, Opposer approached Applicant about attempting to extend the Board's present deadlines. Applicant declined this offer, which was extended to Applicant after a lengthy period in which Applicant took no action in favor of waiting until Opposer's pre-trial disclosure deadline was approaching, in an apparent act of tactical gamesmanship. For this additional reason, Applicant cannot now be heard to complain about a lack of adequate time to produce documents when it was given multiple opportunities to do, or about the alleged lack of "good-faith efforts" when Applicant has extended no such efforts itself while refusing requests for additional time while the parties worked to finalize a written settlement agreement. In fact, Opposer has been working diligently in a good faith effort to resolve this matter and to finalize a written settlement agreement setting forth the agreed upon terms and reasonably expected that Applicant would agree to a further extension of the deadlines while the parties exchanged

comments with respect to the draft agreement. Instead, Applicant unreasonably refused to consent to the extension, shortly before the upcoming deadline, and at the same time refuses to produce the documents and information necessary for Opposer to meet the deadlines and present its case. Applicant cannot have it both ways.

5. Furthermore, for reasons that include the ongoing national Covid-19 pandemic, the fact that the parties are represented by counsel located nearly two-thousand (2,000) miles apart from one another, as well as basic, practical expense considerations, Applicant's statement that there has been no "in-person communications" regarding discovery is highly disingenuous. To be sure, for approximately the past year the parties have been engaged in settlement discussions and have had numerous communications. During this time, Applicant has never suggested an "in-person communication" would be productive or somehow stood in the way of Applicant following through on its discovery obligations. Applicant's suggestion that it should be excused from ordinary and straightforward discovery obligations is opportunistic and lacks any credibility.

6. In all Board proceedings, every party has a basic obligation to cooperate in the discovery process. *See, e.g. Emilio Pucci Intl' B.V. v. Sachdev*, 118 U.S.P.Q.2d 1383, 1385 (TTAB 2016) (noting affirmative duty to cooperate in discovery process); *Panda Travel Inc. v. Resort Option Enters., Inc.*, 94 U.S.P.Q.2d 1789, 1791 (TTAB 2009) ("Each party has a duty to make a good faith effort to satisfy the reasonable and appropriate discovery needs of its adversary"). A party who receives written discovery requests has a basic duty to search its records for the information sought by the request and to produce same within the time set forth by rule. *No Fear Inc. v. Rule*, 54 U.S.P.Q.2d 1551, 1555 (TTAB 2000). These requirements are well-known and common

to every Board case. Applicant has not come close to satisfying even these most basic obligations.

7. Opposer has an undeniable right to basic information relevant and necessary to present its case. In the absence of same, Opposer is severely prejudiced, placed in an untenable position, and is unable to proceed with marshalling the necessary evidence in support of its position. Applicant should be made to comply with rudimentary discovery rules and production requirements.

WHEREFORE, Opposer Birds Eye Foods, LLC respectfully requests that the Trademark Trial and Appeal Board grant its Motion to Compel and that this Board issue 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, or be prevented from introducing information responsive to same, or alleged references to same, into evidence and for such other and further relief as it deems appropriate.

Dated: October 23, 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*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Reply Memorandum in Support of its Motion to Compel Document Production and Responses to Discovery Requests has been duly served on the Applicant by electronic mail on this 23<sup>rd</sup> day of October 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/*