

ESTTA Tracking number: **ESTTA955254**

Filing date: **02/19/2019**

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

Proceeding	92068805
Party	Plaintiff 535 5th, LLC
Correspondence Address	MARIA JOHNSON DE NOVO LEGAL PC 2055 CORTE DEL NOGAL CARLSBAD, CA 92011 UNITED STATES maria@denovopc.com, jeff@denovopc.com 858-964-8217
Submission	Opposition/Response to Motion
Filer's Name	Maria Johnson
Filer's email	maria@denovopc.com, jeff@denovopc.com
Signature	/maria johnson/
Date	02/19/2019
Attachments	20190219 Response to Motion to Compel 92068805.pdf(406368 bytes)

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

In the Matter of Application Serial No. 86/517,520
Mark: RUSTIC ROOT

535 5th, LLC,

Petitioner,

v.

ZZ SOUTHGATE LLC,

Registrant.

Cancellation No. 92068805

**RESPONSE OF PETITIONER TO REGISTRANT’S MOTION TO
COMPEL FURTHER RESPONSES TO INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to T.B.M.P. § 523 and 37 C.F.R. § 2.120, *et seq.*, Petitioner, 535 5th, LLC (“Petitioner”), submits the following response to Registrant’s motion to compel Petitioner to provide further responses to Interrogatories and Requests for Production of Documents.

At the outset, Petitioner agrees to supplement its discovery responses as outlined below and agrees to an extension of the applicable discovery deadlines in order to allow time for the parties to resolve their outstanding discovery disputes, including any deficiencies in Registrant’s recent responses to discovery propounded by Petitioner.

A. RESPONSES TO BE SUPPLEMENTED

For Interrogatory Nos. 8, 12, 16, 20, 38, 39, 43, 50, and 52, Registrant requested Petitioner identify the amounts spent on various types of advertising, promotional, and/or marketing materials and activities. Petitioner provided information to the Registrant regarding the “publicity value” of certain public relation services rendered on behalf of Petitioner. Petitioner will make a further search of its records and agrees to identify any “amounts spent” on advertising, promotional, and/or marketing activities. If Petitioner’s investigation finds that no such information exists, Petitioner shall serve a verified response so stating.

For Interrogatory Nos. 21 and 22, Petitioner will supplement its response to “Identify the name of the first Person hired to work at Petitioner’s Restaurant as (a) a chef, (b) a waiter, and (c) kitchen staff, and the dates on which those Persons were hired” as James Thorpe, Chef Antonio, Jason Denton (kitchen), Daniel Wilkenson (server). Petitioner will make a due and diligent search for information regarding the dates on which Petitioner first hired the identified personnel and the date on which Petitioner first advertised it was hiring for the positions. Petitioner will make a due and diligent search for any additional documents to substantiate its response. Furthermore, Petitioner will produce any such documents relied upon in supplementing the response to this Interrogatory as requested in RFP No. 81. Alternatively, Petitioner will state under oath that it cannot locate any additional documents.

For Interrogatory Nos. 23 and 25, Petitioner initially responded to Registrant’s Interrogatory 23 asking to “Identify the date on which the signage appearing on the outside of Petitioner’s Restaurant was *completely installed*,” with a date of June 5, 2015. After further investigation, Petitioner will supplement its response to Interrogatory 23 to include the date barricade signage featuring Petitioner’s trademark was *completely installed* outside of Petitioner’s Restaurant

which was as least as early as November 19, 2014. Petitioner will supplement its response to Interrogatory 25 to attest that the permanent signage affixed to its Restaurant was commissioned sometime before May 16, 2015. Likewise, Petitioner will attest that the barricade signage installed outside its Restaurant was commissioned sometime before November 19, 2014. Petitioner agrees to further investigate the exact dates “on which Petitioner commissioned the installation of” these signs and supplement its responses accordingly. Alternatively, Petitioner will state that it is unable to ascertain the exact dates.

For Interrogatory No. 24, Petitioner agrees to make a due and diligent effort to identify the Person who installed the signage in question, or a statement under oath that such person’s identify is unknown. Such information shall be provided pursuant to the Protective Order in this proceeding, if necessary.

For Interrogatory No. 26, Petitioner responded to Registrant’s Interrogatory 23 asking to “Identify the date construction of Petitioner’s Restaurant began,” as on or about February 1, 2014. This date is supported by, *inter alia*, the document previously produced entitled Inspection Record with Bates Stamp RUS000004. Petitioner will make a due and diligent search for any additional documents to substantiate dates relating to the construction of Petitioner’s Restaurant. Petitioner will produce any such documents relied upon in responding to this Interrogatory as requested in RFP No. 81, and supplement its response accordingly. Alternatively, Petitioner will state under oath that it cannot locate any additional documents.

For Interrogatory No. 28, Petitioner agrees to supplement its response to identify the Person(s) who managed, supervised, and/or oversaw the construction of Petitioner’s restaurant. Petitioner will make a due and diligent search for any additional documents to substantiate its response. Furthermore, Petitioner will produce any such documents relied upon in supplementing the response to this

Interrogatory as requested in RFP No. 81. Alternatively, Petitioner will state under oath that it cannot locate any additional documents.

For Interrogatory Nos. 33 and 36, Petitioner has already explained that it cannot ascertain from any form of evidence how many Persons actually *read* any given article as opposed receiving it or clicking on it online.

For Interrogatory No. 42, Petitioner acknowledges that its response may have been inclusive of services rendered beyond the specific time period requested. Therefore, Petitioner agrees to supplement its response by narrowing its response services rendered only prior to January 28, 2015, or will state under oath that no such services were rendered during that time period.

For Interrogatory No. 53, Petitioner previously responded by stating, “RMD has a management contract with Petitioner to operate the venue.” Despite a due and diligent search, Petitioner has yet to locate a copy of any written agreement. Petitioner agrees to conduct a further search for such a written agreement, and if located, produce any such documents relied upon in supplementing the response to this Interrogatory as requested in RFP No. 81. Alternatively, Petitioner will state under oath that it cannot locate any additional documents.

For RFP No. 9, Petitioner previously producing 346 pages of documents including documents responsive to this request. Petitioner agrees to supplement its response to this request by identifying each document by Bates Stamp number that are specifically responsive to this request.

For RFP No. 13, Petitioner previously supplemented its response by producing 323 pages of documents, marked with Bates Stamps RUS000016 through RUS000179, RUS000224 through RUS000237, and RUS000238 through RUS000282. Petitioner agrees to supplement its response to categorize the

documents by the requested date ranges: (a) prior to January 28, 2015; (b) between January 28, 2015 and June 13, 2016; and, (c) from June 13, 2016 to the present.

For RFP No. 14, As Registrant has indicated, Petitioner produced certain documents related to the value of certain promotional services. However, Petitioner has not located any other documents “showing payments or non-payments for print advertising and promotional materials for various time periods.” Petitioner will verify that it has no further documents responsive to this request, and so state under oath if its investigation confirms that this is the case.

For RFP No. 38, Petitioner previously supplemented its response by producing 166 pages of documents, marked with Bates Stamps RUS000016 through RUS000179, and RUS000283 through RUS000284. Petitioner agrees to supplement its response by narrowing the documents to those prior to January 28, 2015, or will state under oath that it has no such documents.

For RFP No. 39, Registrant is insistent that Petitioner produce documents sufficient to show the number of persons who read and/or viewed the articles referred to in Request No. 38. Petitioner has already explained that it has no way of ascertaining how many Persons actually *read* a given article as opposed to merely clicking on the online article. Petitioner agrees to further search for documents showing online visitors, not clicks or impressions, in response to this request, or will state under oath that it has no such documents.

For RFP Nos. 46-49, Petitioner agrees to produce documents for the entire time period requested (2014-2016) or amend its response to indicate those periods for which it does not have such documents. Petitioner will further search for documents showing online visitors, *not* circulation, in response to RFP Nos. 46 and 47, or will state under oath that it has no such documents.

For RFP No. 50, Petitioner agrees to confirm that there were no communications between Petitioner, as defined, including J Public Relations, and

the publishers of any articles identified and/or produced by Petitioner prior to January 28, 2015.

For RFP No. 54, Petitioner previously supplemented its response by producing 20 pages of documents, marked with Bates Stamps RUS000180 through RUS000199. Petitioner agrees to supplement its response by narrowing the documents to those prior to January 28, 2015, or will state under oath that it has no such documents.

For RFP No. 57, Petitioner previously supplemented its response by producing five pages of documents, marked with Bates Stamps RUS00011 through RUS00015. Petitioner's agrees to revisit its supplemental response and either produce responsive documents or amend its response to state that it has no such documents.

Dated: February 19, 2019

DE NOVO LEGAL, PC

/s/ Maria Johnson

Maria Johnson
Attorneys for Petitioner
535 5th, LLC

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2019, I served a copy of the foregoing ***RESPONSE OF PETITIONER TO REGISTRANT'S MOTION TO COMPEL FURTHER RESPONSES TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS*** by email upon Registrant's counsel as follows:

Robert B.G. Horowitz
Kevin M. Wallace
BAKER & HOSTETLER LLP
rhorowitz@bakerlaw.com
kwallace@bakerlaw.com

/s/ Maria Johnson
Maria Johnson