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

Proceeding	91184741
Party	Defendant E & J Buffalo Brothers, LLC
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Date	09/29/2008
Attachments	Protective Order Agmt.pdf ( 15 pages )(515937 bytes )

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

In the matter of trademark application Serial No. 77/379383  
for the mark BUFFALO BROS  
Published in the Official Gazette on June 10, 2008

BUFFALO BROTHERS, INC. d/b/a  
BUFFALO BROTHERS PIZZA AND  
WINGS CO.,

Opposer,

v.

E&J BUFFALO BROTHERS, LLC

Applicant.

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Opposition No: 91184741

PROTECTIVE ORDER AGREEMENT

PROTECTIVE ORDER AGREEMENT

BUFFALO BROTHERS, INC. d/b/a BUFFALO BROTHERS PIZZA AND WINGS  
CO. (“Opposer”) and E&J BUFFALO BROTHERS, LLC (“Applicant”) agree to the following  
Protective Order that shall govern confidentiality of documents produced in **Opposition No:  
91184741** (the “Action”) and accordingly, the Trademark Trial and Appeal Board (“TTAB”) **ORDERS** as follows:

**1. Introduction and Scope**

This Agreed Protective Order shall govern all documents and information exchanged during this Action, including, but not limited to, disclosures, documents produced by the parties or non-parties, documents from any other litigation between the parties which the producing party specifically cites as responsive in this litigation, deposition testimony, interrogatory answers, responses to requests for admission and any documents or information exchanged during settlement discussions designated pursuant to this Agreement. The documents and information governed by

this Agreed Protective Order shall be collectively referred to as “Discovery and Settlement Material.”

**2. Designation of Certain Discovery and Settlement Material as “Confidential.”**

Discovery and Settlement Material may be designated as “Confidential” where such Discovery and Settlement Material relates to non-public, sensitive or confidential information. Such Discovery and Settlement Material shall be so identified at the time of service of such Discovery and Settlement Material by including on each page the legend “Confidential.”

**3. Designation of Certain Discovery and Settlement Material as “Attorneys Only.”**

A party may also designate Discovery and Settlement Material as “Attorneys Only.” Discovery and Settlement Material may be designated as “Attorneys Only” if such Discovery and Settlement Material contains particularly sensitive confidential information that the producing party believes in good faith cannot be disclosed to without threat of competitive injury, because such Discovery and Settlement Material contains trade secrets or other proprietary or commercially sensitive information. Such Discovery and Settlement Material shall be so identified at the time of service of such Discovery and Settlement Material by including on each page the legend “Attorneys Only.”

**4. Limitations on Access to Discovery and Settlement Material.**

Subject to Paragraphs 5 and 6 of this Agreement, no “Confidential” or “Attorneys Only” Discovery and Settlement Material shall, without prior written consent of the producing party, (a) be disclosed, to anyone other than the TTAB and the persons and entities specified in Paragraphs 5 and 6 hereof; or (b) be used by anyone for any purpose whatsoever other than the prosecution or defense of this litigation. Nothing herein shall detract from, or affect in any way, confidentiality

obligations to which the parties may be subject pursuant to agreements independent of this litigation.

**5. Limitations on Access to Confidential Discovery and Settlement Material.**

Access to and disclosure of Confidential Discovery and Settlement Material marked and identified in accordance with this Agreement shall be limited to Authorized Personnel listed in this paragraph and shall not be provided, shown, made available or communicated in any way to any other person or entity. Authorized Personnel are:

(a) Outside counsel for the Applicant, namely partners and associates of Whitaker Chalk Swindle & Sawyer, LLP, including their legal assistants, administrative assistants, secretaries, and other members of their clerical and administrative staffs.

(b) Outside counsel for the Opposers, namely members and associates of Coats + Bennett, PLLC, including Edward H. Green, legal assistants, administrative assistants, secretaries, and other members of their clerical and administrative staffs;

(c) Additional designees for each party as agreed in the future. Upon receiving a submission identifying a requested additional designee, a party shall have five (5) business days to approve or object to the proposed designee. Upon approval, any designee shall execute an Acknowledgement in the form annexed hereto as Appendix A, prior to the disclosure to him or her of any Confidential Discovery and Settlement Material. Approvals and objections shall be in writing. Parties shall in good faith, attempt to resolve disputes over objections, but no party shall disclose any Confidential Discovery and Settlement Material to a designee who is the subject of a standing objection. Pursuant to paragraph 6 of this Agreed Protective Order, no "Attorneys Only" Discovery and Settlement Material shall be disclosed to designees under this paragraph 5(c);

(d) Outside experts or outside consultants for any party, including their administrative

assistants, secretaries, and other members of the clerical and administrative staffs of those outside experts or outside consultants whose advice and consultation are being or will be used by such party in connection with this proceeding, including any motions in this proceeding. Outside experts or outside consultants, as used in this paragraph, shall not include any regular employee of the receiving party. A party desiring to disclose Confidential or Attorneys Only Discovery and Settlement Material to outside experts or consultants shall first obtain from each expert or consultant an Acknowledgement in the form provided in Exhibit A and a current resume. A copy of the Acknowledgement and resume shall be served upon opposing counsel with a cover letter identifying each entity for which the expert or consultant has worked in the past two years. The opposing party shall then have five business days to serve a specific written objection to such disclosure. If objection is served within the five business day period, there shall be no disclosure to the expert or consultant except by agreement of the parties or Order of the TTAB. If no objection is served within the five day period, objections are waived and disclosure to the expert or consultant may proceed. No party may object to the selection of an expert or consultant unreasonably. If a party objects pursuant to the provisions of this paragraph and the parties cannot resolve their dispute on the terms of disclosure, the party making the objection may apply to the TTAB for an order barring disclosure of Confidential Discovery and Settlement Material or Attorneys Only Discovery and Settlement Material to such person, or other appropriate relief. Such an application to the TTAB shall be made within ten business days of the receipt of the disclosure of the witness (or such longer period agreed to by the parties in writing);

- (e) The TTAB and the TTAB's staff;
- (f) Employees of outside vendors providing copy services and exhibit preparation

services in connection with this litigation;

(g) Stenographic reporters and videographers engaged for depositions or proceedings necessary to this Action;

(h) Any person (a) who is identified as an author or recipient, including receipt by copy, of any document, information therein or tangible medium and is not otherwise shown prior to such disclosure not to have received the document, information therein or tangible medium or (b) who has been identified in writing by the designating party as having been provided with the document, information therein or tangible medium. Such persons shall be considered "Authorized Personnel" solely with respect to the specific document, information therein or tangible medium.

(i) the parties as necessary for defense or prosecution of claims in this case.

**6. Limitation on Access to Attorneys Only Discovery and Settlement Material.**

Access to and disclosure of Attorneys Only Discovery and Settlement Material marked and identified in accordance with this Agreed Protective Order shall be limited solely to Authorized Personnel listed in Paragraph 5, except that no Attorneys Only Discovery and Settlement Material shall be provided, shown or made available to the persons identified in Paragraph 5(c) or 5(i). Attorneys Only Discovery and Settlement Material shall not be provided, shown, made available or communicated in any way to any person or entity other than provided for in this paragraph. Notwithstanding the limitations on the access to and disclosure of Attorneys Only Discovery and Settlement Material provided in this paragraph, the following materials may be disclosed to the respective representatives of parties; i) briefs, memoranda or any other writing filed with the TTAB in this litigation by any party (redacted to remove Attorneys Only information) and ii) any expert reports served in this litigation (redacted to remove Attorneys Only information). The Party

receiving such information will maintain such materials as confidential in accordance with the terms of this Agreed Protective Order.

**7. Party's Own Information.**

The restrictions on the use of Discovery and Settlement Material established by this Agreed Protective Order are applicable only to Discovery and Settlement Material received by a party from another party or from a non-party as a direct result of this litigation. A party is free to do whatever it desires with its own Discovery and Settlement Material.

**8. Related Material.**

The restrictions on the use of Discovery and Settlement Material established by this Agreed Protective Order shall extend to: (i) all copies, extracts and complete or partial summaries prepared from such Discovery and Settlement Material; and (ii) portions of briefs, memoranda, or any other writing filed with the TTAB and exhibits thereto that contain or reflect the content of any such Discovery and Settlement Material, copies, extracts, or summaries, provided that such writings are identified as containing Confidential or Attorneys Only Discovery and Settlement Material as provided for by paragraph 9 hereto and are marked "Confidential" or "Attorneys Only" on at least the first page of the writing.

**9. Designation of Documents Under Seal.**

Should a party wish to file with the TTAB Discovery and Settlement Material designated as Confidential or Attorneys Only by another party, the party wishing to file such material must file the documents under seal. This order constitutes leave to do so. The party filing any material that reflects or contains any Confidential or Attorneys Only Discovery and Settlement Material shall file such material in a sealed envelope bearing the caption set out above,, the name of the party filing

the paper, the legend CONFIDENTIAL, and a statement substantially in the following form:

“This envelope contains documents subject to a Agreed Protective Order between the parties. The party filing this document has been granted leave to do so under seal by the TTAB. The contents of this envelope should not be disclosed, revealed, or made public except by order of the TTAB or agreement of the parties.”

**10. Depositions.**

Testimony taken at a deposition may be designated by the deponent as Confidential or Attorneys Only under the terms of this Agreed Protective Order by making a statement to that effect on the record at the deposition. Arrangements shall be made with the TTAB reporter taking and transcribing such proceeding to separately bind such portions of the transcript containing information designated as Confidential or Attorneys Only, and to label such portions respectively. In addition, each party shall have ten (10) business days after receipt of a deposition transcript to review such transcript and designate in writing portions of such transcript as Confidential or Attorneys Only. Until such designation, or the passage of ten (10) business days, the entire transcript shall be treated by all parties as Attorneys Only. If testimony at a deposition is designated as Confidential or Attorneys Only, then only persons authorized to receive such information under the terms of this agreement may be present during such portion of the deposition, and may receive copies of deposition transcript portions so designated.

**11. Use of Discovery and Settlement Material at Hearing or Trial.**

At any hearing or trial relating to this proceeding, subject to the rules of evidence and Order of the TTAB, a party may use any Confidential or Attorneys Only Discovery and Settlement Material for any purpose.

In the event that any Confidential or Attorneys Only Discovery and Settlement Material is used in any TTAB proceeding in connection with this litigation, it shall not lose its status as Confidential or Attorneys Only Discovery and Settlement Material through such use, provided that the parties to this Action take steps reasonably calculated to protect its confidentiality during such use. The parties may request that attendance at those portions of the hearing or trial or access to the transcripts of those hearings or the trial in which Confidential or Attorneys Only Discovery and Settlement Material is disclosed be restricted to TTAB personnel and persons authorized to receive such disclosure by the terms of this Agreed Protective Order. The parties agree to cooperate in restricting attendance to those persons authorized to receive such disclosure. The parties furthermore agree that they will not challenge the assertion of the Confidential or Attorneys Only nature of the Discovery and Settlement Material at a hearing unless they have previously objected to such designation at least ten business days in advance of such hearing. Where a party plans to use Confidential or Attorneys Only Discovery and Settlement Material in a hearing or trial except solely for impeachment purposes, that party shall notify opposing counsel at least 24 hours ahead of the hearing or trial and shall notify the TTAB at the outset of the proceeding that some portions of the evidence to be presented have been so designated.

**12. Challenge to Designation.**

In the event that the party receiving Confidential or Attorneys Only Discovery and Settlement Material disagrees with the designation by the producing or designating party, or disagrees with the designation of deposition testimony as Confidential or Attorneys Only, then the parties initially will try to resolve the dispute on an informal basis. If the parties are unable to resolve such a dispute informally within five (5) business days, the receiving party may apply to the

TTAB for relief Any such disputed items shall be treated as Confidential or Attorneys Only Discovery and Settlement Material, as designated, and subject to the protections of this agreement unless and until the TTAB determines otherwise. Neither party shall be obligated to challenge the propriety of a Confidential or Attorneys Only designation, and failure to do so shall not constitute an admission that any item or information is in fact Confidential or Attorneys Only Discovery and Settlement Material.

**13. Other Protections; Challenge to Confidential or Attorneys Only Treatment.**

This Agreed Protective Order shall not preclude any party from seeking additional protection with respect to the confidentiality of Discovery and Settlement Materials as that party deems appropriate. Nor shall any party be precluded from seeking an Order from the TTAB permitting the disclosure or use of certain Discovery and Settlement Materials otherwise prohibited by this Agreed Protective Order.

**14. Enforcement.**

The parties agree that any alleged violation of this Agreed Protective Order shall be presented for decision by the TTAB by noticed motion with an opportunity to respond.

**15. Inadvertent Disclosure.**

If a disclosing person through inadvertence produces or provides discovery which it believes is subject to a claim of attorney-client privilege, work product immunity, or any other privilege, the disclosing person may give written notice to the receiving party that the document or thing is deemed privileged and that return of the document or thing is requested. Upon such written notice, the receiving party shall immediately gather the original and all copies of the document or thing of

which the receiving party are aware and shall immediately return the original and all such copies to the disclosing party. Return of the document by the receiving party shall not preclude the receiving party from later moving the TTAB to compel production of the returned documents or things.

**16. Return of Discovery and Settlement Material.**

Upon final termination of this Action, unless otherwise agreed in writing by counsel for the parties, each party shall either destroy or assemble and return all Confidential and Attorneys Only Discovery and Settlement Material, including all copies, extracts, and summaries thereof, to the party from whom the Discovery and Settlement Material was obtained, provided that any documents, copies, extracts or summaries that constitute attorney work product may be retained by counsel or destroyed.

**17. Waiver or Termination.**

The provisions of this Agreed Protective Order may not be modified, waived, or terminated except by the written stipulation of counsel or Order of the TTAB. This Agreed Protective Order shall survive the final termination of this proceeding with respect to any retained Confidential or Attorneys Only Discovery and Settlement Material. Termination of the proceedings shall not relieve any person from the obligations of this Agreed Protective Order, unless the TTAB orders otherwise. The TTAB shall retain jurisdiction to enforce the Agreed Protective Order despite the termination of this lawsuit.

**18. Notice.**

All notices required by this Agreed Protective Order are to be served via certified mail and email as follows:

If to Applicant:

David R. Childress  
WHITAKER CHALK SWINDLE & SAWYER L.L.P.  
301 Commerce Street, Suite 3500  
Fort Worth, TX 76102-4186  
(817)878-0500

If to Opposer:

Edward H. Green  
Coats & Bennett, PLLC  
1400 Crescent Green, Suite 300  
Cary NC 27518

The date by which a party to this Agreement receiving a notice shall respond, or otherwise take Action, shall be computed from the date indicating that the was sent plus three days for mailing, whether sent by mail or email. Any of the notice requirements herein may be waived in whole or in part, but only in writing signed by an attorney for the party designating the Discovery and Settlement Material under this Agreed Protective Order

**19. Other Proceedings.**

By entering this Agreed Protective Order and limiting the disclosure of Discovery and Settlement Material in this case, the parties do not intend to preclude another TTAB from finding that information may be relevant and subject to disclosure in another case. Any person or party subject to this Agreed Protective Order who becomes subject to a motion to disclose another party's Discovery and Settlement Material that has been designated Confidential or Attorneys Only pursuant to this Agreed Protective Order shall promptly notify the other party of the Motion so that the party may have an opportunity to appear and be heard on whether that information should be disclosed.

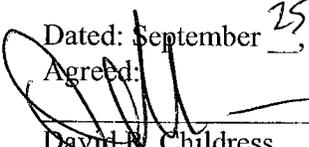
**20. Further Restriction.**

All information produced or exchanged in the course of the above-captioned case shall be

used solely for purposes of this litigation and for analyzing settlement proposals, and shall not be used in the marketplace or in the conduct of business.

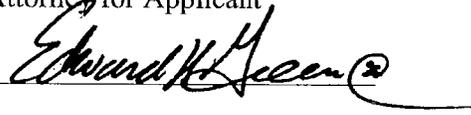
Dated: September <sup>25</sup>, 2008

Agreed:

  
David R. Childress

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Attorney for Opposer



I am employed by \_\_\_\_\_ and my title is \_\_\_\_\_

Notary \_\_\_\_\_