

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

Soft Serve, Inc. d/b/a Sprinkles)

Opposer,)

v.)

Sprinkles Cupcakes, Inc.)

Applicant.)

Opposition No. 91194188

77/770,541

OPPOSER'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO COMPEL

I. INTRODUCTION

Opposer respectfully requests consideration of this Reply Brief and accompanying exhibits offered in support of its Motion to Compel.¹ This Reply Brief is offered for the purpose of clarifying issues and disputes, addressing matters raised for the first time in Applicant's Brief, and correcting the most glaring of the inaccuracies set forth therein.²



02-02-2011

U.S. Patent & TMO/PTM Mail Rep'd Ct. #01

¹ Applicant has incorporated into its briefing various arguments and assertions advocating its positions with respect to use dates, the nature of Opposer's business, Opposer's discovery responses, etc. To the extent that these allegations are not related to Opposer's Motion to Compel, such are not proper subject matter for argumentation or consideration at this point and Opposer has resisted the urge to respond to these allegations at this juncture. Suffice it to say that Opposer in no way agrees with Applicant's conclusions and characterizations and will methodically dispose of such in a procedurally appropriate manner outside of this Motion to Compel.

Applicant also uses its Brief in response to Opposer's Motion to Compel to assert its position that the filing of Opposer's Motion should result in the stay of all proceedings between the parties. It is submitted that the parties' briefing in connection with Opposer's pending Motion to Compel is not a procedurally appropriate vehicle for requesting, nor for ordering, the suspension of the other proceedings. Moreover, the issues involved may be somewhat more complex than they initially appear. Nevertheless, Opposer's counsel will, promptly upon the filing and service of this Reply Brief, correspond with Applicant's counsel concerning this issue. In the meanwhile, Opposer would greatly appreciate the Board deferring any action in connection with Applicant's suggestion that a suspension of all proceedings would be appropriate.

² Without exception, the Exhibits submitted herewith comprise documents generated or produced by Applicant and documentation provided to Applicant during the pendency of this proceeding. Thus, the Board's consideration of these Exhibits in no way unfairly disadvantages Applicant or constitutes "surprise".

II. ARGUMENT

A. Applicant's Arguments With Respect To Specific Interrogatory Answers And Production Request Responses Are Unavailing.

1. Applicant Is Required To Produce Requested Information Divulging Its Revenues.

Noting that "The Board does not issue damages, or any other kind of monetary relief" (Ap. Br. p. 13), Applicant asserts that Opposer's Interrogatory No. 4 requesting information relating to Applicant's revenues in connection with goods offered under its SPRINKLES marks is not discoverable. In fact, this information is clearly discoverable. *Sunkist Growers, Inc. v. Benjamin Ansehl Co.*, 229 U.S.P.Q. 147, 148 (TTAB 1985).

Moreover, Applicant has similarly propounded discovery inquiring of Opposer's sales. See Ap. Int. 5 and Ap. Prod. Reqs. 18 - 20, as well as Opposer's responses thereto, submitted herewith as Ex. 7.³ Having requested (and received) such financial information from Opposer, Applicant cannot claim that it is not required to provide meaningful responses to discovery probing the same subject matter. See TBMP § 402.01 and cases cited therein.⁴

2. Applicant Is Required To Respond In Full To Discovery Relating To Third Party Challenges.

Applicant, for the first time in its Response brief, claims that documentation and correspondence pertaining to challenges and claims involving third parties under the SPRINKLES mark, and the SPRINKLES OF PALM BEACH registrations asserted by Applicant in its Answer to the Notice of Opposition, are irrelevant. This assertion is erroneous as a matter

³ Exhibit numbering continues sequentially from Opposer's opening brief.

⁴ In the event that the requested financial information is not ordinarily kept by Applicant in the exact manner requested by Opposer, Applicant should be required to produce annual summaries of sales/revenues, as such were generated and produced by Opposer in response to Applicant's sales related discovery.

of law. See, for instance, *Am. Soc'y of Oral Surgeons v. Am. Coll. of Oral and Maxillofacial Surgeons*, 201 USPQ 531, 534 (TTAB 1979).

Consequently, Applicant should be ordered to produce all documents relating to conflicts, challenges and controversies with third parties. (Op. Prod. Reqs. 10 and 22). Applicant also needs to fully and candidly respond to Interrogatory No. 13 which requests information relating to conflicts, etc., with third parties. In addition, the "identification" of the 19 individuals named in response to Interrogatory No. 13 needs to be supplemented to provide, at a minimum, addresses and telephone numbers. The mere listing of names provided by Applicant does not constitute a meaningful identification and such additional information is obviously within Applicant's possession as it has communicated with these parties. Finally, Applicant also needs to identify litigation is has brought relating to its marks. Applicant has instituted relevant litigation and not divulged such in its discovery responses.

3. The "Representative Samplings" Relied Upon By Applicant Are Patently Inadequate.

Applicant argues that it has produced to Opposer a representative sampling of various categories of requested documents and things in response to Op.'s Prod. Reqs. 2 and 3. However, Applicant's production in this regard is patently inadequate. Evidencing this shortcoming is the fact that no samples of specimens (Op. Prod. Req. 2), nor advertising or promotional materials generated by Applicant or others under Applicant's marks (Op. Prod. Req. 3) have been produced with respect to, for instance, the "Sprinkles-branded cupcake mix available at Williams-Sonoma" noted by Applicant at page 2 of its Brief.⁵

⁵ Obviously, as Applicant has refused to produce any sales information, Opposer has also been deprived of the ability to consider or further explore the extent of any sales to Williams-Sonoma and the time periods during which any such sales may have occurred.

4. Applicant is Required to Provide A Meaningful Response To Discovery Directed to Registrations Applicant Has Introduced Into This Proceeding.

Applicant, since the filing is its Answer, has repeatedly relied upon two U.S. trademark registrations obtained by assignment in 2009. (See Applicant's Answer to Notice of Opposition ¶ 16). Opposer's Production Request. No. 25 unambiguously requests the production of documents establishing continuity of use of those marks.

Applicant has elected to ignore the clear thrust of this inquiry by claiming that it is confused, and that it is being forced to decide whether Opposer's inquiry is directed to documents which would satisfy a Section 8 filing or, instead, news articles. (Ap. Br. p. 11.) Opposer's request is not confusing and Applicant's choices are not so limited. Opposer is entitled to probe issues concerning Applicant's ability to rely upon registrations it has elected to interject into this proceeding. Clearly, an inquiry requesting documentation in support of continuity of use of the asserted marks is appropriate and cannot be fairly read to be limited to materials submitted in support of a Section 8 Declaration or news articles authored by third parties which possess no evidentiary value.

Applicant should be ordered to provide a full and meaningful response to Request No. 25 and to either produce the documents called for or to acknowledge its inability to establish continuity of use of the marks it has interjected into this proceeding.

5. Applicant Must Produce Documentation Relating To Its Marketing Plans.

Applicant touts its eight U.S. locations (Ap. Br. p. 2). Its website proudly announces the opening of new stores, and the estimated opening dates of yet more stores, such as those currently contemplated in Washington, D.C. and New York. (Ex. 8) Nevertheless, Applicant

steadfastly insists that no documentation exists comprising, relating, or referring to any market plans for goods or services offered, or to be offered, by Applicant under the SPRINKLES mark. (See Ap. Res. to Op. Prod. Req. 4 and Ap. Br. p. 8) Applicant's plans for expansion are clearly relevant under various *DuPont* factors and it is obvious that Applicant's expansion cannot be occurring without its possessing marketing plans responsive to the call of Op. Prod. Req. 4. Consequently, Applicant should be required to produce the documentation requested.

B. Applicant's Claims of Attorney-Client Privilege And Work Product Protection Are Without Support And Its "Privilege Log" Totally Inadequate.

1. The Attorney-Client Privilege

F.R.C.P. 26 (b)(5)(A) unambiguously states:

When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must;

- (i.) expressly make the claim; and
- (ii.) describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

The notes following Rule 26 are also unambiguous in stating the privilege claimant's obligations. "The objection must include sufficient information so that the court and opposing counsel can assess the applicability of the privilege." Actions that might constitute waiver of the privilege are also specifically addressed in the drafter's notes. ("Privileges may be waived broadly for failure to produce a privilege log or to produce a sufficiently detailed log, or specifically for any documents omitted from the privilege log.") The notes following F.R.C.P. 33 are similarly unambiguous ("When privileged information is withheld, the responding party must explicitly state the objection and describe the nature of the information not provided sufficiently to enable other parties to assess the applicability of the privilege".)

Federal courts have had no problem in applying the unambiguous requirements of Rule 26. See, for instance, *Greene, Tweed of Delaware, Inc., v. DuPont Dow Elastomers, LLC*, 202 F.R.D. 418, 423 (E.D. Penn. 2001):

“A proper claim of privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving the confidentiality. (Citations omitted). Thus, ‘[i]t is incumbent upon one asserting the privilege to make a proper showing that all of the elements of the privilege are present.’”

See also *Willemijn Houdstermaatschaap BV v. Apollo Computer, Inc.*, 707 F.Supp. 1429, 1439 (D.Del. 1989):

When responding to an interrogatory, claims of attorney-client privilege and work product protection do not excuse a party from specifically identifying the allegedly privileged item. (Citations omitted). [A] proper claim of attorney-client privilege ‘requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality.’ (Citation omitted). Similarly, a party asserting work product protection must ‘identify the withheld documents with sufficient particularity [sic] that the opposing counsel can intelligently argue that the privilege ought not to apply.’ (Citations omitted).

“Blanket claims” of privilege do not satisfy the burden of proof imposed on the claimant. *IP Co. LLC v. Cellnet Technology, Inc.*, 2008 WL 3876481 (N.D. Cal.) Moreover, discovery responses claiming privilege that are evasive and incomplete are recognized, both by the federal rules and the tribunals applying those rules, as being the equivalent of a failure to answer. (“An evasive discovery response is no response at all.”) Fed. R. Civ. P. 37(a)(3). See also *Elkay Mfg. Co. v. Ebco Mfg. Co.*, 1995 WL 389822 (N.D. Ill.)

Finally, “Because the assertion of the privilege frustrates the search for truth, the privilege must be strictly construed.” *Burroughs Wellcome Co. v. Barr Laboratories, Inc.*, 143 F.R.D. 611, 615 (E.D. N.C. 1992).

2. Applicant Has Failed To Adequately Support Claims of Attorney-Client Privilege and Work Product Protection.

While Applicant's interrogatory answers and production responses frequently evoke attorney-client privilege and work product claims, Applicant characterizes the efforts required of it to substantiate these claims as "busy work". (Ap. Br. p. 5).⁶

Applicant claims that it substantiated its claims of privilege as required first through the September 30 letter of its counsel and again through a privilege log. (Ap. Br. p. 4-5). Thus, Applicant claims that the following single sentence satisfies its privilege claim obligations:

"[T]o the extent that any documents were redacted or withheld, they concerned attorney-client communications or notes of counsel, which are protected by the work product doctrine."

Obviously, this conclusory allegation completely fails to meet the standards of description and specificity with respect to particular communications claimed to be privileged or work product protected. Failing to satisfy the standards of Rule 26, and providing neither Opposer nor the Board with any ability to evaluate its claims with respect to a single document, Applicant's reliance upon its September 30 letter is completely unavailing.

Perhaps sensing the inadequacy of its argument with respect to the September 30 letter, Applicant concludes that the privilege document dispute "[I]s moot because Sprinkles later provided a privilege log, detailing each communication withheld on the basis of privilege." (App. Br. p. 5). Let us evaluate this assertion by considering Applicant's "privilege log".⁷

⁶ While not germane to Opposer's Motion to Compel, Applicant's mischaracterizations of Opposer's position with respect to the attorney/client privilege in responding to Applicant's discovery is revealing. Specifically, Applicant repeatedly notes that Opposer has not produced a privilege log. Applicant states "Soft Serve objected on the basis of privilege in response to multiple requests. Though Sprinkles requested a privilege log in its letter of September 30... Soft Serve has not provided one." (Ap. Br. p. 4.) In fact, in response to exactly four of Applicant's discovery inquiries Opposer succinctly and unambiguously stated that while the inquiry requested privileged information, no such documents exist. Enough said. (Opposer's responses to these four discovery inquiries are attached as Ex. 9).

⁷ Applicant's "Privilege Log" was forwarded to Opposer weeks after the filing of the Motion to Compel and well subsequent to Applicant's repeated promises to provide such. The "Privilege Log" is appended hereto as Ex. 10.

Applicant's "official privilege log" (App. Br. p. 6) is comprised of 74 entries. The first two of these entries are identified as opinions of counsel. 71 of the 74 entries are documents authored subsequent to the commencement of this proceeding and thus were not germane to a privilege log. *Grider v. Keystone Health Plan Central, Inc.*, 580 F.3d. 119, 140 n. 22 (3rd Cir. 2009); Notes to Fed. R. Civ. Proc. 26 (b)(5). Significantly, the single remaining entry in the "privilege log", which Applicant repeatedly insists satisfies its obligations reads as follows:

Date	To	From	Subject	Privilege Claim
2005 – 2010	Charles Nelson, Nicole Schwartz, & Bobby Nelson	John Slafsky, Hollis Hire Matthew Kuykendall, and other attorneys at Wilson, Sonsini, Goodrich & Rosati	Opinions of outside counsel regarding Sprinkles' right to use and register SPRINKLES	Attorney-client privilege

Through this single entry Applicant looks to shield from discovery, Opposer and the Board, in one broad swipe, all allegedly privileged materials generated between 2005 and 2010. How can Opposer, or the Board, even begin to consider the propriety of privilege and work product claims of documents that are not identified? This approach makes a mockery of the attorney-client privilege, the discovery process, the Federal Rules and the Board. It is questioned how Applicant could reasonably conclude that such a "description" provides the specificity and detail required in order to accommodate the overriding consideration of providing those whose discovery would be limited by claims of privilege with details sufficient in order to comprehend the basis for withholding particular documents and communications.⁸

In the event that Applicant's ploy was ignored by the Board it could reasonably be expected that privilege logs in future Board proceeding would contain but a single reference, spanning years, and reciting a single description, such as "Opinions regarding right to use and register involved mark." Challenging parties, and the Board in every case before it, would be

⁸ Note also that while Applicant's discovery objections routinely assert claims of attorney-client privilege and work product protection, its "privilege log" is silent as to work product claims.

completely precluded from any consideration of any specific documents or communications as to which privilege or work product claims were asserted.

In addition, the single entry approach adopted by Applicant deprives Opposer and the Board with non-privileged details that would be reflected in adequate descriptions of otherwise privileged documents. For instance, dates of authorship may be revealing, as may dates upon which various parties received, or were copied with, correspondence or other documents involving numerous *DuPont* subfactors. The single entry approach adopted by Applicant deprives Opposer of its right to nonprivileged information which may itself either constitute evidence or be reasonably calculated to lead to admissible evidence.

3. Applicant Should Be Ordered To Produce Allegedly Privileged Documents As To Which No Identification Has Been Made.

The failure to adequately establish claims of privilege warrants an Order requiring the production of communications that might have been privileged. Significantly, and contrary to the impression Applicant seeks to make, those failing to satisfy their burden in establishing the applicability of privilege are routinely ordered to produce withheld documents. See, for instance, *Willemijn*, 707 F.Supp. at 1440, wherein upon concluding that defendant's privilege claims were evasive and incomplete it was summarily concluded that "Accordingly, defendant will be ordered to fully respond to these interrogatories". See also *Applied Telematics, Inc. v. Sprint Communications Company, L.P.*, 1996 WL 539595 (E.D. Pa.) (p. 6) ("Plaintiff has failed to meet its burden of proving the applicability of the attorney-client privilege to these documents and they must be produced".) The Board is likewise urged to order the production of all privileged documents in the single entry claim asserted by Applicant. The imposition of a lesser sanction, specifically an Order requiring Applicant to submit a privilege log, would be ineffectual given

the "privilege log" which has already been proffered by Applicant and would, moreover, ignore the delay, expense, and waste of judicial resources Applicant has created in connection with this issue.

Finally, while it is submitted that an Order requiring production may be justified in cases in which unjustified delay, inexcusable conduct, or bad faith are not present, it is also respectfully submitted that the cavalier attitude displayed by Applicant in asserting, but refusing to substantiate claims of privilege and work product as constituting nothing more than "busy work", and its disregard for the time honored standards established in connection with making and substantiating claims of privilege, well warrant an Order requiring production of all documents falling within Applicant's single entry claim, regardless of the standard employed in ascertaining the appropriateness of this sanction.

III. CONCLUSION

Opposer's Motion to Compel should be granted. Applicant should be ordered to fully and accurately respond to Interrogatories 4-5, 8 and 13, and Production Requests 2-5, 7, 9, 10, 22 and 25 and to make full production of all documents responsive to Opposer's discovery requests notwithstanding claims of privilege and/or work product protection.

Respectfully submitted,

Date: _____

2/1/11



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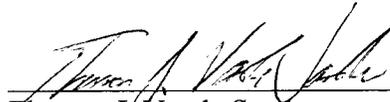
CERTIFICATE OF SERVICE

The undersigned, Thomas J. Vande Sande, attorney for Opposer, hereby certifies that one (1) copy of the foregoing "OPPOSER'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO COMPEL" was this day served on Applicant by mailing same, first class mail, to:

Hollis Beth Hire, Esquire
John L. Slafsky, Esquire
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304-1050

Date: _____

2/1/11



Thomas J. Vande Sande
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INTERROGATORY NO. 5

For each product and service requested to be identified in Interrogatory No. 2, state the sales, on an annual basis (in terms of dollar volume and units) of such product or service from the date of first use of the mark SPRINKLES in connection with such product or service, through the present.

ANSWER

This interrogatory is objected to as being overly broad. Moreover, sales information is not available as requested by this interrogatory. Opposer Sprinkles will provide annual sales information, to the extent such is available, and on a year to year basis and under the terms of the Protective Order in response to Production Request No. 18.

INTERROGATORY NO. 6

For each product and service requested to be identified in interrogatory No. 2, explain the extent to which there has been any interruption to continuous use of the mark SPRINKLES to identify the product or service.

ANSWER

All goods and services identified in answer to Interrogatory No. 2 as currently offered by Opposer Sprinkles have been offered continuously and without interruption since their first offering.

INTERROGATORY NO. 7

For each product and service requested to be identified in Interrogatory No. 2, identify the persons most knowledgeable about the sales and distribution of the product or service.

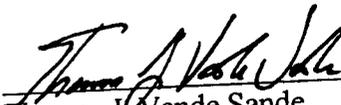
CERTIFICATE OF SERVICE

The undersigned, Thomas J. Vande Sande, attorney for Opposer hereby certifies that one (1) copy of the foregoing "OPPOSER'S ANSWERS AND OBJECTIONS TO APPLICANT'S FIRST SET OF INTERROGATORIES" was this day served on Applicant by mailing same, first class mail, to:

John L. Slafsky, Esquire
Matthew J. Kuykendall, Esquire
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304-1050

Date:

8/10/10



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

Soft Serve, Inc. d/b/a Sprinkles)	
)	
)	
Opposer,)	
)	
v.)	Opposition No. 91194188
)	
Sprinkles Cupcakes, Inc.)	
)	
Applicant.)	
_____)	

**OPPOSER'S RESPONSES AND OBJECTIONS TO APPLICANT'S
FIRST SET OF PRODUCTION REQUESTS**

Pursuant to Federal Rule of Civil Procedure 34 and the Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), Opposer Soft Service, Inc. d/b/a Sprinkles ("Opposer Sprinkles"), by and through its undersigned counsel, hereby responds to the First Set of Requests For Production of Documents and Things ("Requests") of Applicant Sprinkles Cupcakes, Inc. as follows:

GENERAL OBJECTIONS

GENERAL OBJECTION NO. 1:

Opposer Sprinkles objects to the Requests, to each and every individual request contained therein, and to the "Definitions" contained in the Requests, to the extent they are inconsistent

DOCUMENT REQUEST NO. 17

All documents relating to your efforts or plans to promote or expand awareness of the mark SPRINKLES.

RESPONSE

Opposer Sprinkles objects to this production request as being vague. Specifically, all produced documents "relate" to efforts or plans to promote or expand awareness of Opposer Sprinkles' mark and its business. Notwithstanding this objection, see documents produced in response to Request. No. 2.

DOCUMENT REQUEST NO. 18

Documents sufficient to show the annual sales (in dollars and in number of units sold) of each product sold by you under the mark SPRINKLES.

RESPONSE

No such documents exist. Opposer Sprinkles will produce a summary of annual sales.

DOCUMENT REQUEST NO. 19

Documents sufficient to show the annual sales (in dollars) of each service rendered by you under the mark SPRINKLES.

RESPONSE

See Response to Request No. 18.

DOCUMENT REQUEST NO. 20

Documents sufficient to show the annual sales (in dollars and in number of units sold) of cupcakes sold by you under the SPRINKLES mark.

RESPONSE

See Response to Request No. 18. To the extent possible, Opposer Sprinkles will provide in summary fashion, documentation evidencing sales of baked goods.

DOCUMENT REQUEST NO. 21

All documents comprising or relating to classes of dealers, customers, clients, sales representatives, brokers, and/or distributors of Opposer's SPRINKLES products and services.

RESPONSE

See documents produced in response to Request No. 2.

DOCUMENT REQUEST NO. 22

Documents sufficient to identify each catalog, sales outlet, Internet web site or other electronic means, retail outlet, and wholesale outlet in which products offered in connection with the SPRINKLES mark are, or are intended to be, advertised, promoted, distributed, sold, or offered for sale.

RESPONSE

See documents produced in response to Request No. 2.

CERTIFICATE OF SERVICE

The undersigned, Thomas J. Vande Sande, attorney for Opposer hereby certifies that one (1) copy of the foregoing "OPPOSER'S RESPONSES AND OBJECTIONS TO APPLICANT'S FIRST SET OF PRODUCTION REQUESTS" was this day served on Applicant by mailing same, first class mail, to:

John L. Slafsky, Esquire
Matthew J. Kuykendall, Esquire
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Date: 8/10/10



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phoenix-scottsdale 4501 north scottsdale road

san diego-la jolla 8855 la jolla village drive fall 2010

san francisco-palo alto 393 stanford shopping center

washington dc-georgetown 3015 m street nw fall 2010

coming soon vote for the next Sprinkles location!

atlanta boston charlotte denver kansas city london las vegas
miami minneapolis nashville paris philadelphia sf seattle tokyo



DOCUMENT REQUEST NO. 37

All documents relating to any incident in which a third party has challenged the rights you claim in the mark SPRINKLES, including but not limited to any demand to cease and desist.

RESPONSE

None, as no such challenge or demand has been made.

DOCUMENT REQUEST NO. 38

All documents relating to any incident in which you have challenged the rights of a third party based on the rights you claim in the mark SPRINKLES, including but not limited to any demand to cease and desist.

RESPONSE

None, as no such challenge or demand has been made.

DOCUMENT REQUEST NO. 39

All documents relating to actual confusion arising from Applicant's use of the mark SPRINKLES.

RESPONSE

None, yet.

DOCUMENT REQUEST NO. 40

All documents relating to communications between you and your legal counsel with experts in the Opposition proceeding.

RESPONSE

No such documents currently exist. To the extent that such come into being, this response will be supplemented and related documents will be produced to the extent that such do not constitute or reveal attorney-client privileged communications or protectable work product.

DOCUMENT REQUEST NO. 41

All documents relating to communications between you and your legal counsel with potential experts in this Opposition proceeding.

RESPONSE

No such documents currently exist. To the extent that such come into being, this response will be supplemented and related documents will be produced to the extent that such do not constitute or reveal attorney-client privileged communications or protectable work product.

DOCUMENT REQUEST NO. 42

All documents comprising or relating to opinions of each expert witness that you will or may call in this Opposition proceeding.

RESPONSE

No such documents currently exist. To the extent that such come into being, this response will be supplemented and related documents will be produced to the extent that such do not constitute or reveal attorney-client privileged communications or protectable work product.

CERTIFICATE OF SERVICE

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**OPPOSER'S ANSWERS AND OBJECTIONS TO APPLICANT'S
FIRST SET OF INTERROGATORIES**

Pursuant to Federal Rule of Civil Procedure 33 and the Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), Opposer Soft Serve, Inc. d/b/a Sprinkles ("Opposer Sprinkles"), by and through its undersigned counsel, hereby responds to the First Set of Interrogatories ("Interrogatories") of Applicant Sprinkles Cupcakes, Inc. as follows:

GENERAL OBJECTIONS

GENERAL OBJECTION NO. 1:

Opposer Sprinkles has not completed its investigation in this matter. All responses to Interrogatories are based upon the information presently known to Opposer Sprinkles and are given without prejudice to its right to adduce evidence discovered or analyzed subsequent to the date of these responses. Opposer Sprinkles expressly reserves the right to revise and supplement

ANSWER

Opposer Sprinkles' goods and services are offered and sold primarily to individual consumers of baked goods, frozen desserts, and non-alcoholic beverages. Opposer Sprinkles' customers reside in, grew up in, or are visiting the Washington, D.C. metropolitan area and include residents of Potomac, Maryland and surrounding areas; individuals commuting to and from downtown Washington, D.C.; residents of Washington, D.C.; surrounding suburbs of Washington, D.C., and individuals visiting and/or utilizing the various park lands and recreational areas found in Potomac, Maryland. Such include visitors to nearby Great Fall National Park and the thousands of bicyclists per year traveling north and south on Falls Road in Potomac, Maryland who thereby are exposed to Opposer Sprinkles' SPRINKLES retail store and products.

INTERROGATORY NO. 28

Identify every trademark search you conducted relating to the mark SPRINKLES.

ANSWER

Prior to the adoption of SPRINKLES, Mr. Orban conducted a basic computer search.

INTERROGATORY NO. 29

Identify every opinion, legal or otherwise, requested or received by you, regarding the right to use the mark SPRINKLES, including the identity of the persons requesting the opinion, the date and substance of the opinion, and the persons receiving the opinion.

ANSWER

This interrogatory is objected to to the extent that it seeks the substance of attorney-client communications. Without waiving this objection, Opposer Sprinkles answers that no opinions responsive to this request were sought or obtained.

INTERROGATORY NO. 30

Describe (including but not limited to party names, dates of inception and expiration dates) the licenses that you maintain with third parties that allow those third parties to use your mark SPRINKLES.

ANSWER

Opposer Sprinkles has granted no licenses that allow third parties to use the mark SPRINKLES.

INTERROGATORY NO. 31

Identify all documents (license, contract, etc.) by which you have authorized any third party to use the mark SPRINKLES.

ANSWER

No such documents exist as no third parties have been authorized by Opposer Sprinkles to use the mark SPRINKLES.

CERTIFICATE OF SERVICE

The undersigned, Thomas J. Vande Sande, attorney for Opposer hereby certifies that one (1) copy of the foregoing "OPPOSER'S ANSWERS AND OBJECTIONS TO APPLICANT'S FIRST SET OF INTERROGATORIES" was this day served on Applicant by mailing same, first class mail, to:

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Date: 8/10/10


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Soft Serve, Inc. d/b/a Sprinkles v. Sprinkles Cupcakes, Inc.

Opposition No. 91194188

Applicant Sprinkles Privilege Log

December 29, 2010

Date	To	From	Subject	Privilege Claim
7/15/2005	Charles Nelson	John Slafsky	Attorney advice regarding availability search for SPRINKLES mark	Attorney-client privilege
2/23/2009	Charles Nelson	Hollis Hire	Attorney advice regarding availability search for SPRINKLES mark	Attorney-client privilege
3/17/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
3/29/2010	John Slafsky	Charles Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
4/1/2010	John Slafsky	Charles Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
4/15/2010	John Slafsky	Charles Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
4/15/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
5/3/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
5/6/2010	Bobby Nelson & Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
5/11/2010	John Slafsky	Charles Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
5/11/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
5/13/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
5/17/2010	Charles Nelson & John Slafsky	Bobby Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
5/17/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
5/18/2010	Charles Nelson & John Slafsky	Bobby Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
5/18/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
6/1/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
6/7/2010	Nicole Schwartz	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
6/8/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
6/10/2010	John Slafsky	Charles Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
6/13/2010	John Slafsky	Charles Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
6/13/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
6/14/2010	John Slafsky	Bobby Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
6/14/2010	John Slafsky	Nicole Schwartz	Attorney advice regarding the instant dispute	Attorney-client privilege
6/14/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
6/15/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
6/16/2010	Nicole Schwartz	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
6/17/2010	Nicole Schwartz	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
6/18/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
6/22/2010	Nicole Schwartz	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
6/22/2010	John Slafsky	Nicole Schwartz	Attorney advice regarding the instant dispute	Attorney-client privilege
6/23/2010	John Slafsky	Charles Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
6/23/2010	John Slafsky	Nicole Schwartz	Attorney advice regarding the instant dispute	Attorney-client privilege
6/24/2010	John Slafsky	Charles Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
6/27/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
6/29/2010	Nicole Schwartz	Matthew Kuykendall	Attorney advice regarding the instant dispute	Attorney-client privilege
6/29/2010	Matthew Kuykendall	Nicole Schwartz	Attorney advice regarding the instant dispute	Attorney-client privilege
6/30/2010	Matthew Kuykendall	Charles Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
6/30/2010	Charles Nelson	Matthew Kuykendall	Attorney advice regarding the instant dispute	Attorney-client privilege

Soft Serve, Inc. d/b/a Sprinkles v. Sprinkles Cupcakes, Inc.

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Applicant Sprinkles Privilege Log

December 29, 2010

Date	To	From	Subject	Privilege Claim
7/5/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
7/7/2010	John Slafsky	Charles Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
7/8/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
8/9/2010	Charles Nelson	Hollis Hire	Attorney advice regarding the instant dispute	Attorney-client privilege
8/18/2010	Matthew Kuykendall & Bobby Nelson	Nicole Schwartz	Attorney advice regarding the instant dispute	Attorney-client privilege
8/30/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
9/16/2010	John Slafsky	Charles Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
10/4/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
10/5/2010	Bobby Nelson	Matthew Kuykendall	Attorney advice regarding the instant dispute	Attorney-client privilege
10/6/2010	Matthew Kuykendall	Bobby Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
10/6/2010	Bobby Nelson	Matthew Kuykendall	Attorney advice regarding the instant dispute	Attorney-client privilege
10/7/2010	Matthew Kuykendall	Bobby Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
10/12/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
10/19/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
10/19/2010	Charles Nelson	Hollis Hire	Attorney advice regarding the instant dispute	Attorney-client privilege
10/25/2010	Charles Nelson	Hollis Hire	Attorney advice regarding the instant dispute	Attorney-client privilege
10/28/2010	John Slafsky & Hollis Hire	Nicole Schwartz	Attorney advice regarding the instant dispute	Attorney-client privilege
10/29/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
11/1/2010	Charles Nelson	Hollis Hire	Attorney advice regarding the instant dispute	Attorney-client privilege
11/5/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
11/8/2010	Charles Nelson	Hollis Hire	Attorney advice regarding the instant dispute	Attorney-client privilege
11/9/2010	Charles Nelson	Hollis Hire	Attorney advice regarding the instant dispute	Attorney-client privilege
11/9/2010	Hollis Hire	Charles Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
11/10/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
11/10/2010	Hollis Hire	Charles Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
11/23/2010	Charles Nelson	Hollis Hire	Attorney advice regarding the instant dispute	Attorney-client privilege
11/30/2010	Charles Nelson	Hollis Hire	Attorney advice regarding the instant dispute	Attorney-client privilege
12/1/2010	John Slafsky	Bobby Nelson	Attorney advice regarding the instant dispute	Attorney-client privilege
12/1/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
12/15/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
12/15/2010	Charles Nelson	Hollis Hire	Attorney advice regarding the instant dispute	Attorney-client privilege
12/16/2010	Charles Nelson	John Slafsky	Attorney advice regarding the instant dispute	Attorney-client privilege
2005-2010	Charles Nelson, Nicole Schwartz, & Bobby Nelson	John Slafsky, Hollis Hire, Matthew Kuykendall, and other attorneys at Wilson, Sonsini, Goodrich & Rosati	Opinions of outside counsel regarding Sprinkles' right to use or register SPRINKLES	Attorney-client privilege & work product doctrine