

ESTTA Tracking number: **ESTTA477415**

Filing date: **06/11/2012**

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

Proceeding	91194188
Party	Defendant Sprinkles Cupcakes, Inc.
Correspondence Address	JOHN J SLAFSKY WILSON SONSINI GOODRICH & ROSATI 650 PAGE MILL ROAD PALO ALTO, CA 94304-1050 UNITED STATES trademarks@wsgr.com, jslafsky@wsgr.com, hhire@wsgr.com, eminjarez@wsgr.com, rben-veniste@mayerbrown.com, rasmus@mayerbrown.com
Submission	Opposition/Response to Motion
Filer's Name	John L. Slafsky
Filer's e-mail	jslafsky@wsgr.com, hhire@wsgr.com, trademarks@wsgr.com
Signature	/John L. Slafsky/
Date	06/11/2012
Attachments	REDACTED Sprinkles Opposition to Soft Serve Summary Judgment Motion.pdf ( 27 pages )(915789 bytes ) Charles Nelson II Declaration.pdf ( 50 pages )(1557023 bytes ) PUBLIC Donna Marks Declaration.pdf ( 21 pages )(382001 bytes ) John Lojpersberger Declaration.pdf ( 1 page )(45860 bytes ) Terra Marsden Declaration.pdf ( 2 pages )(166264 bytes ) Andrea Williams Declaration.pdf ( 2 pages )(57872 bytes ) Matthew Wallace Declaration.pdf ( 1 page )(27015 bytes ) Tom Walsh Declaration.pdf ( 17 pages )(546118 bytes )

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

SOFT SERVE, INC. d/b/a SPRINKLES,

Opposer/Petitioner,

v.

SPRINKLES CUPCAKES, INC.,

Applicant/Respondent.

**Opposition No. 91194188**

Opposition No. 91195669

Opposition No. 91195985

Opposition No. 91195986

Opposition No. 91196035

Opposition No. 91196061

Opposition No. 91196087

Cancellation No. 92053109

**SPRINKLES CUPCAKES' OPPOSITION TO  
SOFT SERVE'S SUMMARY JUDGMENT MOTION**

**REDACTED VERSION**

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

SOFT SERVE, INC. d/b/a SPRINKLES,

Opposer/Petitioner,

v.

SPRINKLES CUPCAKES, INC.,

Applicant/Respondent.

**Opposition No. 91194188**

Opposition No. 91195669

Opposition No. 91195985

Opposition No. 91195986

Opposition No. 91196035

Opposition No. 91196061

Opposition No. 91196087

Cancellation No. 92053109

**SPRINKLES CUPCAKES' OPPOSITION TO  
SOFT SERVE'S SUMMARY JUDGMENT MOTION**

Pursuant to Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 528 and Federal Rule of Civil Procedure 56, Applicant/Respondent Sprinkles Cupcakes, Inc. ("Sprinkles"), by and through its undersigned counsel, hereby submits this memorandum of law in opposition to the August 11, 2011 Summary Judgment Motion of Opposer/Petitioner Soft Serve, Inc. ("Soft Serve"). Together with this memorandum of law Sprinkles submits the declarations of Charles Nelson ("Nelson Decl."), Terra Marsden ("Marsden Decl."), Donna Marks ("Marks Decl."), Thomas Walsh ("Walsh Decl."), Andrea Williams ("Williams Decl."), Matthew Wallace ("Wallace Decl."), John Lojpersberger ("Lojpersberger Decl."), Ronald Goodstein ("Goodstein Decl.") and John Slafsky ("Slafsky Decl.")<sup>1</sup>

**INTRODUCTION**

Soft Serve alleges common-law rights to the mark SPRINKLES arising from its sale of ice cream, bagels, donuts and other goods at a single store in Potomac, Maryland. Soft Serve is challenging 10 of Sprinkles' federal trademark registrations and applications for SPRINKLES-related marks, alleging priority and likelihood of confusion. Sprinkles has asserted a defense that it enjoys superior trademark

---

<sup>1</sup> In an abundance of caution, and pursuant to the parties' Protective Order, Sprinkles is filing under seal excerpts from the transcript of the deposition of Soft Serve's principal, Thomas Orban, inasmuch as Soft Serve has not yet made confidentiality designations.

rights. Soft Serve now seeks a pre-trial determination that one of Sprinkles' trademark filings – Sprinkles' registration for the mark SPRINKLES in Classes 30 and 35 – must be cancelled.

There is, however, no basis for summary judgment in favor of Soft Serve, and Sprinkles must be afforded the opportunity to defend its registration at trial. To secure summary judgment, Soft Serve must demonstrate the absence of any genuine issue as to trademark priority and likelihood of confusion. It can do neither. The relevant facts do not come close to establishing priority or likely confusion as a matter of law. Rather, there are numerous, genuinely disputed, fundamental facts that cannot be resolved against Sprinkles.

Soft Serve's claim of trademark priority, in particular, is not even a close question. Soft Serve does not own any federal or state trademark registrations. Its self-serving statements concerning first use of the SPRINKLES mark are conflicting and uncorroborated, and there are significant questions concerning the credibility of its testimony. Soft Serve cannot substantiate isolated use of the SPRINKLES mark until, at earliest, 2003, and there is no evidence of any reputation or goodwill under its mark until considerably later. In contrast, Sprinkles enjoys broad trademark rights dating back to 1985, and its position is corroborated by multiple third-party declarations and significant national publicity as well as federal trademark registrations. Indeed, given Sprinkles' priority, were one to accept as true Soft Serve's allegations concerning likely confusion, then Soft Serve would be a trademark infringer.

In any event, the parties have fundamentally different businesses and offer products and services under conditions of sale that cannot be considered remotely similar. Soft Serve operates a single small, neighborhood ice cream shop, typical of those found in suburbs or small towns, in Potomac, Maryland. It does little marketing or advertising, but claims a small, loyal, local following. On the other hand, Sprinkles has developed a "super-premium" national brand and has demonstrated an exceptional commitment to retail design and innovative marketing. Its award-winning, gourmet cupcakes retail for \$39 per dozen. Sprinkles' customers are passionate, sophisticated and highly discriminating. It is no surprise, therefore, that no one has ever suggested to Sprinkles (particularly to its Georgetown store or its Washington, D.C. - area licensees) any confusion about the source of its products or services or about any possible connection to Soft Serve.

Because Soft Serve has not met its burden of showing the absence of any genuine issue as to the material facts, the Summary Judgment Motion must be denied.

## FACTS

### A. PROCEDURAL POSTURE

Eight of the Board proceedings initiated by Soft Serve have been consolidated under this parent case (Opposition No. 91194188).<sup>2</sup> Soft Serve seeks Summary Judgment with respect to a single trademark registration owned by Sprinkles: Registration No. 3,306,772 for the standard-character mark SPRINKLES with “bakery goods” (Class 30) and “retail shops featuring baked goods” (Class 35). This is the trademark registration subject to Cancellation No. 92053109.

Soft Serve filed its summary judgment motion on August 11, 2011. By order dated August 26, 2011, the Board suspended this proceeding pending disposition of the Summary Judgment Motion. Slafsky Decl., Ex. 1. Sprinkles responded by filing a motion under Federal Rule of Civil Procedure 56(d), seeking a continuance enabling affidavits to be obtained, depositions to be taken and other discovery undertaken so that it could respond fully to the motion. By order dated March 13, 2012, the Board granted, in part, Sprinkles’ motion, allowing Sprinkles to take further depositions and to serve additional document demands before submitting this opposition to the summary judgment motion. The Board’s March 13 order states, in pertinent part:

[T]he timing of the filing of plaintiff’s motion for summary judgment, i.e., with eight weeks remaining in the discovery period and after defendant had noticed several discovery depositions, indicates that plaintiff used the motion for summary judgment as a means of cutting off general discovery well in advance of the October 7, 2011 close of discovery as last reset in the Board’s July 6, 2011 Order.

Slafsky Decl., Ex. 2.

---

<sup>2</sup> Two other proceedings initiated by Soft Serve (Cancellation Nos. 92054376 and 92054401) have been separately consolidated. The Board previously indicated that those proceedings will be consolidated together with these proceedings once the Summary Judgment Motion is decided.

## **B. DISCOVERY TO DATE**

The parties have served and responded to written discovery demands, including requests for production of documents, interrogatories and requests for admission. In addition, Sprinkles conducted the Board-ordered deposition of Soft Serve's principal, Thomas Orban, on May 10, 2012.

Sprinkles had also noticed the depositions of Soft Serve's landlord, of the two ex-employee witnesses identified in Soft Serve's Initial Disclosures, and of Soft Serve (pursuant to Fed. R. Civ. P. 30(b)(6)), but the Board, in its March 13 order, did not permit these depositions to proceed at this time. For reasons made clear below, these depositions are highly germane to key issues in this proceeding and thus Sprinkles intends to re-notice them after the Summary Judgment Motion on this single registration is decided and the suspension is lifted. Sprinkles also intends to subpoena testimony and documents from key third parties identified only last month by Soft Serve (nearly two years after this information was first requested by Sprinkles), such as ex-Soft Serve employees who worked at the time of Soft Serve's alleged first-use date.

As of August 11, 2011, when Soft Serve prematurely filed its Summary Judgment Motion, there remained approximately a month before the parties' expert disclosures were due and approximately two months before the cut-off for pre-trial discovery.

## **C. THE PARTIES' MARKS**

### **1. Soft Serve's Rights to the SPRINKLES Mark Date Back, at Earliest, to 2004**

Soft Serve owns a single ice cream shop in Potomac, Maryland. According to Soft Serve, the shop has sold ice cream and frozen yogurt, as well as bagels and donuts. Slafsky Decl., Ex. 3. More recently, since the time Sprinkles announced plans to open a store in Washington, D.C., Soft Serve has begun heavily promoting the sale of cupcakes. *Id.*, Exs. 3 and 4; Nelson Decl.

Beginning in 1989, Soft Serve did business as a franchisee of the "I Can't Believe It's Yogurt" (ICBY) frozen yogurt chain. Slafsky Decl., Ex. 5. Soft Serve held itself out publicly under the name "I

# REDACTED

Can't Believe It's Yogurt" for approximately a decade. *Id.*<sup>3</sup> Soft Serve documents make clear that it then began a transition toward the new name SPRINKLES during the latter part of 2002. In particular, Soft Serve,



*Id.*, Ex.'s 6 and 7.<sup>4</sup> On October 18, 2002,

Soft Serve wrote to its landlord anticipating a future name-change:

The store needs a good name. It will be called "Sprinkles", which is American, and kids like it. Sprinkles says ice cream. There are sprinkled donuts, too. It is an easy name. I need a logo designed, freezer labels printed for products and t-shirts. The outside sign will be redone.

*Id.*, Ex. 9. Weeks later, on November 21, 2002, Soft Serve applied to the Maryland Department of Assessments and Taxation to register the trade name SPRINKLES. *Id.*, Ex. 10. On December 18, 2002, Soft Serve applied to Montgomery County, Maryland for a Food Service permit; the application identifies the applicant as "I Can't Believe It's Yogurt" but with a handwritten notation striking out the name and replacing it with SPRINKLES. *Id.*, Ex. 11. At about the same time Soft Serve commissioned a manufacturer to create an outside SPRINKLES sign for its store, and the computer-generated template for the new sign is dated December 31, 2002. *Id.*, Ex. 12.<sup>5</sup> Months later, during July-October 2003, Soft Serve opened up merchant accounts with credit card companies Discover and American Express under the SPRINKLES name. *Id.*, Ex. 14-15. By 2004 phone directory listings for SPRINKLES at Soft Serve's address appeared for the first time. *Id.*, Ex. 16.

---

<sup>3</sup> To this day Soft Serve displays portions of its legacy "I Can't Believe It's Yogurt" branding, such as ICBY's stylized rendering of the word "Yogurt" prominently in the front window of its store. Goodstein Decl.

<sup>4</sup> Article I of Soft Serve's agreement with its landlord ("Basic Lease Provisions") limits use of the leased property to "Retail sale of 'I Can't Believe It's Yogurt' . . . off and on premises consumption . . ." Slafsky Decl., Ex. 8.

<sup>5</sup> The first invoice from the manufacturer referencing sale of a SPRINKLES sign is dated almost a year later, October 22, 2003. Slafsky Decl., Ex. 13.

Strikingly, there is nothing else in the record for the years 2002 or 2003 suggesting the existence of any Soft Serve public announcements; advertising; press releases; marketing materials; publicity; websites; letterhead; business cards; packaging; labels; uniforms; or promotional merchandise related in any way to the name SPRINKLES.<sup>6</sup> Under the circumstances, it was certainly not until 2004, at earliest, before Soft Serve could have established any goodwill or reputation under the SPRINKLES name.

## 2. Sprinkles' Rights to the SPRINKLES Mark Date Back to 1985

Sprinkles, the first cupcakes-only bakery in the U.S., was founded in 2004, and its trademark rights date back well before then, to at least as early as 1985. *See* Nelson Decl.; Marks Decl.; Walsh Decl.; Williams Decl. Sprinkles has been featured on numerous national television shows including *The Oprah Winfrey Show*, *The Martha Stewart Show*, *The Today Show*, *Good Morning America*, *Nightline*, *Access Hollywood* and *Entertainment Tonight*. Nelson Decl. Sprinkles has also been featured in major publications such as *The Washington Post*, *The New York Times*, *The Los Angeles Times*, *Time*, *People*, *InStyle*, *Bon Appetit*, *Gourmet* and *Travel & Leisure*. *Id.*

Sprinkles' success and nationwide fame have afforded the company the opportunity to expand across the United States. In addition to its Beverly Hills store, Sprinkles now operates stores in Newport Beach, Palo Alto, Dallas, Scottsdale, Houston, Chicago, La Jolla, Washington, D.C., and New York. Nelson Decl. Sprinkles' stores are not the only places where customers can order and purchase Sprinkles' products. Sprinkles' cupcake mixes are also available in approximately 250 Williams-Sonoma stores throughout North America. *Id.* Williams-Sonoma started selling SPRINKLES-branded products in Williams-Sonoma stores

---

<sup>6</sup> The earliest alleged documentary evidence of Soft Serve's use of the name SPRINKLES is a "Money Mailer" direct-mail coupon, allegedly distributed by Soft Serve's landlord, with an expiration date of May 31, 2003. Slafsky Decl., Ex. 17. However, this coupon is not part of the Summary Judgment record and thus must be disregarded. Soft Serve produced the coupon in August 2010; if it had wanted the Board to consider it in connection with its August 2011 Summary Judgment Motion, it should have submitted a properly authenticated copy at that time. Trademark Rule § 2.127(e)(2) (for purposes of deciding summary judgment, the Board can consider certain documents "if a copy is provided with the party's brief on the summary judgment motion"); *see also*, *Remington Health Prods v. OLA LOA, LLC*, No. 119,704, 2002 WL 31001991 (T.T.A.B. Aug. 29 2002) (sustaining objection to exhibits offered for first time with reply because they were untimely); *Florists' Transworld Delivery, Inc. v. Fresh Intellectual Prods., Inc.*, No. 29,650, 2001 WL 245748 (T.T.A.B. 2001) (same).

(including more than a dozen such stores in the District of Columbia and surrounding areas) and via the Williams-Sonoma website as early as December 2006. *Id.*; *see also*, Wallace Decl.; Lojpersberger Decl.

On July 21, 2009, Sprinkles acquired further rights to SPRINKLES-related marks, including the rights underlying two federal trademark registrations, from an ice cream and baked goods store that had been in operation for over 20 years and that enjoyed a national reputation. Nelson Decl.; Marks Decl. These applications matured into U.S. Trademark Registration Nos. 2,938,800 (SPRINKLES OF PALM BEACH) and 3,004,757 (SPRINKLES PALM BEACH and Design) for “ice cream” and “retail store services featuring ice cream” (the “Sprinkles Palm Beach Registrations”). Nelson Decl., Ex. C. The registrations include disclaimers of, respectively, OF PALM BEACH and PALM BEACH. The registrations are now incontestable, and trademark priority for these registrations dates back to at least as early as October 2002. *Id.* Significantly, the underlying trademark rights acquired by Sprinkles – covering not just ice cream, but also baked goods and sandwiches – are geographically broad and date back to as early as 1985. *See* Nelson Decl.; Marks Decl.; Walsh Decl.; Williams Decl.<sup>7</sup>

To recap, a timeline summarizing key first-use dates for the parties is set forth below (with Soft Serve dates substantiated in the Slafsky Decl. and Sprinkles dates substantiated in the Nelson Decl.):

---

<sup>7</sup> Sprinkles intends to amend the first-use dates in the challenged registration from October 2002 to 1985 once this proceeding is decided. *See, Mason Eng'g & Design Corp. v. Mateson Chem. Corp.*, 225 U.S.P.Q. 956, 957 n.4 (T.T.A.B. 1985).

## SOFT SERVE

## SPRINKLES CUPCAKES

Begins trading in Potomac as "I Can't Believe It's Yogurt" (Slafsky Decl., Ex. 5)

Trades as "I Can't Believe It's Yogurt," per signed real estate documents (Exs. 6 and 7)

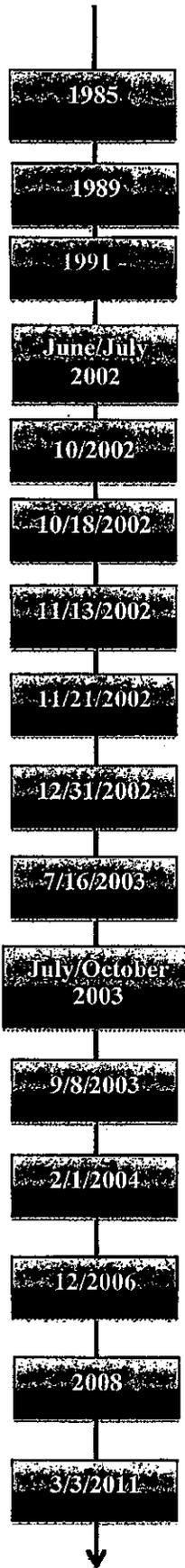
Anticipates future name change to SPRINKLES in letter to landlord (Ex. 10)

Maryland Trade Name application for SPRINKLES (Ex. 11)

SPRINKLES template from sign manufacturer (Ex. 12)

Accounts with credit card companies opened under name SPRINKLES (Exs. 14 and 15)

First phone directory listing for SPRINKLES (Ex. 16)



Opening of SPRINKLES store (frozen desserts, bakery goods) in Palm Beach (Nelson Decl.)

National press coverage of SPRINKLES (Palm Beach), including *Washington Post*, begins (Ex. B)

First use ("at least as early as") in SPRINKLES OF PALM BEACH applications (Ex. C)

Filing date for SPRINKLES OF PALM BEACH® trademark (Ex. C)

Filing date for SPRINKLES PALM BEACH AND DESIGN® trademark (Ex. C)

*People* magazine rates SPRINKLES (Palm Beach) #1 ice cream (Ex. A)

First use ("at least as early as") in SPRINKLES trademark application ("bakery goods")

National sales of SPRINKLES cupcake mixes in Williams-Sonoma stores begin

First sales of SPRINKLES cupcakes (by mail) to Maryland and Virginia

Opening of SPRINKLES store in D.C.

**D. THE PARTIES HAVE VERY DIFFERENT BUSINESSES WITH  
FUNDAMENTALLY DISTINCT CONDITIONS OF SALE**

Soft Serve is a small, neighborhood ice cream shop typical of those found in suburbs or small towns. Goodstein Decl.; Slafsky Decl., Ex. 18. Its products are priced competitively against local Dairy Queen or Baskin-Robbins stores. Goodstein Decl. It sells, among other things, day-old baked goods at a discounted price. *Id.* The design of its store reflects no theme per se. *Id.* It does little marketing or advertising, but nonetheless claims to have a small, loyal, local following. Orban Decl.; Goodstein Decl.; Slafsky Decl., Ex. 18.

Sprinkles, in contrast, is a national business offering gourmet desserts and an upscale, luxurious experience. Nelson Decl. Sprinkles' cupcakes cost \$3.50 each, and \$39 for a dozen. *Id.* Sprinkles sells only fresh, just-baked cupcakes.<sup>8</sup> *Id.* Each of the Sprinkles stores features the distinctive Sprinkles store design, which was created specifically for Sprinkles by an award-winning designer. *Id.* Sprinkles' popularity among Hollywood celebrities has greatly increased the brand recognition and cachet of Sprinkles' cupcakes. *Id.* According to marketing expert Ronald Goodstein, a professor at Georgetown University's McDonough School of Business:

Sprinkles [] is a brand that takes full advantage of the positive influence of retail atmospherics. The shop itself is part of the delight in the brand. They utilize an attractive color scheme that is consistent across outlets and their website. This is also congruent with their packaging and displays, meaning that the brand can be identified both in the retail outlet and outside of the store. Their service is welcoming... There was an intimate café feeling in the store and in the seating. The display cases for Sprinkles [] were organized to separate and showcase the cupcakes, in a manner indicating high-end products. The cupcakes certainly had "curb appeal," and appeared appetizing and expensive.

Goodstein Decl.

Sprinkles has received substantial attention due to the popular Food Network television program "Cupcake Wars," televised nationally. Sprinkles' co-founder and head pastry chef Candace Nelson, is a featured judge on the program. *Id.* Sprinkles and its cupcakes have been featured on numerous national television shows including *The Oprah Winfrey Show*, *The Martha Stewart Show*, *The Today*

---

<sup>8</sup> Sprinkles stores donate all unsold cupcakes each evening to local homeless shelters, such as Crowder Owens Food Bank and Central Union Mission in Washington, D.C. Nelson Decl.

*Show, Good Morning America, Nightline, Access Hollywood, The Tonight Show, Live! with Regis and Kelly, and Entertainment Tonight. Id.*

Professor Goodstein concludes that:

- Sprinkles offers a super-premium brand utilizing many marketing tools to do so, while Soft Serve offers a commonplace local ice cream shop experience;
- Marketplace factors including equity positioning and retail atmospherics differentiate the businesses dramatically; and
- Sprinkles would have no incentive to associate itself with Soft Serve, as such association would only harm Sprinkles' well-established, national, super-premium brand identity.

Goodstein Decl.

### ARGUMENT

#### **I. BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT, THE BOARD MUST DENY THE SUMMARY JUDGMENT MOTION**

Summary judgment is an exceptional remedy that entitles the moving party to judgment as a matter of law only when no material fact is in dispute. Here, Soft Serve has the burden of showing the absence of *any* genuine issue as to all the material facts in the case. Fed. R. Civ. P. 56. Sprinkles, as the non-moving party, “must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist; and the evidentiary record . . . and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to [Sprinkles].” TBMP § 528.01; *see also, e.g., Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 767 (Fed. Cir. 1993); *Olde Tyme Foods v. Roundy's, Inc.*, 961 F.2d 200, 202-03, 22 U.S.P.Q.2d 1542 (Fed. Cir. 1992). Insofar as Sprinkles demonstrates a genuine issue of material fact, the Board must deny the motion. TBMP § 528.01 (the Board “may not resolve an issue of fact; it may only determine whether a genuine issue of material fact exists”).

Where, as here, the basis for the summary judgment motion is a claim of likelihood of confusion, the Board should proceed cautiously. *See, e.g., Autozone, Inc. v. Strick*, 543 F.3d 923, 929 (7th Cir. 2008) (summary judgment on likelihood of confusion should be approached with great caution and is only appropriate where evidence is so one-sided that there can be no doubt); *Gen. Motors Corp. v. Keystone*

*Auto. Indus., Inc.*, 453 F.3d 351, 359 (6th Cir. 2006) (denial of summary judgment is “a common disposition in evaluating of likelihood of confusion”); *KP Permanent Make-Up, Inc. v. Lasting Impression, Inc.*, 408 F.3d 596, 608 (9th Cir. 2005) (“determining whether a likelihood of confusion exists at the summary judgment stage is generally disfavored”).

As set forth below, the record in this proceeding is replete with genuine issues of material fact as to both priority and likelihood of confusion.

## **II. THERE ARE TRIABLE ISSUES OF FACT CONCERNING SOFT SERVE’S CLAIM OF TRADEMARK PRIORITY**

To establish trademark priority, a party must prove that vis-à-vis the other party, it owns a mark or trade name previously used in the United States. 15 U.S.C. § 1052(d); *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002). Priority must be established by a preponderance of the evidence. *B.R. Baker Co. v. Lebow Bros.*, 150 F.2d 580, 583 (C.C.P.A. 1945). Prior rights can arise from prior registration, prior trademark/service mark use, prior trade name use or prior analogous use. *Id.* Soft Serve does not own a trademark registration, so it must rely instead on prior trademark/service mark use, prior trade name use or prior analogous use.

For Soft Serve to establish priority via prior trademark/service mark use, it must show, during the relevant time period, actual use of the mark in commerce, either on its goods or by display or advertisement of the mark in connection with its services. *E.g., philosophy, inc. v. Kristi M. Wilson*, No. 91189376, 2012 WL 975573, at \*11 (T.T.A.B. Mar. 7, 2012). Absent customer recognition of the mark, Soft Serve has no goodwill, and thus there is nothing for the mark to symbolize or represent. 1 MCCARTHY ON TRADEMARKS § 2:20.

Likewise, for Soft Serve to establish priority via prior trade name use, it must show that, while it may not have commenced trademark use, it nonetheless engaged in sufficient activity under the trade name to have acquired goodwill during the relevant period. *Dynamet Tech., Inc. v. Dynamet Inc.*, 593 F.2d 1007, 1010-11, (C.C.P.A. 1979); *see also, Dial-A-Mattress Operating Corp. v. Mattress Madness, Inc.*, 841 F. Supp. 1339, 1347 (E.D.N.Y. 1994) (name must become “synonymous with the entity in the minds of the relevant consuming public”). The existence of a state trade name registration (Slafsky Decl., Ex. 11) does not confer

on Soft Serve any greater rights to use the SPRINKLES name than it otherwise already has. *Visa Int'l Serv. Assoc. v. Visa Realtors*, 208 U.S.P.Q. 462, 463 (T.T.A.B. 1980).

Finally, for Soft Serve to establish priority via analogous use, it must show that, via pre-launch activity during the relevant period, it somehow created the necessary association with the mark in the minds of the purchasing public. *Herbko Int'l*, 308 F.3d at 1162 (reversing grant of summary judgment because petitioner had not adduced evidence that relevant public associated mark with petitioner); *T.A.B. Sys. v. Pactel Teletrac*, 77 F.3d 1372, 1376 (Fed. Cir. 1996). The requisite use of the name must be “open and notorious public use directed to the segment of the purchasing public for whom the services are intended . . . .” *Id.* (citation omitted).

The *T.A.B. Systems* decision is instructive. The Federal Circuit held that a party seeking to establish priority must prove that its promotional activities (1) reached more than a negligible share of potential customers and (2) were sufficient to have a substantial impact on the purchasing public. *Id.* The court vacated the Board’s grant of summary judgment because it found that the opposer’s evidence – which included renaming of the business unit with the mark, issuance of press releases and press kits bearing the mark, presentation to potential customers of a marketing slide show bearing the mark, a booth at trade show featuring the mark, marketing brochures bearing the mark, and eleven news articles referring to the mark – failed to establish that the opposer had “reached more than a negligible share of potential customers or that the customers who *were* reached saw more than a few references to [the target word] over a one or two month period.” *Id.* at 1375-77; *see also, Selfway, Inc. v. Travelers Petroleum, Inc.*, 579 F.2d 75, 79 (C.C.P.A. 1978) (use of mark in brochure not sufficiently pervasive for “necessary impact”); *Westrex Corp. v. New Sensor Corp.*, 83 U.S.P.Q.2d 1215, 1218 (T.T.A.B. 2007) (opposer’s activities failed to “constitute clear, widespread, and repetitive activities sufficient to have established prior analogous trademark use”). The decision also makes clear that the legal test is one of actual perception of potential consumers, not some hypothetical persons or the intent of the petitioner. *T.A.B. Sys.*, 77 F.3d at 1376.

In sum, to establish a first-use date before 2004, it is not enough for Soft Serve to show that it made use of the SPRINKLES mark during that period; it must instead show that its promotional activity

# REDACTED

at the time was sufficiently clear, widespread and repetitive to have made a substantial impact on the community. It has not come close to doing so.

## **A. Soft Serve's Uncertain Common-Law Rights Date Back No Earlier Than 2004**

According to Soft Serve, its summary judgment papers "unequivocally and indisputably establish that [it] used SPRINKLES as a trade name, trademark and service mark well prior to [Sprinkles'] first use dates and filing date. . . ." Mot. Summ. J. at 2. Nothing could be further from the truth. The record does not indicate that Soft Serve established common-law rights in the mark SPRINKLES before 1985 (when Sprinkles' predecessor-in-interest began use of the mark) or, alternatively, before October 2002 (the first-use date in Sprinkles' acquired trademark registration) or even before February 2004 (the first-use date in the initial trademark registration filed by Sprinkles).

### **1. Soft Serve Has Failed to Allege a Certain Priority Date**

Soft Serve's position concerning its first use of the SPRINKLES mark has been evasive, inconsistent and highly questionable. Soft Serve did not allege any priority date in its Petition. Slafsky Decl., Ex. 19. Only after Sprinkles filed an Answer citing two trademark registrations with an October 2002 first-use date did Soft Serve allege, in an interrogatory response, that it began use of the mark in April 2002.<sup>9</sup> Slafsky Decl., Ex. 20. Soft Serve then amended its position by claiming, in a May 2011 declaration, that its first-use date was actually "no later than the summer of 2002." Orban. Decl. Then, months later, in its August 2011 Summary Judgment Motion, Soft Serve alleged instead an uncertain date "prior to Registrant's 2004 and 2005 first use dates." Mot. Summ. J. at 3. Most recently, in a May 2012 deposition, Soft Serve's principal, Thomas Orban, took yet another position by claiming that [REDACTED] (Slafsky Decl., Ex. 22) [REDACTED] *Id.*, Ex. 23. These ever-shifting positions, unsupported by documentary evidence, call into question the credibility of Soft Serve's priority claim.

---

<sup>9</sup> This date, in particular, is flatly contradicted by the sworn testimony and correspondence of a Soft Serve employee at the time, Aaron Yoches. Slafsky Decl., Ex. 21.

**2. Documents Establish that Soft Serve's Rights, if Any, Date Back to, at Earliest, 2004**

With respect to the critical time period of 2002-2003, there is no corroborating documentary evidence of *any* use of the SPRINKLES mark by Soft Serve. In particular, there is no documentary evidence of:

- a sign in use;
- advertising;
- marketing materials;
- press releases;
- letterhead;
- business cards;
- packaging;
- labels;
- direct-mail items;
- uniforms;
- White or Yellow pages listings;
- disclosure to the landlord;
- public announcements; or
- contemporaneous statements from consumers, vendors or other third parties.

Indeed the only documents produced by Soft Serve from this time period anticipate use of the mark in the future.<sup>10</sup>

Thus the documentary evidence on which Soft Serve relies is hardly sufficient to establish prior rights. *See, Dial-A-Mattress Operating Corp. v. Mattress Madness, Inc.*, 841 F. Supp. 1339, 33 U.S.P.Q.2d 1961 (E.D.N.Y. 1994). Instead, the documents produced in discovery make clear that Soft Serve began a transition toward a new SPRINKLES name during the latter part of 2002. *See*, Section C(1), *supra*. The few cancelled checks cited in the Summary Judgment Motion, bearing the handwritten notation "SPRINKLES," are from 2003.<sup>11</sup> Orban Decl., Ex. 24. Only by the latter part of

---

<sup>10</sup> As explained above, the earliest alleged documentary evidence of Soft Serve's use of SPRINKLES is not part of the Summary Judgment record: a "MoneyMailer" coupon, allegedly distributed by Soft Serve's landlord, with an expiration date of May 31, 2003. Sprinkles noticed the deposition of Soft Serve's landlord in order to probe about such documents. The Board, however, suspended the proceeding before the deposition could take place and then denied Sprinkles' request, pursuant to Rule 56(d), to proceed promptly with the deposition.

<sup>11</sup> Soft Serve produced to Sprinkles 47 checks for the time period April 2002 – January 2004, but only submitted four checks with a handwritten "SPRINKLES" notation with its Summary Judgment Motion. The rest do not reference "SPRINKLES." Slafsky Decl., Ex. 24.

# REDACTED

2003 had Soft Serve opened up merchant accounts with credit card companies under the SPRINKLES name, and only by 2004 was the SPRINKLES name first referred to in local phone directories. Slafsky Decl., Exs. 15, 16 and 17. These documents show, if anything, isolated and low-key usage of the mark, not pervasive marketing of the kind the law requires for trademark priority.

### 3. Orban Testimony

With knowledge of the first-use dates in Sprinkles' trademark filings, Soft Serve's principal, Mr. Orban, has attempted to establish a first-use date as of 2002. However, the Board should grant little weight to his shifting testimony, as it is not only self-serving and uncorroborated, and taking place a decade after the relevant events, but it is full of indefiniteness and inconsistencies, and there are serious questions concerning his credibility. As set forth above, Mr. Orban has offered at least *four different dates* when he claims use of the mark began; his position changes routinely. Furthermore, during his deposition he conceded [REDACTED]

[REDACTED] (Slafsky Decl., Ex. 25), and he now maintains that [REDACTED]

[REDACTED] *Id.*, Ex. 26. Given his record of misrepresentations, the Board cannot take his word at face value. As one court explains:

When, in cases like the one at bar, the oral testimony of a single witness, testifying long after the events happened, is relied upon to prove priority, such testimony, while entitled to consideration, should be most carefully scrutinized; and if it does not carry conviction of its accuracy and applicability, it should not be permitted to thus successfully attack the presumed validity of a registered trade-mark. (citation omitted). Whether or not the testimony of the single witness . . . , indefinite and uncertain as it is, together with the apparent lack of probative force to be given to the exhibits, is sufficient proof of priority in this case does not even present a close question.

*B.R. Baker*, 150 F.2d at 583-84.<sup>12</sup>

---

<sup>12</sup> The cases cited by Soft Serve concerning the sufficiency of self-serving affidavits to show trademark priority are inapposite. *C and G Corp. v. Baron Homes, Inc.*, 183 U.S.P.Q. 60, 61 (T.T.A.B. 1974) and *4U Co. of Am., Inc. v. Naas Foods, Inc.*, 175 U.S.P.Q. 251 (T.T.A.B. 1972) merely stand for the proposition that such sworn statements, if fully corroborated by documents and if unchallenged by the opposing party, may be sufficient.

# REDACTED

## 4. Concealment of Third-Party Testimony

Yet another reason to reject Soft Serve's priority claim is its concealment of relevant testimony from the Board. To wit: during the critical time period of 2002 Soft Serve employed approximately 8 employees. Slafsky Decl., Ex. 27. Soft Serve selected only two of them, Saira Haider and Aaron Yoches, for its "Supplemental" Disclosures (*Id.*, Ex. 28). Haider signed a declaration in this matter on May 11, 2011 (*Id.*, Ex. 29), and Yoches signed a similarly worded but conflicting declaration on June 3, 2011. *Id.*, Ex. 21. Soft Serve withheld the declarations from the Board and Sprinkles in connection with the Summary Judgment Motion, and further withheld the declarations from Sprinkles for another eight months, until April 25, 2012. *Id.*, Ex. 30.<sup>13</sup> The two declarations take contradictory positions concerning the timing of Soft Serve's transition toward the SPRINKLES mark. Sprinkles has not had an opportunity to depose either witness; although Sprinkles noticed their depositions before the Summary Judgment Motion, the Board suspended these proceedings and then denied Sprinkles' request, pursuant to Rule 56(d), to proceed before this opposition.

In addition, Soft Serve only recently acknowledged having communicated with some of the other six ex-employees (from 2002) about this matter. Although Sprinkles had requested disclosure of such communications as early as June 2010 (*Id.*, Ex. 31), Mr. Orban could not confirm at his May 2012 deposition that [REDACTED]

[REDACTED] *Id.*, Ex. 27. Sprinkles should be afforded the opportunity to review such documents and to depose these witnesses as well.

### B. Sprinkles' Trademark Rights Date Back to 1985

Sprinkles' trademark rights date back well before the time when Soft Serve claims it began use of the SPRINKLES mark. *See*, Timeline, *supra* at 8. On July 21, 2009, Sprinkles acquired further rights to SPRINKLES-related marks, including the rights underlying two federal trademark registrations. Nelson Decl.; Marks Decl. These applications matured into the Sprinkles Palm Beach Registrations. Nelson Decl.,

---

<sup>13</sup> Sprinkles' June 11, 2010 document demands (Slafsky Decl., Ex. 31, Requests Nos. 4-5, 28-29) called for production of such documents 10 months earlier.

Ex. C.<sup>14</sup> The Sprinkles Palm Beach Registrations are now incontestable, and trademark priority for these registrations dates back to at least as early as October 2002. *Id.* Significantly, the underlying trademark rights acquired by Sprinkles – covering not just ice cream, but also baked goods and sandwiches – are geographically broad and date back to as early as 1985, when Sprinkles’ earliest predecessor-in-interest first used the SPRINKLES mark. *See* Nelson Decl.; Williams Decl.; Walsh Decl.; Marks Decl.<sup>15</sup>

Sprinkles can obtain trademark priority by acquiring a name or mark. *See, e.g., Old Swiss House, Inc. v. Anheuser-Busch, Inc.*, 569 F.2d 1130, 1132 (C.C.P.A. 1978); *Metro Traffic Control, Inc. v. Shadow Network Inc.*, 104 F.3d 336 (Fed. Cir. 1997); *Augustines Spiritual Goods, Inc. v. Augustines Eternal Gifts, LLC*, No. 92049453, 2010 WL 3501482, at \*4 (T.T.A.B. Aug. 26, 2010). Moreover, the predecessors’ goodwill in a name or mark can merge with Sprinkles’ separately accrued goodwill in its mark. *Dial-A-Mattress*, 841 F. Supp at 1350-51. This is particularly true where, as here, the predecessors’ marks and Sprinkles’ mark are legal equivalents. *See*, Williams Decl.; Walsh Decl.; Marks Decl.; Nelson Decl.; *see also, Am. Sec. Bank v. Am. Sec. & Trust Co.*, 571 F.2d 564 (C.C.P.A. 1978) (AMERICAN SECURITY is legal equivalent of AMERICAN SECURITY BANK); *Black Bear Bottling Grp. v. Black Bear Spring Water LLC*, No. 92050665, 2011 WL 3871951 (T.T.A.B. Aug. 18, 2011) (*ditto* BLACK BEAR and BLACK BEAR SODA); *Club Amenities, LLC Pettenon Cosmetici SNC*, No. 92043178, 2005 WL 2034549 (T.T.A.B. Aug. 18, 2005) (*ditto* ALTER EGO and ALTER EGO THE

---

<sup>14</sup> The Summary Judgment Motion avoids any mention of the Sprinkles Palm Beach Registrations, even though they were specifically called out in Sprinkles’ Answer. *See*, Slafsky Decl., Ex. 32 (Fourth Affirm. Defense). Soft Serve has previously maintained that Sprinkles is somehow estopped from relying on the Sprinkles Palm Beach Registrations, due to statements made by Sprinkles’ predecessor during the USPTO trademark prosecution process. Soft Serve has not made this argument in the Summary Judgment Motion. In any event, there is no basis for any “prosecution estoppel” argument. Sprinkles is not bound by the arguments or positions taken by its predecessor, *ex parte*, before the USPTO. *Anthony’s Pizzas & Pasta Int’l, Inc. v. Anthony’s Pizza Holding Co.*, 95 U.S.P.Q.2d 1271, 1281 (T.T.A.B. 2009); *Sigma Instruments, Inc. v. Sigma Indus., Inc.*, 165 U.S.P.Q. 654, 659 (T.T.A.B. 1970).

<sup>15</sup> The declarations make clear that the SPRINKLES store in Palm Beach routinely received customers from across the United States, including the Washington, D.C. area, and that the store received national and international publicity, such as in *The Washington Post* and *People* magazine.

PERSONAL CARE COMPANION); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 U.S.P.Q.2d 1645 (T.T.A.B. 2010) (*ditto* CAPITAL CITY BANK and CAPITAL CITY BANK GROUP).

**C. The Trademark Registrations Filed by Sprinkles Date Back to 2004**

Irrespective of the Sprinkles Palm Beach Registrations, Sprinkles also owns the challenged trademark registration, with first use dates of February 1, 2004 (for “bakery goods”) and April 13, 2005 (for “retail shops featuring baked goods”). Slafsky Decl., Ex. 33 (Reg. No. 3306772). Soft Serve has not demonstrated pervasive or widespread use of the SPRINKLES mark, in any manner generating reputation or goodwill, prior to either of these dates.

**D. Sprinkles’ Sales in the Washington, D.C. Area Date Back to 2006**

Sprinkles began using the SPRINKLES mark with cupcake mixes sold at Williams-Sonoma stores in Washington, D.C. and on nearby Rockville Pike in Maryland as early as 2006. Nelson Decl.; Wallace Decl.; Lojpersberger Decl. Again, Soft Serve has not demonstrated pervasive or widespread use of the SPRINKLES mark, in any manner generating reputation or goodwill, prior to this date.

In sum, the Board, in determining trademark priority, is to look to the total picture presented by the evidence. *W. Fla. Seafood Inc v. Jet Rests. Inc.*, 31 F.3d 1122 (Fed. Cir. 1994). The total picture presented by the evidence above makes clear that Sprinkles, not Soft Serve, enjoys superior trademark rights.<sup>16</sup>

**III. THERE ARE TRIABLE ISSUES OF FACT CONCERNING SOFT SERVE’S CLAIM OF LIKELIHOOD OF CONFUSION**

To succeed on its motion, Soft Serve must also demonstrate that there are no genuine issues of material fact with respect to likelihood of confusion. It has not done so. As set forth below, there are a number of genuinely disputed facts concerning the potential, if any, for confusion arising from Sprinkles’ use of its SPRINKLES mark.

---

<sup>16</sup> On this basis alone, the Summary Judgment Motion must be denied. The Board need not proceed further with analysis of the second prerequisite, likelihood of confusion. Furthermore, the Board may *sua sponte* grant summary judgment in favor of the non-moving party, Sprinkles. TBMP § 528.08.

It is well-established that the Board applies the *du Pont* test to analyze likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973). In particular, the Board applies a number of different factors to the totality of facts of the case. *Id.* The *du Pont* test is an equitable balancing test, with the Board applying the factors flexibly, based on the particular facts, and with no particular factor decisive or preeminent. *See, In re Mighty Leaf Tea*, 601 F.3d 1342, 1346-47 (Fed. Cir. 2010). Sprinkles need not refute each and every factor in order to successfully defend its registration. *Id.* at 1346 (“Not all of the *du Pont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”). Moreover, the test itself contemplates consideration of “[a]ny other established fact probative of the effect of use.” *du Pont* at 476 F.2d at 1361. Applying the relevant *du Pont* factors to the facts of this case, it is clear that there is no likelihood of confusion.

**A. Sprinkles Adopted and Registered Its Mark in Good Faith**

Sprinkles’ undisputed good faith is an equitable consideration that the Board should consider. *See, First Int’l Servs. Corp. v. Chuckles, Inc.*, 5 U.S. P.Q.2d 1628, 1633 (T.T.A.B. 1988) (circumstances surrounding adoption of mark may bear on likelihood of confusion determination). Sprinkles adopted its SPRINKLES mark in good faith, without any knowledge of Soft Serve. Nelson Decl. Sprinkles then registered its mark in good faith, filing its application in 2006, receiving no Section 2(d) objection from the USPTO and encountering no opposition (from Soft Serve or anyone else) when the application was published. Sprinkles subsequently filed 16 other SPRINKLES-related applications and invested millions of dollars in its SPRINKLES-related brands. Nelson Decl.<sup>17</sup>

**B. Sprinkles Has Diligently Enforced Its Trademark Rights**

The *du Pont* test calls for consideration of the extent to which the trademark applicant, Sprinkles, has a right to exclude others from use of its mark on its goods. *du Pont*, 476 F.2d at 1361. With Sprinkles’ considerable commercial success, imitators have emerged in the United States and elsewhere. Sprinkles has diligently enforced its trademark rights for five years, dispatching over 30 cease-and-desist

---

<sup>17</sup> Professor Goodstein opines that Sprinkles would have no incentive to associate itself with Soft Serve, as such association would only harm Sprinkles’ well-established, national, super-premium brand identity. Goodstein Decl.

letters to third parties who subsequently adopted and used the SPRINKLES mark in a confusing manner. Nelson Decl. Sprinkles has also been compelled to sue trademark infringers in court. *Id.* The vast majority of these efforts have been successful. *Id.* Sprinkles' right and ability to exclude others from use of its SPRINKLES mark with similar goods further undermines Soft Serve's confusion arguments.

**C. The Parties' Conditions of Sale are Fundamentally Different**

A key *du Pont* factor is the conditions under which and buyers to whom sales are made, that is "impulse" versus careful, sophisticated purchasing. *du Pont*, 476 F.2d at 1361. Here, the parties' conditions of sale are quite different from one another, mitigating any potential for confusion. In particular, both parties claim loyal customer followings, and it is inconceivable that customers will make an impulse purchase of a cupcake from Sprinkles thinking that it is actually from Soft Serve or that Sprinkles is somehow affiliated with Soft Serve.

As set forth above, Soft Serve is a small, neighborhood ice cream shop typical of those found in suburbs or small towns. Goodstein Decl. The design of Soft Serve's store reflects no theme per se. Goodstein Decl. Soft Serve's prices are competitive against local Dairy Queen or Baskin-Robbins stores and it sells, among other things, day-old baked goods at a discounted price. Goodstein Decl. Soft Serve does little marketing or advertising. Orban Decl.

Sprinkles, in contrast, distinguishes itself by selling gourmet desserts and an upscale, luxurious experience. Goodstein Decl.; Nelson Decl. Sprinkles' cupcakes cost \$3.50 each, and \$39 for a dozen (prices considerably more expensive than those of Soft Serve). *Id.*<sup>18</sup> Each of the Sprinkles stores features the distinctive Sprinkles store design, which is contemporary and stylish and which was created specifically for Sprinkles by an award-winning designer. *Id.* Sprinkles' popularity among Hollywood celebrities has created cachet for its brand. *Id.* According to marketing expert Ronald Goodstein, Sprinkles' "retail atmospherics" are exceptional: "Sprinkles [] is a brand that takes full

---

<sup>18</sup> Sprinkles is committed to selling only the freshest and highest-quality cupcakes and thus its policy is not to sell day-old product. Nelson Decl.

advantage of the positive influence of retail atmospherics. The shop itself is part of the delight in the brand.” Goodstein Decl.

Furthermore, both parties command loyal clienteles. Orban Decl.; Nelson Decl.; Slafsky Decl., Ex. 18. Sprinkles’ customers, in particular, are food enthusiasts who are especially concerned with quality and brand loyalty. Nelson Decl. Professor Goodstein concludes that the presence of such committed customers further mitigates any potential for confusion:

Loyalty is important because it represents the proportion of the brand’s sales that are due to “regulars,” those customers that are most apt to purchase this brand repeatedly. Loyal customers know the brand well, have an affinity and knowledge about the brand that others would not have, and are less susceptible to competitors’ tactics because of this intimacy with the brand. A brand that has a strongly loyal following would be more easily able to tell an imitator from the actual brand than would a novice in the product category. My review of websites, commentaries, and stores leads me to conclude that Soft Serve has a strongly loyal local customer base, and Sprinkles [] has a strongly loyal national customer base. Due to the presence of significant loyalty for both of these brands, the chances that customers would be confused as to which brand was which is significantly diminished.

Goodstein Decl. *See also, Bachelierie v. Z. Cavaricci Inc.*, 20 U.S.P.Q.2d 1282 (brand-focused buyers exercise a greater degree of care with their purchases); *Turtle Wax Inc. v. First Brands Corp.*, 781 F. Supp. 1314, 1326 (car buffs more likely to be discerning regarding purchase of special car wax); *Luigino's Inc. v. Stouffer Corp.*, 170 F.3d 827, 831 (8th Cir. 1999) (“diet-conscious purchasers of these prepared entrees are a special class of purchasers” who are highly discriminating) (citation omitted).

#### **D. The Absence of Market Interface Between the Parties**

Another *du Pont* factor is the market interface between the challenger and the trademark registrant, Sprinkles. *du Pont*, 476 F.2d at 1361. There is none here. The parties do not do business with one another. Indeed, Soft Serve’s location is suburban and at a substantial distance in miles and driving time from Sprinkles’ Georgetown store. This, too, weighs against any potential for future confusion.

#### **E. The Absence of Actionable Confusion**

The absence of actionable confusion is yet another factor in Sprinkles’ favor. *du Pont* at 1361. Sprinkles has been selling SPRINKLES-branded cupcake mixes at Williams-Sonoma stores in the Washington, D.C. area since 2006. Sprinkles has been shipping cupcakes, in response to phone orders, to customers in the Washington, D.C. area since 2008. Sprinkles’ store in the Georgetown neighborhood of

# REDACTED

Washington, D.C. has now been open over a year, since March 2011. Nelson Decl. Strikingly, no one has ever suggested to anyone at Sprinkles (in particular, to anyone at the Georgetown store) any confusion about the source of Sprinkles' products or services or about any possible connection to Soft Serve. Nelson Decl.; Marsden Decl. Nor is Williams-Sonoma aware of any such confusion at its nearby stores. Wallace Decl.; Lojpersberger Decl.

Soft Serve nonetheless is relying on evidence of purported confusion. The Board should disregard this evidence altogether, because (i) Soft Serve has unclean hands, having encouraged marketplace confusion, (ii) much of this evidence is impermissible hearsay, (iii) much of this evidence consists of non-actionable, misdirected phone calls, (iv) much of this evidence consists of non-actionable inquiries, in which no consumers are confused about the source of products or services, and (v) in any event, Soft Serve has conceded that it has suffered no resulting economic harm.

First, Soft Serve has unclean hands insofar as, following Sprinkles' announcement of plans to open a D.C. store (Nelson Decl.), Soft Serve commenced heavy promotion of cupcakes under the SPRINKLES mark while mimicking Sprinkles' distinctive marketing techniques. Soft Serve specifically [REDACTED]. Slafsky Decl., Ex. 34. Soft Serve then added the word "CUPCAKES" to the SPRINKLES sign outside its store in or about 2009. Slafsky Decl., Exs. 3 and 35. In February 2011, one month before Sprinkles was to open its D.C. store, Soft Serve began featuring "cupcakes" in new promotions via the social media sites Facebook and Twitter, where Sprinkles was already a pioneering marketer. Slafsky Decl., Exs. 36 and 37; Nelson Decl., Ex. D and E. *See, e.g.*, "A great day for a free espresso or kids ice-cream with your Sprinkles cupcake purchase." Soft Serve even copied Sprinkles' "whisper" campaign, in which Sprinkles distributes free cupcakes to social media "fans" who visit its stores and say designated passwords. *Compare*, Slafsky Decl., Exs. 36 and 37, and Nelson Decl., Exs. D and E. As a result, to the extent there has been any confusion, Soft Serve's own behavior is at least partly responsible.

Second, the Board should disregard, or heavily discount, Soft Serve's evidence of confusion on the ground that it is impermissible hearsay. Soft Serve's declarations merely present secondhand information concerning the alleged state of mind of other people who are not witnesses. Neither

Sprinkles nor the Board have the ability to probe the other people regarding their state of mind or the source of their confusion, if any. *See, Duluth News-Tribune v. Measbi Publ'g Co.*, 84 F.3d 1093, 1098 (8th Cir. 1998) (upholding denial of summary judgment in part because confusion evidence consisting of employee testimony regarding misdirected calls was “hearsay of a particularly unreliable nature”); *see also, Edom Labs. Inc. v. Lichter*, No. 91193427 (T.T.A.B. March 30, 2012) (non-precedential) (hearsay evidence is “of a minimal probative value in the absence of evidence from the third parties themselves”); *Citizens of Financial Group*, 2002 WL 32808575 \*1 (denying summary judgment for trademark plaintiff because of limited evidentiary value of phone log of 1,350 misdirected calls); *R.J. Ants, Inc. v. Marinelli Enterp.*, 771 F. Supp. 2d. 475, 496-97 (E.D. PA. 2011) (call log has limited value because there is no ability to question callers concerning their state of mind); *Primepoint, LLC v. PrimePay, Inc.* 545 F. Supp. 2d 426, 441-44 (D. Mass. 2008) (testimony and phone log heavily discounted because evidence is self-serving and does not establish confusion).

Third, the existence of a number of misdirected phone calls following the opening of Sprinkles' Washington, D.C. store in March 2011 is hardly evidence of actionable confusion. Such calls are *de minimis*, in context, and they are very likely the product of telephone operator error or similar mistakes, not trademark confusion. The Soft Serve declarations, for example, only identify evidence of 13 calls in a four-month period. During a typical four-month period, Sprinkles' Washington, D.C. store receives approximately 1,800 calls. Marsden Decl. That means the percentage of misdirected calls shortly after the Sprinkles store opened was well-below 1%. Such evidence does not come close to establishing that consumers have been confused about the source of the parties' respective goods or services or about any connection between the parties. *See, Lang v. Ret. Living Publ'g Co., Inc.*, 949 F.2d 576, 582-83 (2d Cir. 1991) (400 misdirected phone calls to plaintiff are not confusion evidence where plaintiff failed to show they stemmed from confusion between the marks); *Checkpoint Sys, Inc. v. Check Point Software Techs.*, 269 F.3d 270, 298 (3rd Cir. 2001), overruled on other grounds by *Fancaster, Inc. v. Comcast Corp.*, 2011 WL 6426292 (D.W.S. Dec. 22, 2011) (“it is uncertain whether the consumers were confused by the parties' similar names or whether directory assistance erred”); *Riverbank, Inc. v. River Bank*, 625 F. Supp. 2d 65, 74 (D. Mass. 2009) (denying summary judgment despite misdirected phone calls because no

additional evidence was produced to show “that the alleged confusion resulted in a mistaken purchase by any consumers”); *Becoming, Inc. v. Avon Prods., Inc.*, No. 01 CIV 5863 (JSM), 2001 WL 930794 \*8 (misdirected calls that are not directly related to purchasing decisions are not evidence of actionable confusion); *Savings Bank Life Ins. Co. of Mass. v. SBLI Mut. Life Ins. Co.*, No. CIV. A. 00-3255, 2000 WL 1758818 \*17-18 (E.D. Pa. 2000) (misdirected calls are not evidence of confusion when they are not shown to have impacted any purchaser decision).<sup>19</sup>

Fourth, the Soft Serve declarations in a number of instances refer to customers calling and inquiring whether there is a connection between Soft Serve’s store and the Washington, D.C. store of Sprinkles. These calls, if anything, are evidence *against* a likelihood of confusion. The inquiries suggest that the inquirers already suspect a distinction between the two parties. *Elec. Water Conditioners, Inc. v. Turbomag Corp.*, 221 U.S.P.Q. 162, 164 (T.T.A.B. 1984) (questions regarding relationship between trademark challenger and alleged infringer not actual confusion).

Fifth, and perhaps most importantly, to the extent there has been any confusion, it is undisputed that this has not caused *any* economic harm to Soft Serve. Slafsky Decl., Ex. 38.<sup>20</sup>

---

<sup>19</sup> Notably, the declarations on which Soft Serve is relying appear also to “double-count” misdirected calls; multiple declarations seem to describe the same incidents.

<sup>20</sup> Soft Serve cites *Miguel Torres S.A. v. Casa Vinicola Gerardo Cesari S.R.L.*, 49 U.S.P.Q.2d 2018 (T.T.A.B. 1998) for the proposition that it is entitled to summary judgment even absent evidence of any confusion. This is, in fact, a post-trial (not summary judgment) decision that, in any event, has been vacated by the Federal Circuit. *Casa Vinicola Gerardo Cesari S.R.L. v. Miguel Torres S.A.*, 230 F.3d 1372 (Fed. Cir. 1999).

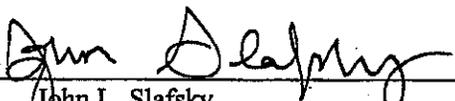
**CONCLUSION**

For the foregoing reasons, the Board should deny Soft Serve's Summary Judgment Motion in its entirety, consolidate this proceeding with the parties' other consolidated proceeding (parent no. 92054376) and reschedule the parties' remaining pre-trial and trial deadlines.

Dated: June 11, 2012

Respectfully Submitted,

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

By:   
John L. Slafsky  
Hollis Beth Hire

650 Page Mill Road  
Palo Alto, CA 94304-1050

MAYER BROWN LLP  
Richard Ben-Veniste, Esq.  
Richard Assmus, Esq.  
1999 K Street, N.W.  
Washington, D.C. 20006-1101

Attorneys for Applicant  
SPRINKLES CUPCAKES, INC.

**CERTIFICATE OF SERVICE BY HAND DELIVERY**

I, Elvira Minjarez, declare:

I am employed in Santa Clara County. I am over the age of 18 years and not a party to the within action. My business address is Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, California 94304-1050. I am readily familiar with Wilson Sonsini Goodrich & Rosati's practice for collection and processing of correspondence for same-day delivery by messenger. In the ordinary course of business, correspondence would be consigned to a messenger service on this date.

On this date, I caused to be personally served

1. **SPRINKLES CUPCAKES' OPPOSITION TO SOFT SERVE'S SUMMARY JUDGMENT MOTION [REDACTED VERSION]**
2. **DECLARATION OF JOHN L. SLAFSKY**
3. **DECLARATION OF CHARLES E. NELSON II**
4. **DECLARATION OF DONNA MARKS**
5. **DECLARATION OF RONALD G. GOODSTEIN, PH.D.**
6. **DECLARATION OF JOHN LOJPERSBERGER**
7. **DECLARATION OF TERRA MARSDEN**
8. **DECLARATION OF MATTHEW WALLACE**
9. **DECLARATION OF THOMAS WALSH**
10. **DECLARATION OF ANDREA WILLIAMS**

on the person(s) listed below by placing the document(s) described above in an envelope addressed as indicated below, which I sealed. I consigned the envelope(s) to a messenger for hand delivery by placing it/them for collection and processing on this day, following ordinary business practices at Wilson Sonsini Goodrich & Rosati.

Thomas J. Vande Sande  
Hall & Vande Sande, LLC  
10220 River Road, Suite 200  
Potomac, Maryland 20854

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Palo Alto, California on June 11, 2012

  
Elvira Minjarez

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

SOFT SERVE, INC. d/b/a SPRINKLES,	)	
	)	<b>Opposition No. 91194188 (parent)</b>
Opposer/Petitioner,	)	Opposition No. 91195669
	)	Opposition No. 91195985
v.	)	Opposition No. 91195986
	)	Opposition No. 91196035
SPRINKLES CUPCAKES, INC.,	)	Opposition No. 91196061
	)	Opposition No. 91196087
Applicant/Respondent.	)	Cancellation No. 92053109
	)	
	)	
	)	

**DECLARATION OF CHARLES E. NELSON II**

I, Charles E. Nelson II, declare:

1. I am the President and co-founder of Sprinkles Cupcakes, Inc. ("Sprinkles"), the Applicant/Respondent in these consolidated proceedings.

**History of Sprinkles Cupcakes**

2. My wife, Candace Nelson, and I founded Sprinkles in 2004, and we still own and operate the business today. In 2004 Sprinkles began selling bakery goods and on April 13, 2005 Sprinkles opened its first retail bakery in Beverly Hills, California. Sprinkles was the first cupcake-only bakery in the U.S. Sprinkles has for 8 years dedicated itself to using the best ingredients in a highly stylish and sophisticated presentation, to create a modern take on a classic treat.

3. Sprinkles and its cupcakes have been featured on numerous national television shows including *The Oprah Winfrey Show*, *The Martha Stewart Show*, *The Today Show*, *Good Morning America*, *Nightline*, *Access Hollywood*, *The Tonight Show*, *Live! with Regis and Kelly*, and *Entertainment Tonight*. Sprinkles has also been featured in major publications such as *The New York Times*, *The Los Angeles Times*, *Time*, *People*, *InStyle*,

*Bon Appetit, Gourmet, and Travel & Leisure.* In addition, Sprinkles has received considerable coverage in the Washington, D.C. press, including *The Washington Post, The Washington Times, Washingtonian, Politico* and *Roll Call*. True and correct copies of a sampling of such articles are attached to this Declaration as Exhibit A. Sprinkles has also been featured in local television news programs (ABC, CBS, NBC and Fox) in the District of Columbia.

4. Sprinkles' success and nationwide fame have afforded the company the opportunity to expand across the United States. In addition to its Beverly Hills store, Sprinkles now operates stores in Newport Beach (California, opened August 2006), Palo Alto (California, September 2008), Dallas (Texas, March 2007), Scottsdale (Arizona, May 2008), Houston (Texas, June 2010), Chicago (Illinois, July 2010), La Jolla (California, January 2011), Washington D.C. (March 2011), and New York (May 2011).

5. Each of the Sprinkles stores features the distinctive Sprinkles store design, which was created specifically for Sprinkles by an award-winning designer. The store design includes a copyrighted menu board design, angled light wood display shelving with built-in individual cupcake holes, and a tall (over 8 foot) glass panel in front of the cupcake display. Sprinkles' bakeries have won American Institute of Architects (AIA) Awards for design in Beverly Hills in 2006 and Chicago in 2011. The store is designed to present a luxurious, upscale experience to visitors.

6. Sprinkles attracts an upscale consumer base, looking for a top-of-the-line dessert and a luxurious experience. Sprinkles' popularity among Hollywood celebrities has greatly increased the brand recognition and cachet of Sprinkles' cupcakes in a short time.

7. Sprinkles' customers are particularly passionate, extremely loyal, and highly discriminating. Many of our customers travel from around the world specifically to visit our stores. They routinely purchase cupcakes "packed for travel" so that they can share them with out-of-state friends and family. Our stores routinely have long lines of customers outside, and

the lines sometimes are two hours long. Our stores even have customers when the stores are closed, now that we sell cupcakes via a 24-hour Cupcake ATM machine.

8. Sprinkles' cupcakes cost \$3.50 each, and \$39 for a dozen. The majority of Sprinkles' cupcakes have Sprinkles' distinctive "modern dot" trademark as a cupcake topper, and are therefore easily recognizable as Sprinkles' cupcakes. Sprinkles only sells fresh, out-of-the-oven cupcakes, and never sells day-old cupcakes.

9. Sprinkles' stores are not the only places where prospective customers can order and purchase Sprinkles' products. Sprinkles' cupcake mixes are also available in approximately 250 Williams-Sonoma stores throughout North America. Williams-Sonoma started selling Sprinkles-branded products in their stores and via their website, including more than a dozen stores in the District of Columbia and surrounding areas, as early as December 2006. Sprinkles' cupcake mixes cost \$14.95 in the Williams-Sonoma store and online.

10. Sprinkles also maintains a website at <[www.sprinkles.com](http://www.sprinkles.com)> (the "Sprinkles Website"), where customers can view Sprinkles' menu and place orders for Sprinkles' cupcakes and other products. The Sprinkles Website receives on average over 17,000 visits each day and 500,000 visits per month from Internet users, including, upon information and belief, many visitors from the District of Columbia and surrounding communities.

11. In addition to Sprinkles' exposure in national television and print media, Sprinkles has received considerable attention as the result of a highly coordinated and innovative social media promotional campaign. For example, Sprinkles promotes itself via a dedicated page on the online social network Facebook, where Sprinkles has attracted approximately 350,000 "fans" across the United States and around the world, including, upon information and belief, many fans from the District of Columbia and surrounding communities. Sprinkles regularly solicits visitors to its stores by asking its Facebook fans to come in to a store and to "whisper" a special code-word entitling the fans to a free cupcake or other discount. Sprinkles also maintains a Twitter account, and has over 85,000 Twitter followers, including, on information and belief, many followers from the District of Columbia

and surrounding communities. Sprinkles' innovative social media initiative has been noted in publications such as the *Los Angeles Times* and was recently featured by Facebook in connection with the company's "roadshow" for its initial public offering ("IPO"). Attached hereto as Exhibits D and E are relevant excerpts of Sprinkles' Facebook and Twitter pages.

12. Sprinkles has also received substantial attention due to the popular Food Network television program "Cupcake Wars," televised nationally since December 2009. My wife, Sprinkles' co-founder and head pastry chef Candace Nelson, is a featured judge on the program. "Cupcake Wars" is watched by approximately 60 million viewers and is the fourth-rated program on the Food Network (in the U.S.).

13. Sprinkles' first direct sales of cupcakes to Maryland and Virginia customers were in response to phone orders in 2008.

#### **Sprinkles' Trademarks**

14. My wife and I selected the SPRINKLES name for our business in 2004. At that time we had never heard of the Opposer/Petitioner Soft Serve or of any business in Maryland trading as SPRINKLES.

15. Since selling its first cupcake in 2004, Sprinkles has continuously used and extensively marketed its trademarks, which include SPRINKLES CUPCAKES, SPRINKLES CUPCAKES and Design, and SPRINKLES. As a result of Sprinkles' success and publicity, the Sprinkles trademarks have acquired significant recognition among consumers, and the general public has come to associate SPRINKLES and SPRINKLES CUPCAKES with Sprinkles' premium-quality desserts.

16. Sprinkles has been using the trademark SPRINKLES CUPCAKES in connection with bakery goods since at least as early as February 1, 2004 and with retail shops featuring baked goods since as early as April 13, 2005.

17. On June 12, 2007, Sprinkles obtained a federal registration for its SPRINKLES CUPCAKES trademark, U.S. Trademark Registration No. 3,250,609, covering "bakery goods" and "retail shops featuring baked goods."

18. Sprinkles has been using the trademark SPRINKLES CUPCAKES and Design in connection with bakery goods since at least as early as October 19, 2004 and with retail shops featuring baked goods since as early as April 13, 2005.

19. On July 31, 2007, Sprinkles obtained a federal registration for its SPRINKLES CUPCAKES and Design trademark, U.S. Trademark Registration No. 3,271,643, covering “bakery goods” and “retail shops featuring baked goods.”

20. Sprinkles has been using the trademark SPRINKLES in connection with bakery goods since at least as early as February 1, 2004 and with retail shops featuring baked goods since as early as April 13, 2005.

21. On October 9, 2007, Sprinkles obtained a federal registration for its SPRINKLES trademark, U.S. Trademark Registration No. 3,306,772, covering “bakery goods” and “retail shops featuring baked goods.”

22. On June 29, 2009, Sprinkles filed an intent-to-use trademark application with the U.S. Patent and Trademark Office for the mark SPRINKLES for “ice cream; frozen yogurt; candy; sweets; cupcake mixes; ice cream sundaes, sherbets, ices, sorbets, [and] milk shakes.” The application has been allocated Serial No. 77770541.

23. On June 29, 2009, Sprinkles filed an intent-to-use trademark application with the U.S. Patent and Trademark Office for the mark SPRINKLESMOBILE for “retail store services featuring baked goods; mobile retail store services for the sale of baked goods from a custom vehicle.” The application has been allocated Serial No. 77770532.

24. Sprinkles has been using the trademark SPRINKLES CUPCAKES in connection with pet treats since at least as early as April 13, 2005.

25. On September 21, 2010, Sprinkles obtained a federal registration for its SPRINKLES CUPCAKES trademark, U.S. Trademark Registration No. 3,849,382, covering “pet treats.”

26. Sprinkles has been using the trademark SPRINKLES CUPCAKES in connection with serving trays and serving towers since at least as early as April 13, 2005.

27. On September 21, 2010, Sprinkles obtained a federal registration for its SPRINKLES CUPCAKES trademark, U.S. Trademark Registration No. 3,849,383, covering “serving trays; serving trays with recessed holes to hold cupcakes; serving towers, namely, towers comprised of stacked serving trays.”

28. On August 12, 2009, Sprinkles filed an intent-to-use trademark application with the U.S. Patent and Trademark Office for the mark ISPRINKLES for “computer software for locating retail stores featuring bakery goods, desserts, and merchandise, for sending gift certificates for bakery goods, desserts, and merchandise, for sending virtual bakery goods, desserts, and merchandise, for games featuring bakery goods and desserts, for ordering bakery goods, desserts, and merchandise, and for providing information about bakery goods, desserts, and merchandise; computer software for mobile devices for locating retail stores featuring bakery goods, desserts, and merchandise, for sending gift certificates for bakery goods, desserts, and merchandise, for sending virtual bakery goods, desserts, and merchandise, for games featuring bakery goods and desserts, for ordering bakery goods, desserts, and merchandise, and for providing information about bakery goods, desserts, and merchandise.” The application has been allocated Serial No. 77802907.

29. On October 27, 2009, Sprinkles filed an intent-to-use trademark application with the U.S. Patent and Trademark Office for the mark SPRINKLES CUPCAKES for “clothing, namely, shirts, tank tops, baby bodysuits, hats.” The application has been allocated Serial No. 77858599.

30. On November 5, 2009, Sprinkles filed an intent-to-use trademark application with the U.S. Patent and Trademark Office for the mark SAY IT WITH SPRINKLES for “retail shops featuring baked goods.” The application has been allocated Serial No. 77866405.

31. On November 9, 2009, Sprinkles filed an intent-to-use trademark application with the U.S. Patent and Trademark Office for the mark I LOVE SPRINKLES for “bakery goods” and “retail shops featuring baked goods.” The application has been allocated Serial No. 77868765.

32. On November 11, 2009, Sprinkles filed an intent-to-use trademark application with the U.S. Patent and Trademark Office for the mark I LOVE SPRINKLES and Design for “clothing, namely, shirts, tank tops, baby bodysuits, hats.” The application has been allocated Serial No. 77870009.

33. On November 13, 2009, Sprinkles filed an intent-to-use trademark application with the U.S. Patent and Trademark Office for the mark SAY IT WITH SPRINKLES for “bakery goods.” The application has been allocated Serial No. 77872012.

34. On December 15, 2010, Sprinkles filed an intent-to-use trademark application with the U.S. Patent and Trademark Office for the mark SPRINKLES for “aromatic body care products, namely, body lotion, shower gel, cuticle cream, shampoo, conditioner, non-medicated lip balm, soap, body polish, body and foot scrub and non-medicated foot cream; skin lotion; sun care lotion; sun tan lotion; skin cleansing lotion; after-shave lotion; bath soaps in liquid, solid or gel form; cosmetic soaps; hand soaps; nail polish; cosmetics.” The application has been allocated Serial No. 85198795. (The Sprinkles’ trademark registrations cited in the paragraphs above are referred to collectively as the “Registrations” and the Sprinkles’ trademark applications cited in the paragraphs above are referred to collectively as the “Applications”).

35. Since 2004 Sprinkles has invested millions of dollars in developing its SPRINKLES-related brands.

36. Sprinkles has diligently enforced its trademark rights in order to avoid marketplace confusion. Over the past five years or so Sprinkles has had its outside counsel send out approximately 30 cease-and-desist letters with respect to infringing SPRINKLES-related marks, and Sprinkles has also litigated such issues, when necessary, in federal court. The vast majority of these efforts have been successful.

### **Sprinkles of Palm Beach**

37. It is my understanding that Sprinkles in Palm Beach, Florida has operated a “Sprinkles” business since at least as early as 1985. It is also my understanding that

Sprinkles (Palm Beach) has offered bakery goods commonly sold in ice cream and sandwich shops since long before the current owner, Therapy Too, assumed ownership of the store in October 2002.

38. Sprinkles (Palm Beach) is a popular tourist destination in a busy Palm Beach shopping district. Sprinkles (Palm Beach) has received national press in publications including *People* magazine, which voted Sprinkles' Triple Chocolate Supreme flavor the best ice cream in the country in 2003. Sprinkles (Palm Beach) was also featured in *The New York Times* and *The Washington Post* as early as 1991. True and correct copies of the newspapers articles are attached as Exhibit B.

39. Therapy Too filed two U.S. trademark applications: for SPRINKLES OF PALM BEACH and SPRINKLES PALM BEACH and Design. The first application, for the word mark SPRINKLES OF PALM BEACH was filed on November 13, 2002. SPRINKLES PALM BEACH and Design was filed on July 16, 2003. These applications matured into U.S. Trademark Registration Nos. 2,938,800 (SPRINKLES OF PALM BEACH) and 3,004,757 (SPRINKLES PALM BEACH and Design) for "ice cream" and "retail store services featuring ice cream" (the "Sprinkles Palm Beach Registrations"). The registrations include disclaimers of, respectively, OF PALM BEACH and PALM BEACH. The registrations are now incontestable, and trademark priority for these registrations dates back to at least as early as October 2002. True and correct copies of the Sprinkles Palm Beach Registrations are attached as Exhibit C.

40. Therapy Too assigned all rights to these SPRINKLES-related trademarks to Sprinkles on July 21, 2009. Sprinkles in turn licensed the marks back to Therapy Too. Since that time we have periodically reviewed the quality of products and services offered under the licensed marks.

#### **Sprinkles' DC Store**

41. Sprinkles planned to open a store in Washington, D.C. since at least as early as 2006, and listed Washington, D.C. as one of the cities in the "Opening Soon" section of

the Sprinkles website from that time until 2011. On March 3, 2011, Sprinkles followed through with its longstanding plans and opened a store on M Street in the Georgetown neighborhood.

42. I am not aware of any customer confusion arising from Sprinkles' use of SPRINKLES-related trademarks at its Sprinkles D.C. store. To the best of my knowledge, none of Sprinkles' employees at the D.C. store are aware of any instances of confusion arising from Sprinkles' use of its SPRINKLES marks. In particular, no one has ever communicated to Sprinkles any confusion about the source of our cupcakes or services, or about any connection between Sprinkles and Soft Serve.

43. I am not aware of any customer confusion arising from Sprinkles' use of SPRINKLES-related trademarks in connection with its promotion and sales of products at Williams-Sonoma stores in the greater Washington, D.C. area or elsewhere. As set forth above, Williams-Sonoma has been selling these products locally and nationally since 2006.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Beverly Hills, California, on June 7, 2012.

By:



CHARLES E. NELSON II

# **EXHIBIT A**

YOUR TIME

FOOD

# CUPCAKE NATION

By JOEL STEIN

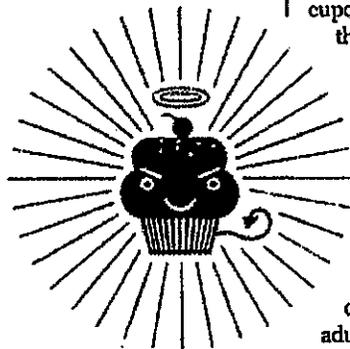
THERE'S NOTHING INHERENTLY WRONG WITH THE CUPCAKE. Just like there's nothing inherently wrong in the Koran. But our society's twisting of the cupcake's role has become a sickness. They've paved the local bakery and put up a \$3 cupcake store. Not only has the cupcake specialty boutique spread like a contagion to nearly every major city in the country, but nearly a dozen cupcake-recipe books have come out in the past two years, which is particularly amazing when you consider that,

not counting dye, there are only about seven ingredients in a cupcake.

Patient zero was Magnolia, a tiny, retro bakery in New York City's West Village, which, in 1996, had some extra batter and made a dozen cupcakes. Soon Magnolia had to institute a limit on cupcakes per customer. Then Sarah Jessica Parker, who lived nearby, put her local phenomenon on *Sex and the City*, leading tour buses to stop there. At the admittedly delicious Sprinkles in Los Angeles, which Oprah declared her favorite cupcake after getting a box from Barbra Streisand, the line on weekends is more than half an hour long. Which, yes, is longer than it takes to bake a cupcake.

I totally get it. As a kid, my heart pumped in anticipation of a classmate's birthday and the inevitable arrival of that wide, low pink box. I'd pick away at the frosted top, then collect the remaining pure cake in both hands, eating out of my palms like a crazed bird on a sugar high. And when no one was looking, I'd shove the paper in my mouth and chew it like cupcake gum. Even now I like an occasional chai latte-flavored Sprinkles cupcake, just as I appreciate a great burger or mac and cheese. The prob-

**These are scary times. That's when people crave comfort food**



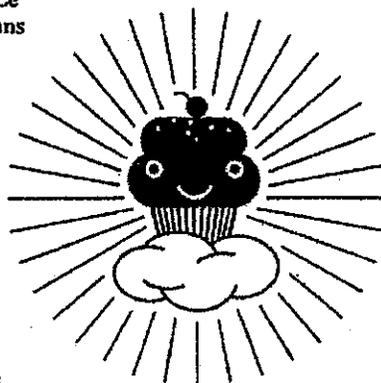
lem is that in the yuppie-under-40 set, there are no other desserts. Just a constant weighing and comparing and blogging about the nation's cupcakeries, as if they were the *Goldberg Variations*.

To my shock, Michelle Myers—who trained at Le Cordon Bleu in Paris, runs the patisserie Boule in Los Angeles and makes some of the best *canelés* and Parisian macarons in the U.S.—approves of cupcake mania. "It crossed our minds that we put a lot of expensive ingredients and skilled technique into making *canelés*, and they're the

same price as cupcakes," she says of what artisanal bakeries have discovered is the most profitable dessert not made by Hostess. But Myers also loves being transported to her childhood via the American madeleine. She not only buys cupcakes but also bakes them on weekends for her little sister.

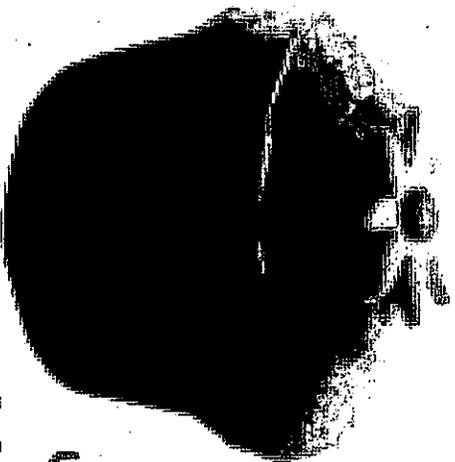
Candace Nelson, who co-owns Sprinkles with her husband, opened a second Los Angeles location last week and plans to go national. "These are scary times. That's when people crave comfort food," says the former investment banker. "That's why I went into the cupcake business. I'm in this little cupcake bubble where everyone is smiling ear to ear."

That's what bugs me about cupcakes: they're fake happiness, wrought in Wonka unfood colors. They appeal to the same unadventurous instincts that drive adults to read *Harry Potter* and watch *Finding Nemo* without a kid in the room. They're small and safe, and so people convince themselves that they can't have that many calories. They are the dessert of a civilization in decline. The worst part is, I want a cupcake right now but bad. ■



ILLUSTRATIONS FOR TIME BY GREG MANN

# What Hath Starbucks Wrought?



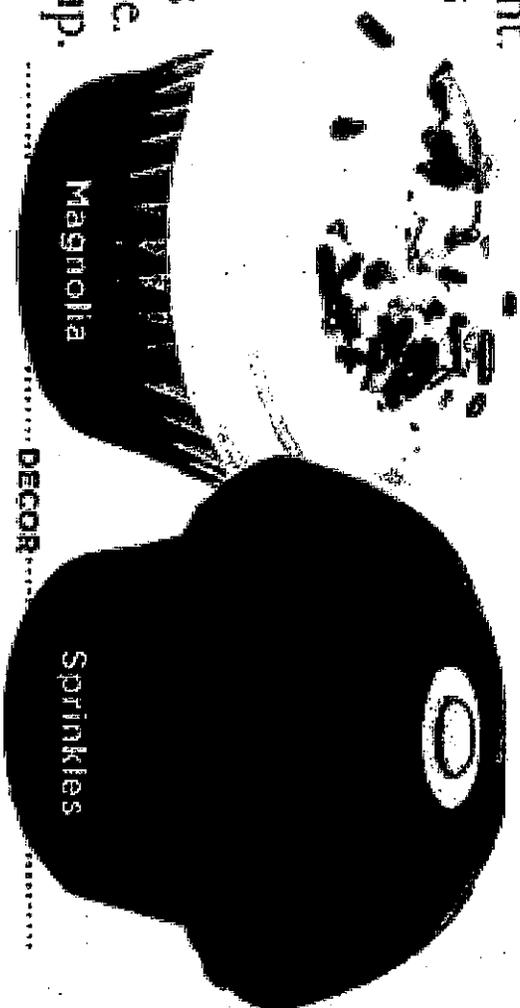
• Sprinkles Cupcakes opened a chic, minimalist Beverly Hills, Calif. store a year ago, selling flavors like lemon coconut and chai latte for \$3.25 a cupcake. Here, vanilla isn't just vanilla. It's Madagascar Bourbon Vanilla.

—Miriam Gottfried

# the great cupcake smackdown

Los Angeles and New York are at each other's throats—  
 or maybe taste buds—over who rakes the cake. Cupcake, that is.  
 The diminutive sweets have become high-end party treats, cure  
 gifts, and an edible style statement.

While there are many bakeries  
 vying for the crown in each city,  
 pioneering Magnolia Bakery  
 in Manhattan and newcomer  
 Sprinkles Cupcakes in L.A.  
 have emerged as the leaders  
 in the bicoastal battle.  
 Here's how they stack up.



Lace curtains, pastel green  
 walls, and a faded blue  
 awning are very *Qualit Eye*  
 for the *Straight Girl*.

## DECOR

Chocolate-colored Bertola wire  
 chairs and sleek wood paneling  
 feel like Barcelona modern  
 meets Beverly Hills schmancy.

## SCENE

Tourists doing their best Carrie  
 Bradshaw impressions and post-  
 date couples looking for  
 a cheap and cheerful dessert.

Desperate Beverly Hills  
 housewives and post-audition  
 starlets drowning their sorrows  
 in buttercream frosting.

## CUPCAKE

Classic versions like Red Velvet  
 cake and the standby yellow  
 cake adorned with cheery toppers.  
 The not-too-sweet cornbread  
 cake tempers the sugar rush  
 from the super-sweet icing.

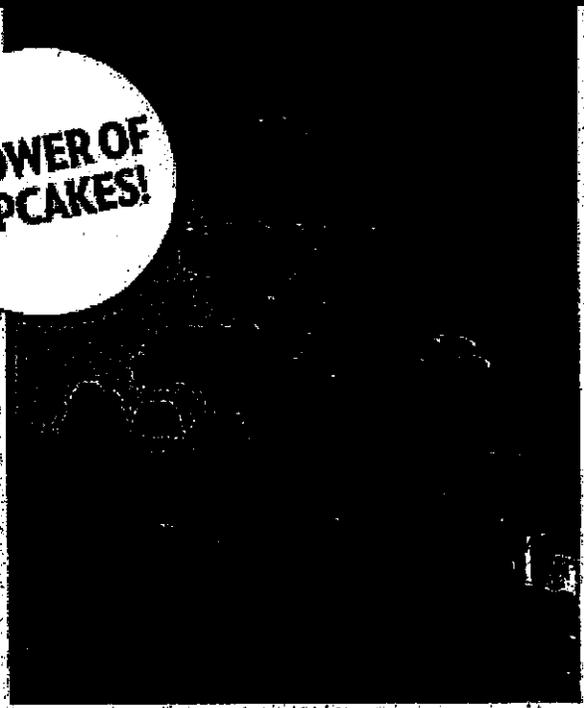
Rich frosting is thickly  
 spread on top of moist cake.  
 Flavors include all the honey  
 favorites like chocolate and  
 lemon, plus the only-in-L.A.  
 Chal Latte.





# BRITISH

A TOWER OF CUPCAKES!



After the dinner buffet, the partygoers were treated to one of Katie Holmes's favorite desserts: chocolate cupcakes. Another big treat of the night? Star spotting. Among the other guests attending the bash: Brooke Shields, Bruce Willis, Derek Luke, Matthew Perry, Star Jones Reynolds, Tom Hanks and wife Rita Wilson, Ron Howard and Jamie Foxx. "It wasn't the young Hollywood crowd," says a guest. "It was classy, elegant Hollywood in a fun way."

**DEMI MOORE,  
& FOREST WHITAKER**

By Jennifer Wulff, Alexis Chiriac, Elizabeth Leonard in L.A.



Home News Travel Money Sports Life Tech Weather

## Streisand's swan song



Enlarge

By Danny Moloshok, AP

Streisand struts her stuff onstage during her last tour stop in Los Angeles, where she sang to Leonardo DiCaprio, Tom Hanks, Rob Lowe, Shirley MacLaine and a host of other celebs.

By William Keck, USA TODAY

LOS ANGELES — While half of Hollywood was making its way back from TomKat's Italian wedding, what seemed like the other half was seated in the front two rows of the Staples Center Monday night to catch the final performance of Barbra Streisand's 2006 tour.

But was the sold-out concert truly her last?

She confirmed that it was only "the last time I'm ever ... going to wear this dress."

Getting a chuckle from her audience, Streisand shot back, "What did you think I was going to say?"

In fact, near the end of the show, Streisand confirmed she has been approached to sing in China and is considering "maybe six more" (shows) in Europe.

Among the famous faces in the crowd: Leonardo DiCaprio and his mother, Irmalin; Tom Hanks and Rita Wilson; Goldie Hawn and Kurt Russell; Sidney Poitier; Rob Lowe; David Hyde Pierce; Ben Stiller and his wife, Christine Taylor; Meg Ryan; Rosie O'Donnell; Sydney Pollack; Diahann Carroll; Shirley MacLaine; Streisand's ex-husband, Elliott Gould; and Jeff Bridges, who escorted his elderly mother, Dorothy, to her seat.

"Her optimism" was MacLaine's favorite part of Streisand's concert. "But the best part was just finding my seat."

The only two celebrities Streisand said hello to from the stage were Barry Manilow and her "dear friend, Q" — as in music producer Quincy Jones.

But she did shine the spotlight on two female Democratic politicians from California in the crowd: U.S. Sen. Barbara Boxer of California and incoming House Speaker Nancy Pelosi, who was seated in front of Bill Maher.

"What a House — and the Senate, too," Streisand quipped, mimicking the same line Billy Crystal delivered two weeks ago at a tribute to Tony Bennett.

Streisand said that when she made 1978's *A Star Is Born*, there were no women in the Senate; 16 will serve in the new term.

The singer happily responded to many expressions of love from the audience. Only once did she have to admonish the overly excited crowd, playfully scolding, "Don't talk amongst yourselves."

The usually guarded Streisand, 64, dropped a few tidbits about her personal life.

She expressed her gratitude in being back in L.A., where she could sleep in her bed and walk in her garden and "get a sunburn in November." Temperatures reached the 90s on Monday.

Though no mention was made of her husband, James Brolin, she said son Jason Gould, 39, recently purchased a home, which, she said, "I helped him paint."

She also said mother and son often begin their mornings by analyzing each other's dreams.

During her three months on the road performing, she said, her own house was being remodeled.

She had intended to spend her first day back in L.A. at the Pacific Design Center to select new tiles but instead made visits to her favorite eateries.

Among her stops: Malibu Seafood, Il Pastaio restaurant and Sprinkles Cupcakes.

"I never got to the Design Center, but I got a taste of L.A.," she said, raving, "Fabulous. Fabulous."

She also cracked several jokes about her age, expressing gratitude for a teleprompter. She blamed "a senior moment" for nearly prematurely jumping into a song. And later, she slipped on her reading glasses and complained of "a cramp in my calf" while sitting at a piano to play the first song she ever wrote. Her musical guests, "opera" quartet Il Divo, contributed their own jokes about her advanced years — mostly about enjoying her music since they were little boys in their various countries.

Streisand ended the evening with a version of *Happy Days Are Here Again*, explaining that the original was written after the stock market crash of 1929, which launched the Great Depression. But, she said, "the people have spoken," referring to the Democratic victory in this month's elections, and "my depression is over."

The New York Times

## Fashion & Style

WORLD U.S. N.Y./REGION BUSINESS TECHNOLOGY SCIENCE HEALTH SPORTS OPINION ARTS STYLE TRAVEL JOBS REAL ESTATE AUTOS

FASHION & STYLE DINING & WINE HOME & GARDEN WEDDINGS/CELEBRATIONS T: STYLE

### So, Sweetie, I Quit to Bake Cupcakes



Monica Almeida/The New York Times

Second-act bakers in the Los Angeles area include Amy and Jeremy Berman of the Vanilla Bake Shop.

By AUDREY DAVIDOW

Los Angeles

Enlarge This Image



Monica Almeida/The New York Times  
Mary Odson and Lisa Ribor of Big Sugar (with supportive children).

AS Hollywood apprentices go, Amy Berman had it pretty good as a production assistant on "Will & Grace." She met guest stars like Madonna and Jennifer Lopez, hung out in the writers room and often had drinks with producers after the Tuesday-night tapings. It was a plum Hollywood primer, letting her explore whether writing, directing or producing might be right for her.

After a year and a half of shuttling scripts, she figured it out: what she really wanted to do was bake. She left the entertainment industry for pastry school, and in 2005 began delivering bite-size cupcakes to the sets of TV shows like "The Office." Next week, her bakery, the Vanilla Bake Shop, a little place with cotton-candy-color walls, is to open in Santa Monica, Calif. "I'm still working 15 hours a day," said Ms. Berman, now 29, "But it's my passion"

Inspired by the allure of the quaint, the glamorization of the food industry and the success of places like Sprinkles Cupcakes in Beverly Hills, which brought the let's-wait-in-long-lines-for-a-cupcake trend to the West Coast, a rash of white-collar professionals in Los Angeles have traded corporate jobs for lives as flour-coated entrepreneurs. In the past year, about a dozen boutique bakeries serving expensive versions of all-American desserts like banana pudding and \$3 red velvet cupcakes have popped up around the city, many run by second-act bakers.

Kirk Rossberg, who owns the 23-year-old Torrance Bakery in the South Bay area of Los Angeles County, said he's swamped with intern applicants. "Until last year, I never had people asking to work for free," said Mr. Rossberg, who is also president of the California Retail Bakers Association. He estimated that of the 30 interns he used this year, 90 percent were leaving professional careers to pursue a dream of opening a bakery.

Blame it on a culture where the BlackBerry-obsessed run around like overcaffeinated track stars, but there is a tremendous craving for comfort, particularly in fast-paced cities like Los Angeles, said Grant McCracken, the author of the book "Culture and Consumption II: Markets, Meaning and Brand Management." For many people, he said, "baking represents that, it harkens back to a simpler time." Comfort food, it seems, has become a comfort career.

Lesley Balla, the editor of the foodie blog *Eater LA*, said: "Do we really need another bakery? Probably not. But Angelenos have been starving for sugar and carbs for so long that the bakeries seem like a breath of fresh air." Besides, she said, "if it's the hot new thing, everyone's going to really want it in L.A. because that's what we do."

And, perhaps, overdo. Jonathan Gold, the Pulitzer-winning food critic for *LA Weekly*, said hardly a week goes by without a box of cookies or cupcakes landing on his desk from a new place he's never heard of. "And they're not just cupcakes," he said. "They're cupcakes with publicists."

Still, Mr. Gold understands why the city might inspire a craving for jobs with more tangible fruits. "In a town where people say no to you all the time and you rarely have the simple satisfaction of getting something made, being able to make a sweet simple thing that makes people happy is really compelling."

Rebecca Marrs, the director of career services at the California School of Culinary Arts in Pasadena, has seen a noticeable rise in the number of older career-shifters, as opposed to 20-somethings hoping to break in after high school or college. Enrollment in the baking program increased 31 percent last year, she said, and the school recently added its first evening and weekend patisserie program to accommodate demand from working professionals looking to switch acts.

Not all late-blooming bakers cultivate the craft at pastry school. Many simply rely on recipes and skills they picked up in grandma's kitchen, with their own ovens and hand mixers playing supporting roles.

Take Charles and Candace Nelson, the team behind the Los Angeles-based cupcake chain Sprinkles, who bid farewell to six-figure investment banking salaries in 2002 to start a dessert-catering business out of their kitchen.

"It was a crazy time to be opening a bakery," Ms. Nelson said. "The 'South Beach Diet Cookbook' was a best seller." She vividly remembers wedding-shower guests refusing to try her cupcakes for fear of exceeding their carb allotment.

Enlarge This Image



Candace Nelson of Sprinkles.

Nationwide, it was a difficult time for sweets. According to MarketResearch.com, after a four-year no-carb slump, the baked goods business started bouncing back in 2005.

Now, even the sveltest of women can't seem to stop wiping butter cream from their lips.

When the first Sprinkles location opened in April 2005, the couple sold 2,000 cupcakes the first week. Fans, including Oprah Winfrey and Katie Holmes, have been lining up ever since, and now the Nelsons have stores in Dallas and Orange County, Calif., with plans to open six more across the country next year.

Despite their business success, their new life isn't necessarily easier. "I found the one job where the hours are worse than investment banking," Ms. Nelson said. "We're on call essentially 24-7." She is due to have the couple's first baby next month and plans to take only a two-week maternity leave.

Not that they, or others who have made the tradeoff, regret it.

Genevieve Ostrander, who opened Deillah's Bakery in the Echo Park neighborhood of Los Angeles four months ago, said her former job as a beauty publicist was "soul sucking." Now, she specializes in making Southern-inspired desserts. "I'm the poorest girl in all of L.A. I don't eat out, I don't shop, I even had to cancel my cable," said Ms. Ostrander, 34. "But I love it."

Lisa Ritter and Mary Odson, the partners behind the new bakery Big Sugar in the Studio City neighborhood (whose doughnut muffins have a big fan in Marc Cherry, the creator of "Desperate Housewives"), were stay-at-home mothers with corporate pasts looking for a flexible way back into the work force. Now, the children have a place to come after school. "The quality of life is fantastic," Ms. Ritter said. "We get to see our kids so much more."

Of course, turning a baking hobby into a business isn't just a Los Angeles trend. Warren Brown, the lawyer who opened CakeLove in Washington in 2002, is now the host of the Food Network show "Sugar Rush." Then there's Jennifer Appel, the clinical psychologist who, with Allysa Torey, opened Magnolia Bakery in New York in 1996, which many credit with starting the cupcake obsession.

Success doesn't always come easy. The failure rate in the baking business is significant, said Abbye Williams, a consultant who is helping a former teacher open a gluten-free bakery in Culver City. "I think she's crazy, to tell you the truth," Ms. Williams said. "She doesn't have any experience and a brick-and-mortar bakery is a ton of work."

Which is why Clare Crespo, a former music producer, skipped the storefront and with two partners rolled out Treat Street, a roving bakery stand, last September. Inspired by Lucy's psychiatry kiosk in the Peanuts, the pink polka-dot stand pops up in the bohemian Silver Lake neighborhood on random Saturdays.

"The idea is like a rave," said Ms. Crespo, who posts pink signs to direct customers to the secret location. "We set up when people are least expecting it. If someone gave me a ton of money, maybe I'd open my own place, but it's still so much pressure and work — waking up early and making the same thing every day.

"This is more like playing bakery."

The New York Times Company

## Halfway around the world and back and increasingly confused

By Tyler Brule

The past week was a bit faster than usual for your cloud-bound correspondent. Flying halfway around the world and back again in just over a week, here's what I found.

LHR-LAX-LHR-ZRH-LHR-NRT-SYD-BKK-LHR: those were the letters that jumped off the page when my intrepid assistant Gaby handed me my week's itinerary last Monday. Any regular traveller would recognise that the second and third LHRs should have been deleted and the ZRH inserted just after the BKK. Even the less-seasoned flier would know that London-Los Angeles-London-Zurich-London-Tokyo-Sydney-Bangkok-London is pushing it (no matter where you're sitting on the plane), but a board meeting in Zurich demanded I return to Europe before embarking on my Pacific Rim runaround.

The first leg of my journey started in seat 1A on the early BA to LA.

I knew I was in for an irritating flight as soon as the canapes were placed in front of the gentleman across the aisle. My fellow passenger eventually decided on the prawn and rice concoction and popped it in his mouth. I normally wouldn't pay such close attention, but I was trying to peer out of his window to get a fix on our location and soon became transfixed when I noticed that he was incapable of eating with his mouth closed. Initially I dismissed the bad table manners as post-take-off nerves or a mild case of "upgrade excitement" but rapidly concluded that he was a "smacker" - the airborne adult equivalent of the screaming one-year-old.

Just as it's impossible to block out a wailing infant two rows behind you, it's equally challenging to cancel out a grown man who smacks through a five-course meal when he's within your immediate airspace. At first I tried staring at him with my best look of bewilderment. On several occasions I considered saying something and in the end had to resort to headphones to delete the sound of a pasty tongue disengaging from sticky gums.

By the time I reached Los Angeles I was in desperate need of a sugar hit, having been put off the afternoon scones and jam by my neighbour. I replenished my supplies by paying a visit to Sprinkles on Little Santa Monica in Beverly Hills. Launched in April, Sprinkles is a modernist cupcake emporium created by former Martha Stewart editor Page Marchese-Norman. Owned by Charles and Candace Nelson, the chocolate-brown, white and oak space trades in 20 varieties of cupcakes (coconut's my favourite) and is already establishing itself as a "must-visit" brand. Where most cupcake emporiums have gone for twee interiors, Marchese-Norman devised a strict, orderly concept with the help of LA-based Austrian architect Andrea Lenardin Madden. Working with the best ingredients and a strong packaging concept, a national roll-out of Sprinkles can't be far off.

Back at LAX 24 hours later, and running very late for my flight to Heathrow, I only had time to grab a copy of the New Yorker and Martha Stewart Living from the newsstand. Since Martha's release, it's clear she's been spending her time under house arrest giving her editorial staff a hard time as the magazine has improved significantly. While climbing to our cruising altitude, I decided that I have to build a screened-in summer room something like the one Martha's team have created in her July issue.

Connecting to Zurich the following afternoon I managed to leave my Fay navy blazer on my Swiss flight and was quite convinced I'd never see it again. By the time I'd finished my board meeting the next morning, the jacket had been recovered and was waiting for me at terminal one. The lady at lost and found proudly told me that pretty much everything gets returned at Zurich airport.

Two hours later I was back at Heathrow, where I picked up Gaby for the Asian portion of my tour - and her first trip to Tokyo.

As ever, the city put on a good show. In Marunouchi I visited the flagship store for Darjeeling Days - the latest concept to come from the United Arrows retail group. Aimed squarely at the male FT reader who doesn't want fashion but does want an elegant, high-quality wardrobe, the concept is already going national across Japan. In Ginza I visited the atelier of Shigeru Takizawa, who's fast becoming Tokyo's most sought after bespoke tailor. In Shinjuku I marvelled at the new-ish Issetan men's store and decided it's the new global benchmark for menswear. Although I didn't need any new garments, I still managed to walk out with a summer tribby from the old-school Tokio Hat brand, eyeglasses from Four Nines and some crisp cotton Gunze briefs.

Remembering that this was also a cultural/social study for Gaby, I took her over to the main Issetan building and gave her a tour of the pinny and slipper section. There's been a proliferation of labels churning out housedresses, aprons, headkerchiefs and little felt booties, so everyone residing in Ebisu and Aoyama can pretend they're either living off the land in Norway (the Ogg brand has cornered this look) or raising chickens in the Piemonte region of Italy.

Escaping the 40°C heat of Tokyo, Sydney greeted us with sunny skies and a crisp 18° C. Still playing tour guide to Miss Gaby, I took her to visit the newest branch of my friend Bill Granger's collection of restaurants, Bills Woolahra, on the corner of Queen Street and Moncur. This latest branch has the added benefit of an entire courtyard filled with tables.

At the time of filing this copy, it's now somewhere between Wednesday and Thursday and I believe I'm on the Qantas QF1 to London. The reason I'm unsure is that there's barely an Australian crew member in sight.

The back of the aircraft seems to be manned by Thai crew and First and Business by English flight attendants. The experience doesn't feel very Qantas - more a set of disconnected people working on a 747-400 that's the flag carrier for a country they have no relationship with. No doubt there are some short-term cost-savings, but for me, who's been around the world in a week, I'd like to know exactly where I am and who I'm flying with. Qantas's finance department might be seeing an upside, but I'm only seeing brand erosion.

tyler.brufe@ft.com

|

This Was Printed From Houston Business Journal

## Sprinkles Cupcakes cashes in on Houston's sugar rush

Premium content from Houston Business Journal - by Allison Wollam

Date: Monday, June 14, 2010, 12:00am CDT - Last Modified: Thursday, June 10, 2010, 5:09pm CDT

Tom Cruise used them to woo Katie Holmes.

Hugh Hefner and his band of buxom beauties sampled them on "The Girls Next Door."

They've even been on Oprah. And now they're coming to Houston.

After trying to find a suitable Bayou City location for the past three years, Sprinkles Cupcakes, the apparent cupcake of choice among several high-profile celebrities, is preparing to open a shop this month in Highland Village.

Charles Nelson, who owns Sprinkles Cupcakes along with his wife Candace, says the owners wanted to come to Houston years ago, and began talking to Highland Village in 2007 after the California-based company opened its first shop in Dallas.

"We've had a couple of near misses at Highland Village," he says. "They ended up putting some other tenants in spots where we thought we were going. The lease has been signed for a year and a half, but we think it will be worth the wait."

Sprinkles Cupcakes will be located in a 2,000-square-foot site in a building currently under construction in the high-profile upscale shopping center at the corner of Drexel and Westheimer.

The store is slated to open June 21. Sprinkles is donating its first day of sales — an estimated \$25,000 — to the Shane Battier Take Charge Foundation. Battier, a Houston Rockets player, will be behind the counter serving cupcakes that day from 11 a.m. to 1 p.m.

He says the most popular cupcakes, by far, are the red velvet cupcakes and the black and white cupcakes. Sprinkles Cupcakes also sells cupcakes without frosting for customers who aren't fans of the sweet stuff and frosting shots for customers who only want the frosting.

When the Nelsons opened the first Sprinkles Cupcakes location in 2005, it was the only bakery in the U.S. that just sold cupcakes. Now, cupcake cafes are popping up in every market that Sprinkles Cupcakes enters — or in the case of Houston, several have already been established prior to its arrival.

Local spots like Crave, Sugarbaby's Cupcake Boutique, Celebrity Cupcakes and Frosted Betty will all be competing with Sprinkles for business.

"It's fun that there are so many choices now," he says. "There's been sort of a renaissance for bakeries and people are once again appreciating homemade, made-from-scratch desserts."

Elizabeth Harrison, owner of Crave cupcakes, which opened in Houston two years ago, agrees there is plenty of room in the market for a new concept.

"Our customers come from all over the place and Houston is such a huge city," she says.

Harrison has experienced such a positive reception to her first store in Uptown Park that she's planning to open a second location in West University by the end of the summer.

The second store, at 5600 Kirby, will offer an expanded selection of breakfast cupcakes, six new cupcake flavors and a full coffee and espresso bar.

"Cupcakes are still available at bakeries all over town, but I think that when you focus on just one thing you are able to do it very well," she says. "I think people appreciate the commitment."

Based on current pricing, local high-end cupcake outlets are competing more on taste and service rather than price.

Sprinkles charges \$3.25 per cupcake or \$3 each when purchased by the dozen, the same prices as when the Nelsons launched the concept five years ago. That is the same price as Crave cupcakes, and the same price for Sugarbaby's "Sugar Chic Line" cupcakes. Sugarbaby's sells its "Old Fashioned" line of cupcakes at a slightly lower price, at \$2.75 for a single and \$31 for a dozen.

Nelson and his wife were both investment bankers before starting Sprinkles Cupcakes. He recalls that, at that time, starting a cupcake bakery was a high-risk venture.

"From our research, a cupcake bakery had the highest risk for failing and a low potential for return, but we went ahead and did it anyway," he says.

Nonetheless, he says the bakery segment in general has seen an uptick in business in recent years. For a while, he says, many second and third-generation bakeries were not receiving enough investment and were not using the highest-quality ingredients, eventually causing the industry to suffer.

Much like the dot-com bust, he believes that the current cupcake craze could crest, but he says there will always be a place for a business that offers a good product at a reasonable price point and great customer service.

"It's really a return to artisan food," he says. "We're offering a new, modern take on the cupcake."

Crave's Harrison also doesn't see the cupcake craze going away anytime soon.

"I eat a good number of cupcakes and I don't see myself liking cupcakes any less in a year from now, so I don't see why people would lose interest," she says.

Nelson recalls that an immediate buzz began filtering through Hollywood soon after his wife Candace started Sprinkles Cupcakes out of their home, and phone calls from celebrities soon followed. The couple knew it was time to find a retail site after Hollywood stars began requesting dozens and dozens of cupcakes.

Despite that red-carpet connection, Nelson says Sprinkles Cupcakes target audience spans all walks of life because high-end cupcakes are affordable, portable and popular at family celebrations.

"Our first store is just off Rodeo Drive. We always tell people that they may not be able to afford a celebrity's dress, but they can afford a celebrity's cupcake," he says.



REAL ESTATE | **JOB** | CARS | DEALS | CLASSIFIEDS | PLACE AN AD | SIGN-IN/SIGN-UP | SUBSCRIBE | E-REGISTER | CUSTOMER SERVICE | TODAY'S PAPER

SEARCH SITE

**BUSINESS**

SURF REPORT/CAMS | 73.0°F in Santa Ana | LIVE TRAFFIC

HOME | NEWS | SPORTS | **BUSINESS** | ENTERTAINMENT | LIFE | TRAVEL | OPINION

Automotive news | Blogs | Columns | Economy | National Business | Photos | Real Estate News | Retail | Small Business | Stocks | Videos

Published: May 18, 2006 9:57 p.m.

Text: [+] [-] [x] Next Article »

## Sprinkles bakery to open in Corona del Mar

Sprinkles Cupcakes, a popular bakery in Beverly Hills, looks to open a second shop in Corona del Mar.

0 Recommend | [Share](#) | [Comments](#) 0

[Email](#) | [Share](#)

Like 6

By NANCY LUNA | The Orange County Register

**BEVERLY HILLS** - Sprinkles Cupcakes got the last-minute order at 2 p.m. A producer with "The Oprah Winfrey Show" asked if the Beverly Hills shop could deliver 300 designer cupcakes to Chicago by 7 a.m. - the next day.

The treats would be featured on "Breakfast with Oprah," where the influential talk-show host touts her favorite treats before millions of viewers.



**BEYOND EMPTY CALORIES:** A customer, left, watches "cupcake associate" Lindsey Golne serve her at Sprinkles Cupcakes on Wednesday in Beverly Hills. Oprah Winfrey helped put the shop on the culinary map during a "Breakfast with Oprah" segment.

H. LORREN AU JR., THE ORANGE COUNTY REGISTER

[MORE PHOTOS »](#)

"You can't say no to Oprah," Sprinkles co-owner Candace Nelson said of the opportunity.

So, she boarded a red-eye flight to the Windy City, lugging suitcases and large brown shopping bags carefully stuffed with her finest flavors: red velvet, coconut, chocolate and vanilla - all topped with a half-inch thick layer of butter-cream frosting.

After the Feb. 1 show, sales of Sprinkles cupcakes, which go for \$3.25 a pop, grew 60 percent to 1,500 per day.

Now, Nelson plans to open a second Sprinkles in Corona del Mar. When the store opens in July, the coastal enclave will be among a handful of trendy U.S. cities serving gourmet versions of an old-fashioned party treat.

Retail consultant Greg Stoffel said the ritzy Corona del Mar Plaza, home of Sur La Table and Bristol Farms, is the perfect spot for shoppers to splurge \$36 for a dozen cupcakes.

"Because this is purely discretionary spending on food, it would require a higher-income area," said Stoffel, of Stoffel & Associates in Irvine. "And, in Orange County, you can't get much higher than Corona del Mar."

Local sweet tooths can hardly wait.

"The red velvet will change your life. It's a heavenly experience," said Miriam Erdos, 33, of Irvine.

Before moving to Orange County a few months ago, Erdos worked in West Los Angeles and often visited Sprinkles, a tiny chocolate-colored storefront nestled near the chic boutiques of Rodeo Drive.

The shop opened last April selling a limited menu of fondant-dotted cupcakes, 75-cent frosting shots, coffee and bottled soda.

The same menu will be at the Corona del Mar store.

"The lines are always so ridiculous. You'd think they were selling bricks of gold," Erdos said.

Nelson and her husband, Charles, are betting that the pace won't stop.

ADVERTISEMENT

EVERYTHING YOUR SMALL BUSINESS NEEDS TO GROW IS HERE.

10,000 SMALL BUSINESSES

Related



**SLIDE SHOW:** Sprinkles bakery to open in Corona del Mar  
5 Photos »

More from Business

- Hi, Mom and Dad, I'm home! ... again 3 hours & 53 minutes ago
- Expert: Employees can take time off for kids
- Block at Orange gets new center, street names 8 minutes ago

Recommended for You

- Police: Man bit off eyebrow during fight
- The Block at Orange gets a new name
- 5,000 homes approved near Great Park
- Lawuit: Sergeant fondled dispatcher
- Teen's fake boyfriend on Facebook spawns a book
- 270 O.C. students named National Merit semifinalists
- Child molester could get shot at freedom

Powered by newstogram

ADVERTISEMENT



Do not buy until you read this 4 week study on the results of using the E-Cigarette to quit smoking. [Learn more](#)



Read our shocking report on e-cigarettes as the break through device for better living in 2011. [Learn more](#)



California: If you owe at least \$125k on your home, new trick allows you to pay much less. [Learn more](#)

**More information**

Sprinkles Cupcakes is slated to open this summer at the Corona del Mar Plaza, 800 Avocado Ave. For more information, go to [www.sprinklescupcakes.com](http://www.sprinklescupcakes.com). The Frosted Cupcakery is at 185 Claremont Ave. in Long Beach. The shop is co-sponsoring the Last Saturday Art Walk at 433 E. First St. on May 27 from 7 to 11 p.m. Free cupcakes will be served. For more information, call Stacia Samartan at (949) 822-9658.

This week, the couple scouted a third location in Scottsdale, Ariz. Eventually, they want to expand to Chicago, Las Vegas and their hometown of San Francisco, where they once worked as investment bankers.

"We went from banking to baking," laughs Nelson.

After the days of the dot-com boom, Nelson told her husband she wanted to enroll in pastry school to perfect a lifetime love of baking. She emerged from the training with the idea of opening a shop dedicated to the childhood dessert.

"This is something people grow up with. We've

just elevated it," Nelson said.

At Sprinkles, Nelson offers 10 of her 20 flavors each day. Fan favorites such as red velvet and dark chocolate are served daily, while specialty flavors such as carrot cake, peanut butter chocolate and chai latte rotate throughout the week.

A \$3.25 standard-size cupcake, nearly half the cost of a dozen Krispy Kreme glazed donuts, comes with a smooth butter-cream frosting drizzled with French sprinkles or an elegant fondant dot. There's no gaudy piping or flowery writing.

Nelson said her concept was partly inspired by Magnolia Bakery in Manhattan, credited for making cupcakes vogue in the Big Apple after they were featured in the popular HBO gay-pal series "Sex and the City."

At the time, New York was one of the only U.S. markets turning the retro dessert into an affordable luxury, said Tina Casaceli, director of pastry arts at the French Culinary Institute in New York City.

"Now I see it's become a big thing everywhere," Casaceli said.

But could this be another food fad that fades faster than a sugar crash? Casaceli doesn't think so.

"This is something that is comfort food for everyone. It's not a trend. It's a staple," she said.

Other cupcake shops popping up across the country include Cupcake Royale in Seattle, Cupcake in Minneapolis, Cake Fetish in Albuquerque and Frosted Cupcakery in Long Beach.

Next year, Starbucks plans to add cupcakes to its pastry shelves after successfully testing three flavors in stores in February, the company said this week.

Stacia Samartan believes the trend has legs.

She and her mother, Nancy Hanley of Huntington Beach, opened the Frosted Cupcakery in Long Beach's upscale Belmont Shore neighborhood three weeks ago. Their plan: Sell 200 cupcakes a day to break even.

"But, once we opened the door, we realized we couldn't keep up with the demand," said Samartan, who still plans to hang on to her day job at Paul Frank Industries in Costa Mesa.

Nelson said Sprinkles sold 200 cupcakes in two hours on opening day. The number eventually jumped to 1,000 a day once word spread in the "OG210" that celebrities such as Tyra Banks and Barbra Streisand were devotees. Babe, as it turned out, gave Oprah the gift of Sprinkles over the holidays, which led to that fateful January call, said Nelson, who baked for six hours straight before catching a sleepless flight to the Windy City.

"It was so surreal," she said of the Oprah experience.

What was real was the frenzy that followed.

Last Friday, an overflow crowd spilled outside Sprinkles over a two-hour period. Some wanted a single fix of red velvet, while others ordered by-the-dozen boxes for dinner parties, play dates and co-workers.

Joy Thurman, a tourist from a one-stoplight town in Mississippi, spent more than an hour circling the traffic-jammed streets of Los Angeles in a desperate search for the cupcakes she saw on Oprah. She wound up spending \$22 at Sprinkles during two visits.

"These are divine," said Thurman with a long, satisfying Southern sigh as she nibbled on a strawberry cupcake. "I'm coming back this afternoon." Yet, Georgana Fairbanks of Mission Viejo, who visited Sprinkles recently because of the Oprah hype, said she didn't understand "the fuss."

"It's not that I didn't like it," Fairbanks said. "I've just had cupcakes from Betty Crocker that were just as good."

COMMENTS | PRINT | EMAIL

SHARE

More from Business >

**Reader Comments**

Comments are encouraged, but you must follow our User Agreement.

- 1. Keep it civil and stay on topic.
- 2. No profanity, vulgarly, racial slurs or personal attacks.
- 3. People who harass others or joke about tragedies will be blocked.

Share your thoughts about this story  
You must be logged in to leave a comment. [Login](#) | [Register](#)

To leave a comment, you need to sign up.

[Sign up](#)
[Log in](#)  
[Forgot password?](#)

powered by Pluck

[View Article](#) | [Article Photos](#) | [Article Data](#)

ADVERTISEMENT



Do not buy until you read this 4 week study on the results of using the E-Cigarette to quit smoking. [Learn more](#)

Read our shocking report on e-cigarettes as the break through device for better living in 2011. [Learn more](#)

California: If you owe at least \$125k on your home, new trick allows you to pay much less. [Learn more](#)



[Home](#) | [News](#) | [Sports](#) | [Business](#) | [Entertainment](#) | [Life](#) | [Travel](#) | [Opinion](#) | [Real Estate](#) | [Jobs](#) | [Cars](#) | [Deals](#) | [Classifieds](#) | [Place An Ad](#) [Return to Top](#)

ADVERTISE OPTIONS	CONTACT OCREGISTER	OCR SERVICES	NEWS YOUR WAY	ADVERTISING	PARTNERS
<a href="#">Self Service</a>	<a href="#">About Us</a>	<a href="#">Archives</a>	<a href="#">Blogs</a>	<a href="#">Classifieds</a>	<a href="#">KOOC-TV</a>
<a href="#">Place an Online Ad</a>	<a href="#">Careers</a>	<a href="#">Buy Our Photos</a>	<a href="#">E-Mail Newsletters</a>	<a href="#">Cars</a>	<a href="#">MSNBC</a>
<a href="#">Place a Print Ad</a>	<a href="#">Contact Us</a>	<a href="#">California Lottery</a>	<a href="#">E-Register</a>	<a href="#">Deals</a>	<a href="#">OC Explorer</a>
<a href="#">Place a Classified Ad</a>	<a href="#">Corrections</a>	<a href="#">Deals</a>	<a href="#">Mobile</a>	<a href="#">Jobs</a>	<a href="#">Coast Magazine</a>
<a href="#">Media Kit</a>	<a href="#">Customer Service</a>	<a href="#">OCRegister Fanshop</a>	<a href="#">RSS</a>	<a href="#">Real Estate</a>	<a href="#">Preferred Destination</a>
<a href="#">Advertising Contact Info</a>	<a href="#">Subscribe Today</a>	<a href="#">Orange County Businesses</a>	<a href="#">Article Map</a>	<a href="#">Place a Classified Ad</a>	<a href="#">OrangeCounty.com</a>
	<a href="#">Subscriber Services</a>	<a href="#">Register Insider</a>	<a href="#">Site Map</a>	<a href="#">View our Media Kit</a>	<a href="#">FreedomPolitics.com</a>
	<a href="#">Site Help</a>	<a href="#">Register in Education</a>	<a href="#">Video</a>	<a href="#">Interactive</a>	
	<a href="#">Site Feedback</a>	<a href="#">Obituaries</a>			

ORANGE COUNTY  
**REGISTER**  
COMMUNICATIONS

Copyright © 2011 Orange County Register Communications. All Rights Reserved.  
[Privacy Policy](#) | [Site Help](#) | [User Agreement](#) | [Site Map](#)

# The Washington Post



## CORRECTION TO THIS ARTICLE

A previous version of this article incorrectly said that Hello Cupcakes is considering adding savory cupcakes to its menu. It is Couture Cupcakes that has been testing savory flavors.

## Sweet Victory

It took 8 weeks, 141 varieties and extra gym time, but we found the best cupcake in town.

By Jane Black  
Washington Post Staff Writer  
Wednesday, November 5, 2008

There's almost always a line at Georgetown Cupcake, especially on weekends. But on Oct. 11, the queue had snaked out the door of the cult bakery on Potomac Street and was threatening to block traffic. Perhaps it was spillover from the Taste of Georgetown food festival, which drew more than 10,000 people. Perhaps it was that the bakery had scored several perfect 10s that week in our Cupcake Wars taste-offs. Whatever the reason, police arrived to help manage the flow. By the end of the day, the eight-month-old bakery had sold 5,000 cupcakes.



That's busier than most Saturdays. But only by about 25 percent. Co-owners and sisters Sophie LaMontagne and Katherine Kallinis, winners of our Cupcake Wars, bake from 5:30 a.m. to 7:30 p.m. most days. And though they allow employees to scoop batter into tins and check the ovens, they pipe the frosting on every single cupcake themselves. On average, the store sells between 2,000 and 3,000 cupcakes Tuesdays through Fridays (up from 800 when it opened in February), 4,000 on Saturdays and 2,000 on Sundays. Do the math: At \$2.75 each, that conservatively adds up to sales of more than \$38,000 a week and \$2 million annually.

No wonder then that "cupcakeries" continue to open in Washington and around the country. This past summer, Lavender Moon Cupcakery opened in Alexandria and Hello Cupcake debuted in Dupont Circle. And just when it seems the market is saturated, more are on the way. Before the end of the year, Nostalgia Cupcake will open in Annapolis, and Red Velvet Cupcakery, sister to Dupont Circle's TangySweet, will open in Penn Quarter. Online-only Bakeshop DC, which sells at Murky Coffee, plans a storefront in Clarendon. Upstart Cup of Yumm is searching for space in and around Gaithersburg. Sprinkles, the famed Los Angeles cupcake shop, is hunting for space in Northwest Washington, with plans to open late next year.

To be honest, we thought that cupcakes' 15 minutes might well be over when we launched Cupcake Wars, a round-robin showdown of Washington area bakeries. But after receiving hundreds of e-mails and phone calls from bakers and rabid fans, we could see that the trend has life in it yet. We established clear rules to keep things manageable -- all bakers must have a retail storefront presence inside the Beltway -- and extended the battle from six to eight weeks to accommodate a mountain of reader suggestions.

It wasn't long before we had a bad case of cupcake fever, too. In and out of the tasting room, we debated at length the proper ratio of frosting to cake and how much more quickly a vanilla cake can dry out than a chocolate one. We had a spreadsheet to crunch the numbers on the cupcakes' weights, prices and

# **EXHIBIT B**



## THE COMPETITION

After PEOPLE correspondents across the country nominated their favorite local ice creams, we picked 16 finalists and sent them to our panelists for judging. Then a select group of hungry staffers at our New York City offices conducted identical tests, and their votes were averaged to count as a single vote on the panel. The hotly contested results at right are out of a possible top score of five scoops.

**SPRINKLES OF PALM BEACH**  
Palm Beach, Fla.  
561-659-1140

**TRIPLE CHOCOLATE SUPREME**  
Our top-scoring treat. "When you need to maintain ice cream or break your diet," says Jane Stern, "this would be the call."



**BONNIE BRAE ICE CREAM**  
Denver  
303-777-0808

**VANILLA**  
Jane Stern found it to be "like white satin, lovely and rich." Palchak, on the other hand, marked it down for "weak body."



**AMY'S ICE CREAMS**  
Austin, Texas  
512-458-6805

**KALEIDESCAPE**  
"Mmmm," says Daryl of this cherry-cocoa combo from a store he loved visiting while filming *Spy Kids* in Texas.



**ORIGINAL PAINTER'S HOMEMADE ICE CREAM**  
North Myrtle Beach, S.C.  
843-272-6934

**BLACK CHERRY**  
"Not bad," says Penn State's Palchak, but one finicky PEOPLE editor deemed it "straight from the supermarket."



**HARDEL'S HOMEMADE ICE CREAM**  
Youngstown, Ohio  
330-788-0358

**CHOCOLATE PECAN**  
"The crunch makes it stand out," says Alexa. Palchak lauds the "smooth, creamy" texture and the "nice pecan inclusion."



**RASSETT'S ICE CREAM COMPANY**  
Philadelphia  
215-684-2771

**VANILLA**  
"I'm a real sucker for the flecks of vanilla. You can taste the nuggets," says Jane Stern. But Palchak called the texture "gummy."



**FOUR SEAS ICE CREAM**  
Centerville, Mass.  
508-775-1394

**CHIP CHOCOLATE**  
Palchak praised the ice cream's "nice all-around flavor" but subtracted points for this Cape Cod favorite's "slightly coarse" consistency.



**DAVE AND ARDY'S HOMEMADE ICE CREAM**  
Pittsburgh  
412-681-9906

**GOLDEN ALE ESPRESSO CHIP**  
An acquired taste, apparently. One PEOPLE writer called it "criminal"; Alexa was diplomatic: "It's different."



**TILLAMOOK COUNTY CREAMERY ASSOCIATION**  
Tillamook, Ore.  
503-815-1300

**CHOCOLATE PEANUT BUTTER**  
Simpson loved the flavor combo: "What's the catch? Do I have to sell my soul to PEOPLE magazine? Deal."



**MITCHELL'S ICE CREAM**  
San Francisco  
415-648-2300

**CANTALOUPE**  
This exotic flavor struck some judges as, well, weird. Spy Kid Daryl couldn't ID the flavor—"Is it orange?"—but Alexa decreed it one of her favorites.





Copyright 1991 The New York Times Company  
The New York Times

October 31, 1991, Thursday, Late Edition - Final

**SECTION:** Section B; Page 8; Column 1; National Desk

**LENGTH:** 1197 words

**HEADLINE:** Palm Beach Rape Trial Faces Test: Finding Jury

**BYLINE:** By DAVID MARGOLICK, Special to The New York Times

**DATELINE:** PALM BEACH, Fla., Oct. 30

**BODY:**

Jury selection is to start Thursday in the case of William K. Smith, the 31-year-old Kennedy heir charged with raping a Florida woman on the family's Palm Beach estate over Easter weekend. But the task of finding six citizens sufficiently unaffected by the saturation news coverage the case has already received could prove formidable.

Lawyers say interviewing potential jurors could take two weeks to a month or more, longer than the time earmarked for testimony in the trial, which is scheduled to begin Dec. 2.

But could a fair jury be found more quickly elsewhere? One local lawyer, Joel Weissman, said "you'd have to go to Haiti" to find someone unfamiliar with the case. And Judge Robert Parker of Palm Beach County Circuit Court went further. In an opinion upholding the right of a supermarket tabloid to print the complainant's name, he suggested that even scientists in igloos on the South Pole were following it.

**Pervasive Influence**

It is hard to walk into any of the bars or restaurants either party patronized without encountering waiters, maitres' and bartenders who have been subpoenaed to testify.

And now it's time for the hundreds of potential jurors, all residing in the epicenter of the case, to take a turn. Starting Thursday, they will be asked whether they can serve and remain sequestered for the duration of the trial. They will also be asked if they have been affected by the publicity about the case and their feelings about what Judge Mary E. Lupo of Palm Beach County Circuit Court, who is hearing the case, has called "any Kennedy-family issues."

It is not uncommon in cases of great notoriety for jury selection to be both arduous and tedious. It took lawyers in New York two months to select the four women and eight men to hear the 1988 murder trial of Robert Chambers, who was convicted of killing Jennifer Levin in Central Park.

The task here could prove even tougher, since the cast of characters is better known, the story starker, the facts far more widely disseminated and arguably, the composition of the panel even more crucial.

Lawyers for Mr. Smith say the only other portion of the case as critical as jury selection is the ruling Judge Lupo will make on what may be allowed as evidence, most notably the prior sexual histories of Mr. Smith and his accuser. Allegations that Mr. Smith has assaulted several other women and that his accuser has a history of psychological instability have already been splattered worldwide.

Palm Beach Rape Trial Faces Test: Finding Jury The New York Times October 31, 1991, Thursday, Late Edition - Final

#### Unpredictable Factors

The impact of the hearings on Clarence Thomas's nomination to the Supreme Court, in which the issue of sexual misconduct loomed large, is unpredictable.

Moreover, this is a jury on which, notwithstanding its inconveniences and meager compensation -- \$10 a day plus 14 cents a mile or a free ticket on local mass transit -- people may well want to sit, and would, therefore, be more intent on masking their prejudices.

Judge Lupo has imposed a gag order on all lawyers in the case, and neither the assistant state's attorney prosecuting the case, Moira Lasch, nor the head of Mr. Smith's defense team, Roy E. Black of Miami, would say what sort of jurors they were seeking.

In July both sides submitted proposed questionnaires for potential jurors. Ms. Lasch's two-page form contained standard queries, Mr. Black's was considerably longer and more exotic, including questions on the potential jurors' "favorite famous persons" and the nature of any bumper stickers they had ever placed on their cars.

Lawyers for Mr. Smith have retained Cathy E. Bennett, a jury consultant from Galveston, Tex. Ms. Bennett did not return a reporter's phone calls. But a friend and professional colleague, Amy Singer of Trial Consultants Inc. in Miami, said that Ms. Bennett usually questioned several hundred people in the county from which the jury is to be drawn.

#### The Kennedy Factor

She would usually ask them their views on the guilt or innocence of the defendant in the case, then correlate her findings to age, sex, educational level and ethnic group, Ms. Singer said. Such investigations, she said, can last six weeks and cost \$150,000.

Ms. Singer said the variable that could prove most important was "the Kennedy love-hate factor." "The Kennedy lovers talk about the girl's moral character, sexual conduct and possible financial gains," she said. "The Kennedy haters talk about the Kennedy boys' moral character, sexual behavior and spoiled-rottenness."

Just as the stolid, utilitarian courthouse in West Palm Beach bears little resemblance to the fanciful, nouveau-Spanish motif of the rest of this gilded ghetto, the Smith case seems in some ways quite remote from quotidian Palm Beach.

The local squirearchy always considered the Kennedys arrivistes, even after one of them was elected President of the United States. Now that Rose Kennedy no longer comes here and her descendants take turns visiting here in season in three-week stints, they are more alien than ever.

That has not dimmed the ardor of local entrepreneurs, who are hawking Kennedy-themed T-shirts. The most popular, with 1,500 sold thus far, parodies the shirts that itemize rock stars' itineraries. On the front is an unflattering caricature of Senator Kennedy holding a mug of beer, along with the words "The Kennedys Easter Tour."

On the back, where the rock star would list the cities where he played, is instead a list of watering holes that family members patronized that Easter weekend, including Au Bar, where Mr. Smith and his accuser first met, Bradley's, Chuck & Harold's, LuLu's and the Safari & Polo Club.

Sprinkles Ice Cream and Sandwich Shop will soon introduce a flavor called "Teddy's Best," which contains Chivas Regal, the scotch Senator Kennedy ordered at Au Bar.

Under the intensity of the television lights, bit players in the drama have gone through whole lifetimes in a matter of weeks.

#### Smith Is Expected

Since claiming to have seen Senator Kennedy without trousers at the family compound and "kinda wobbling" on the night of March 30, Michelle Cassone of Palm Beach appeared on "Sally Jessy Raphael," "Geraldo" and "A Current Affair"; lost her job as a waitress; fled briefly to the Florida Keys; smashed one of Au Bar's doors in anger; was arrested for violating the terms of her probation for driving violations and was hospitalized after an overdose of sleeping pills.

Palm Beach Rape Trial Faces Test: Finding Jury The New York Times October 31, 1991, Thursday, Late Edition -  
Final

Mr. Smith will be on hand Thursday. In an effort to make things more orderly than at his arraignment, when a pregnant reporter was pushed around and one of Mr. Smith's own lawyers was shoved into a fire hydrant, the news media have agreed to limit the number of cameramen recording his entrance.

To explore Judge Parker's conjecture, Ron Wiggins, a columnist for The Palm Beach Post, promptly tried calling the South Pole, but couldn't get through. He did reach Chuck Evans, a scientist near the North Pole, who told him he had been following the case on "Hard Copy" and "A Current Affair." "If the defense wins a change of venue to Barrow, Alaska, Chuck Evans will have trouble getting on the jury," Mr. Wiggins wrote.

**GRAPHIC:** Photo: Local entrepreneurs like David Archibald are selling Kennedy-themed T-shirts in West Palm Beach, Fla. Mr. Archibald has sold 1,500 of the most popular shirt, "The Kennedys Easter Tour." (Associated Press)

**LOAD-DATE:** April 15, 1992



Copyright 1991 The Washington Post  
The Washington Post

November 3, 1991, Sunday, Final Edition

**SECTION: SUNDAY TRAVEL; PAGE E1**

**LENGTH: 2280 words**

**HEADLINE: Posh Palm Beach: Elusive, Reclusive & Terribly Exclusive**

**SERIES: Occasional**

**BYLINE: Mary Jordan, Washington Post Staff Writer**

**BODY:**

You've heard about Palm Beach -- vacationland for millionaires, hangout of the Pulitzers, the Kennedys, the Trumps. Just 12 miles long and a quarter-mile wide, this island of warm winter sun and year-round scandal is as often in the news as in travel books.

So driving across one of the three bridges linking ordinary West Palm Beach to this glamour spot where all things pedestrian -- movie theaters, gas stations, dry cleaners -- are banned, I was expecting a bit more bustle than I found.

For all its notoriety, all its international ink about Prince Charles playing polo and Roxanne Pulitzer playing socialite, Palm Beach remains, to outsiders passing through, a reclusive enclave of gated mansions and private clubs. A place where if you don't have an engraved invitation and a Rolls-Royce, you don't see the action.

Take the current hottest tourist spot, the Kennedy family estate. It's not only inaccessible, it's virtually out of sight.

Of course, everyone here knows exactly which Mediterranean Revival mansion set back from the road it is (1095 N. Ocean Blvd.), and millions have read about the goings-on inside, from President Kennedy's Winter White House galas in the early '60s to the alleged rape there seven months ago involving his nephew, William Kennedy Smith. Passersby, though, see only a sliver of the servants' quarters and the estate's 176 feet of beach.

Farther south on this oceanfront road, at financier Donald Trump's historic 118-room peach-colored castle called Mar-a-Lago (1100 S. Ocean Blvd.), a 75-foot tower with a blue floodlight that mimics the moon is at least visible from the road. But the posted sign has the unofficial island motto: "No Trespassing."

Undeterred, I called Trump's office in New York, and soon the sometime boyfriend of Marla Maples was on the phone granting a rare tour of his home, where every president since Truman has dined.

James Griffin, the caretaker who has lived on the 17-acre estate for more than half a century, said every day or so a tourist starts down the driveway, pretending not to know it is private property. He ejects them immediately, he said. But now, perhaps because Trump is in the midst of a battle with the locals -- over his plans to subdivide the property to build new mini-mansions -- he was conducting this tour of the home, built in 1927 by "Post Toasties" heiress Marjorie Merriweather Post.

Reminiscent of Versailles, this grand palace has velvet thrones, Venetian art, gilded cherubs and vaulted ceilings. Fifty could be seated around the dinner table. Much to the relief of preservationists, Trump has kept intact the historic furnishings that Post collected from around the world (even using the rather small antique bed in the master bedroom). But there are Trump touches: at least five photographs and paintings of the financier on the walls, and two copies of his book "Trump: The Art of the Deal" on his night table.

Posh Palm Beach: Elusive, Reclusive & Terribly Exclusive The Washington Post November 3, 1991, Sunday, Final Edition

Mar-a-Lago is off-limits to the public, but fortunately for frustrated voyeurs, there's Whitehall, a 10-minute drive away near Royal Poinciana Way. The extravagant 73-room mansion was built by Standard Oil millionaire Henry Flagler at the turn of the century for \$ 2.5 million. Then he furnished it for another \$ 1.5 million.

Now a museum, Whitehall hosts an exhibit of the railway that originally connected Palm Beach to the outside world and helped make it a resort. The art collection includes a Gainsborough portrait, the music room has a 1,200-pipe organ, and much of the house has its original furnishings, making it a national landmark and a reminder of the island's early days of grandeur. A few days after touring Mar-a-Lago, when I knew I might be staying for some time as one of 400 reporters who stormed the island to cover the Smith rape case, I foolishly asked a local hotel concierge how I could get a quick organized tour. "As I'm sure you know," he responded smugly, "organized tours are not something that would be allowed here. Buses are not even allowed on the island."

I learned later that if you slip enough money to some of the bellhops and employees at the better hotels, you'll find yourself in a limousine on a personal tour. Instead, I asked the employees at Main Street News and Sprinkles ice cream shop, both on Royal Poinciana Way, to point out celebrity estates and other spots not noted on the maps. Then a local reporter who knew the island helped me continue my mansion tour, past the former home of Beatle John Lennon and his wife, Yoko Ono; past cosmetics magnate Estee Lauder's mansion; past the estates of countless unknown heirs of well-known fortunes -- Kleenex, Campbell Soup, Clairrol.

With very little parking allowed along the island's roads, and impatient drivers behind, it can be difficult to drive slowly by the estates, some of which are valued at more than \$ 10 million. One time, as I turned around to drive by one particularly gorgeous estate again, a member of the omnipresent police force pulled me over.

"Casing the joint?" he asked. Then, apparently satisfied that the only thing I was interested in stealing was a look, he said, "You'll never see anything. Everybody is in Europe. They won't be back until Christmas."

In wintertime, the island's year-round population of 10,000 triples.

Almost since the first house was built on the island just after the Civil War, Palm Beach has been a place for the privileged. Its gentle 70-degree December weather and location between the surf of the Atlantic and the shores of Lake Worth make it an ideal resort. A 19th-century brigantine named Providencia, it is said, is responsible for the palm trees that line many of the avenues: Its cargo was coconuts, and when the ship capsized in 1879, they were quickly planted on the island.

The year before, railroad tycoon Henry Morrison Flagler arrived, financing the first railway to the South Florida peninsula and building the hotels that would draw the rich. Soon afterward, members of high society -- the Vanderbilts, Biddles, Wideners and Wanamakers -- were fleeing here from northern winters.

Today, the resort island looks as though an army of gardeners rises before dawn and clips each uneven blade of grass. Jacaranda, orchids, poinciana and scores of other colorful trees shade the streets and estates. There are no billboards, barely any advertising signs at all. The police station is painted cotton-candy pink and other government buildings are light pastels.

Much of the picture-perfect setting is due to an astronomical number of regulations. No laundromats or homes of "inconsistent architecture" are allowed. Lawn mowers and tennis ball machines are outlawed after 5 p.m. Garbage trucks cannot park on the street overnight. (What! And mar the ambiance?)

Crafty zoning laws have placed private land between the street and public beach, making much of the fine white beach sand inaccessible. There is, though, one designated public beach (with accompanying metered parking) on South Ocean Boulevard just north of Royal Palm Way.

The only time there is anything vaguely resembling a traffic jam is when church lets out on Sunday morning and many retired people, a little shaky behind the wheel, drive slowly toward one of the island's "in" spots for brunch.

The grandest and oldest hotel, the Breakers, offers perhaps the most lavish Sunday brunch in Florida. In its grand Italian Renaissance rooms with gilded gold ceilings, there seems always to be some charity ball or wedding in the works. The last time I stopped by, I watched national championship ballroom dancing, where the women wore sparkly costumes and their male partners seemed half their age.

While much of the island's activity does happen behind closed doors, in the homes, estates, and clubs, eventually everyone, resident or visitor, winds up in the island's two main commercial districts: Worth Avenue, one of the most

expensive shopping districts in the world, and Royal Poinciana Way, where the island's most popular bars and restaurants thrive.

Worth Avenue, known simply as "the Avenue," has been called the classiest shopping district in the country. Store space in this three-block district with Renaissance fountains and wrought-iron lamps has sold for \$ 1,400 a square foot.

Among the 150 or so shops, Saks Fifth Avenue is the largest in this astronomically priced and architecturally acclaimed district. Addison Mizner, the island's legendary architect, left his signature Spanish-style red-roof tiles and Renaissance architecture on much of the area. Among the shops between the Atlantic Ocean and Coconut Row are Charles Jourdan, Cartier, Chanel, Valentino and Van Cleef & Arpels.

Here you can buy everything from pearl-handled caviar servers to fashions by a former Miss America (Kylene Barker Brandon, Miss America 1979, runs her own shop, d. Kylene's). And for the pets, there is a one-of-a-kind "Dog Bar," a pet trough at FAO Schwartz where canines in bows and ties sip sparkling water.

Along with the stores, there are 19 art galleries and notable restaurants, including Renato's, which opens onto one of Worth Avenue's tiny passageways with ornate water fountains and colorful Spanish tiles.

Another type of action can be found on Royal Poinciana Way, a five-minute drive away. Along this avenue of restaurants and bars, where the island's sole newsstand and grocery store are located, are two of the most talked-about locations in the William Kennedy Smith rape trial.

Au Bar, the swanky nightclub where Smith, the nephew of Sen. Edward M. Kennedy, met the woman who accused him of rape, has been exceptionally busy since the incident became public last spring. None of the Kennedy clan has been seen here since then, according to the bartenders, but Roxanne Pulitzer and other local socialites still show up.

A bit pretentious and a definite pickup joint, Au Bar is an expensive club filled with well-dressed people of every age. Rail drinks can run \$ 7; the cover charge is \$ 10. Decorated in one section like a living room, with pink striped couch and matching balloon curtains, the nightclub has a tiny hardwood dance floor and a horseshoe-shaped bar.

Across the street lined with palm trees is Chuck & Harold's, where Burt Reynolds, Brooke Shields and Sen. Kennedy have been customers recently. There is a sidewalk cafe, sometimes a jazz band, and always the best Bloody Marys in town. The food ranges from seafood specials to pizza with sun-dried tomatoes, and the decor is casual.

Kennedy came here for brunch the day after the alleged rape, and customers may testify at the Smith trial scheduled for next month about what, if anything, they heard the senator say about the incident. This Palm Beach institution, like many others, is visited by many as much for its ambiance as its place in the news.

#### WAYS & MEANS

Palm Beach's winter season (when prices double) kicks off in mid-December and lasts through February. Tour buses are forbidden on the island, and there are no organized tours available. Visitors can stop at Main Street News on Royal Poinciana Way and pick up one of the many maps and guidebooks that point out historic and celebrity hotspots. It's easy to drive around (rental cars are available at the nearby West Palm Beach airport). Or you can rent a bike from the Palm Beach Bicycle Trail Shop (223 Sunrise Ave., 407-659-4583) and ride along the palm-tree-lined trail along the shoreline of Lake Worth.

#### GETTING THERE:

Delta, United, Continental and American are among the airlines that offer service between Washington and Palm Beach and are currently quoting round-trip fares of \$ 288 to \$ 340, with restrictions.

#### WHERE TO STAY:

There is a wide variety of accommodations on the mainland in nearby West Palm Beach. Hotels on the island are, of course, more expensive. Among the choices:

The Breakers (1 S. County Rd., 407-655-6611) is the oldest and grandest hotel in Palm Beach. In-season rates are \$ 280 to \$ 420, double.

Brazilian Court (301 Australian Ave., 407-655-7740) is an elegant, historic hotel. \$ 185 to \$ 290.

The Chesterfield (363 Coconut Row, 407-659-5800) has an English setting. \$ 175 to \$ 250.

Posh Palm Beach: Elusive, Reclusive & Terribly Exclusive The Washington Post November 3, 1991, Sunday, Final Edition

The Colony (155 Hammon Ave., 407-655-5430) draws a slightly younger crowd, with a live band in the bar and an outdoor pool shaped like the state of Florida. \$ 180 to \$ 240.

**WHERE TO EAT:**

**Restaurants include:**

Charley's Crab (456 S. Ocean Blvd.) is famous for French seafood and outrageous desserts.

E.R. Bradley's Saloon (111 Bradley Pl.) has a complimentary buffet at happy hour. A very hot singles scene.

Testa's (221 Royal Poinciana Way), one of the island's oldest restaurants, offers Italian cuisine and a sidewalk cafe.

**WHAT TO DO:**

**Among the places of interest in Palm Beach:**

Palm Beach Shores Park, north of Lake Worth Inlet, has 3,000 feet of oceanfront beach with lifeguards.

Bethesda-by-the-Sea (141 S. County Rd., 407-655-4554), an Episcopalian church of Spanish-Gothic design, is one of the finest small-scale cathedrals in the world.

The Docks, located on the Intracoastal Waterway and Peruvian, Australian and Brazilian avenues, is home to some of the most luxurious yachts in the world, including the Octopussy of James Bond movie fame.

Whitchall (Coconut Row at Whitehall Way, 407-655-2833), aka the Henry Flagler Museum, is open for tours from 10 a.m. to 5 p.m. Tuesdays through Saturdays, noon to 5 p.m. Sundays. Admission is \$ 5 for adults, \$ 2 for children 6 to 12. **INFORMATION:**

Palm Beach Chamber of Commerce, 45 Coconut Row, Palm Beach, Fla. 33480, 407-655-3282.

Palm Beach County Convention and Visitors Bureau, 1555 Palm Beach Lakes Blvd., Suite 204, West Palm Beach, Fla. 33401, 407-471-3995.

**GRAPHIC: MAP, ABOVE, AN AIRBOAT ZOOMS THROUGH THE FLORIDA EVERGLADES; AT RIGHT, AN OCEANSIDE VIEW OF DONALD TRUMP'S PALM BEACH ESTATE, MAR-A-LAGO. TWP; PHOTO, NATIONAL PARK SERVICE**



# **EXHIBIT C**



United States Patent and Trademark Office

Home | Site Index | Search | FAQ | Glossary | Guides | Contacts | eBusiness | eBiz alerts | News | Help

Trademarks > Trademark Electronic Search System (TESS)

TESS was last updated on Fri Jun 8 04:35:45 EDT 2012



[Logout] Please logout when you are done to release system resources allocated for you.

Record 1 out of 1

[LIP status] [ASSIGN status] [LIR] [TAB status] ( Use the "Back" button of the Internet Browser to return to TESS)

Typed Drawing

**Word Mark** SPRINKLES OF PALM BEACH  
**Goods and Services** IC 030. US 046. G & S: Ice cream. FIRST USE: 20021000. FIRST USE IN COMMERCE: 20021000  
**Mark Drawing Code** (1) TYPED DRAWING  
**Serial Number** 78184899  
**Filing Date** November 13, 2002  
**Current Basis** 1A  
**Original Filing Basis** 1B  
**Published for Opposition** April 20, 2004  
**Registration Number** 2938800  
**Registration Date** April 5, 2005  
**Owner** (REGISTRANT) Therapy Too, Inc. DBA Sprinkles of Palm Beach CORPORATION FLORIDA 322 Valencia Road West Palm Beach, FLORIDA 33401  
(LAST LISTED OWNER) SPRINKLES CUPCAKES, INC. CORPORATION TEXAS 422 North La Cienega Boulevard Los Angeles CALIFORNIA 90048  
**Assignment Recorded** ASSIGNMENT RECORDED  
**Attorney of Record** Hollis Beth Hire  
**Disclaimer** NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "OF PALM BEACH" APART FROM THE MARK AS SHOWN  
**Type of Mark** TRADEMARK  
**Register** PRINCIPAL  
**Affidavit Text** SECT 15. SECT 8 (6-YR).  
**Live/Dead Indicator** LIVE



---

[| HOME](#) | [SITE INDEX](#) | [SEARCH](#) | [BUSINESS](#) | [HELP](#) | [PRIVACY POLICY](#)



United States Patent and Trademark Office

Home | Site Index | Search | FAQ | Glossary | Guides | Contacts | eBusiness | eBiz alerts | News | Help

### Trademarks > Trademark Electronic Search System (TESS)

TESS was last updated on Fri Jun 8 04:35:45 EDT 2012



[Logout](#) Please logout when you are done to release system resources allocated for you.

## Record 1 out of 1

[LAW STATUS](#) [ASSIGN STATUS](#) [LAW](#) [LAW STATUS](#) ( Use the "Back" button of the Internet Browser to return to TESS)



<b>Word Mark</b>	SPRINKLES PALM BEACH
<b>Goods and Services</b>	IC 035, US 100 101 102, G & S; Retail store services featuring ice cream. FIRST USE: 20021000, FIRST USE IN COMMERCE: 20021000
<b>Mark Drawing Code</b>	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
<b>Design Search Code</b>	01.15.04 - Explosions; Fireworks display; Sparks 05.01.03 - Palm trees 08.09.01 - Ice cream, sherbet and frozen yogurt in cones; Sundae 26.09.07 - Squares with a decorative border, including scalloped, ruffled and zig-zag edges 26.09.28 - Miscellaneous designs with overall square shape; Square shapes (miscellaneous overall shape)
<b>Serial Number</b>	76529862
<b>Filing Date</b>	July 16, 2003
<b>Current Basis</b>	1A
<b>Original Filing Basis</b>	1B
<b>Published for Opposition</b>	November 16, 2004
<b>Registration Number</b>	3004757
<b>Registration Date</b>	October 4, 2005
<b>Owner</b>	(REGISTRANT) Therapy Too, Inc. CORPORATION FLORIDA 322 Valencia Rd. West Palm Beach FLORIDA 33401  (LAST LISTED OWNER) SPRINKLES CUPCAKES, INC. CORPORATION TEXAS 422 North La Cienega Boulevard Los Angeles CALIFORNIA 90048
<b>Assignment Recorded</b>	ASSIGNMENT RECORDED

**Attorney of Record** Hollis Beth Hire  
**Disclaimer** NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "PALM BEACH" APART FROM THE MARK AS SHOWN  
**Description of Mark** Color is not claimed as a feature of the mark.  
**Type of Mark** SERVICE MARK  
**Register** PRINCIPAL  
**Affidavit Text** SECT 15. SECT 8 (6-YR).  
**Live/Dead Indicator** LIVE

---



---

[\[HOME\]](#) | [\[SITE INDEX\]](#) | [\[SEARCH\]](#) | [\[eBUSINESS\]](#) | [\[HELP\]](#) | [\[PRIVACY POLICY\]](#)

# **EXHIBIT D**

facebook

Email or Phone

Password

msundheimer@wagr.com

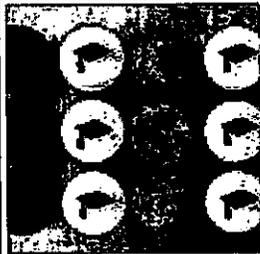
Log In

### Sprinkles Cupcakes is on Facebook.

To connect with Sprinkles Cupcakes, sign up for Facebook today.

Sign Up

Log In



## Sprinkles Cupcakes

356,315 likes · 2,516 talking about this · 76,034 were here

Like

Food/Beverages

Since we opened the world's first cupcake bakery in Beverly Hills, our freshly baked treats have inspired long lines of devoted Hollywood stars and serious appreciators alike.

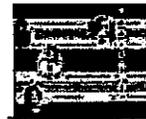
About



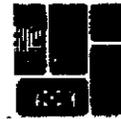
Photos

356k

Likes



iPhone/Android App



iPhone/Android App

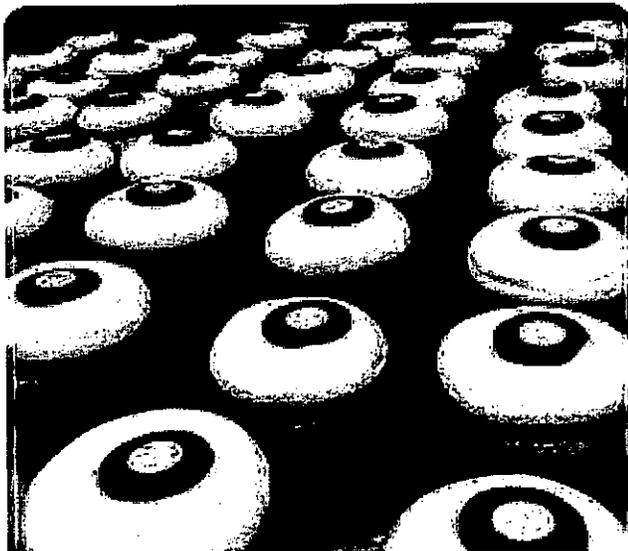
Highlights

Post Photo / Video

Write something...

**Sprinkles Cupcakes**  
19 minutes ago via HeatSuite

Cool down with Sprinkles! The first 50 people to whisper "sweet advisory" at each Sprinkles receive a free strawberry! <https://ow.ly/h/GhBq>



Also On

- <http://www.sprinkles.com>
- <http://www.ilovesprinkles.com>
- <http://www.facebook.com/sprinkles>
- <http://www.twitter.com/sprinkles>
- <http://www.twitter.com/sprinklesmobile>
- <http://www.twitter.com/sprinklescandor>
- <http://www.youtube.com/sprinkles>
- <http://itunes.apple.com/us/app/sprinkles...>
- <https://market.android.com/details?id=co...>

Recent Posts by Others on Sprinkles Cupcakes

See All

- Samantha Martinez**  
I was one of the fifty for the banana cupcake response yesterday! 2 minutes ago
- Megan Kizerahut**  
Bring one to Minneapolis!! Please!!! 15 hours ago

More Posts

Likes

See All

**Sprinkles Cupcakes Dallas**  
Local Business

Like



Like · Comment · Share

2

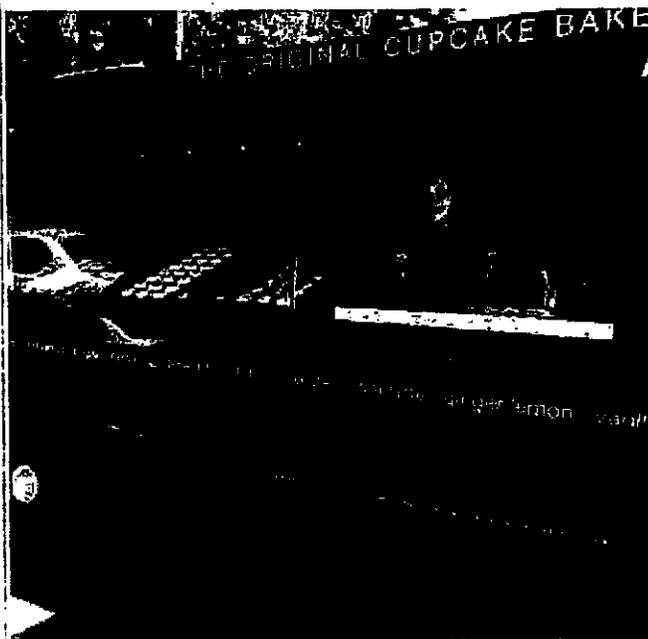
Caillin Kim, Ame Thyst and 155 others like this.

View all 2 comments

Lisa Neal Whoa!  
5 minutes ago

**Sprinkles Cupcakes**  
23 hours ago

Talk about a dream job! Meet Ellen, our Sprinklesmobile Manager, who drives around town day to day doling out a sugar rush to people on the go! Ellen loves her occasional stop at a Hollywood movie set or film premiere, but her favorite da... See More



Like · Comment · Share

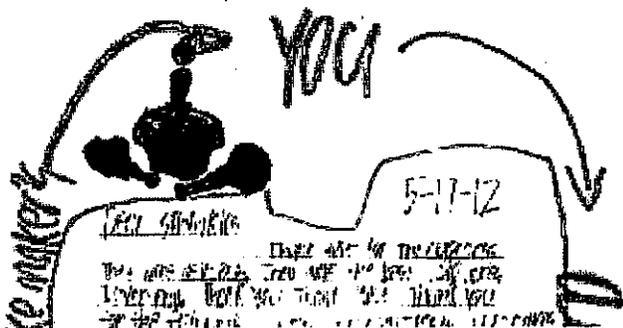
129

Miguel Ferro, Celo Gomez and 1,019 others like this.

View all 73 comments

**Sprinkles Cupcakes**  
June 4

Thank you notes we received for donating cupcakes to a classroom! (6 photos)



**Sprinkles Cupcakes La Jolla**  
Local Business

Like

**Sprinkles Red Velvet**  
Food/Beverages

Like

**Sprinkles Cupcakes Scottsdale**  
Local Business

Like

**Sprinkles Cupcakes Newport Beach**  
Local Business

Like

**Sprinkles Cupcakes**  
Yesterday via HostSuite

What is a popular flavor at Sprinkles? The first 50 people to whisper "linalight" at each Sprinkles receive a free key lime!

Like · Comment · Share

Bertha Gomez, Laura Elizabeth Adams and 25 others like this.

View all 9 comments

Susan Schardon Love me my Sprinkles!  
21 hours ago via mobile

Tami Spierl Walhom We need a "Sprinkles" in Perrysburg, OH!  
17 hours ago

**Sprinkles Cupcakes**  
Wednesday via HostSuite

The first 50 people to whisper "triple cinnamon" at each Sprinkles receive a free buttermilk cinnamon cake topped with cinnamon cream cheese frosting rolled in cinnamon sugar!

Like · Comment · Share

1

Robbin L. Williams, Cately Burton and 50 others like this.

View all 14 comments

Cinnamon Dibs TRIPLE Cinnamon????? Yeah, that's a dangerous idea!  
Wednesday at 6:43pm

Regina Malin It was pretty yummy.  
Wednesday at 6:52pm via mobile

**Sprinkles Cupcakes**  
Tuesday via HostSuite

The first 50 people to whisper "go nuts" at each Sprinkles receive a free pb chip!

Like · Comment · Share

1

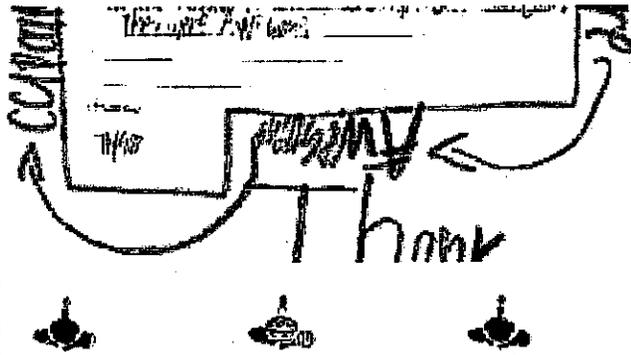
Emen Shurbaji, Murphy Spencer and 39 others like this.

View all 14 comments

Mere Kalata "go nuts"  
Tuesday at 3:34pm

**Sprinkles Cupcakes**  
June 4 via HostSuite

The first 50 people to whisper "banana cream pie" at each Sprinkles receive a free banana cake filled with marshmallow and



Like · Comment · Share

1

Rostanna Wankovszky, Ani Yanes and 53 others like this.

View all 7 comments

David Boersky Wow!  
June 4 at 5:55pm via mobile

City Connection Entertainment Kudos Sprinkles!  
Wednesday at 11:35am

topped with vanilla frosting!

Like · Comment · Share

Insayah Ahmad, AVOH OIVA and 45 others like this.

View all 11 comments

Carl Washington bananas cream pie. (this is one of my favorites). Even if it's not free, hopefully this selection stays on the list with the other cupcakes.  
June 4 at 10:55am

Louise Vergara That sounds divine!  
Tuesday at 9:40am via mobile

Sprinkles Cupcakes shared Sprinkles Cupcakes Palo Alto's photo.  
June 3

We had so much fun decorating cupcakes with these mini chefs!

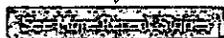


Like · Comment · Share

Gracie Bedala, Robbin L Williams and 127 others like this.

Glamorous Sweet Events Too cute!  
June 3 at 4:31pm · 1

Insayah Ahmad Awww look at those faces! too gosh darn cute!!  
Wednesday at 4:01am



Sprinkles Cupcakes  
May 18 via PhotoSuite

Pirate's booty! The first 50 people to whisper "ahoy, matey!" at each Sprinkles receive a free pirate pumpkin! <http://ow.ly/i/D32g>

Sprinkles Cupcakes  
May 17

Swing by Sprinkles to celebrate Visit Your Relatives Day!

On May 18, Sprinkles is teaming up with People Like Us to give



Like



Sprinkles Cupcakes  
May 5, 2009

Feliz Cinco de Mayo! Las primeras 20 personas que digan "Hola" cuando estan ordenando en cualquier Sprinkles recibiran un Choco Loco gratis.



Like · Comment · Share

55 39

wearing scrubs or a nurse uniform will receive a free red cross red velvet!

Like · Comment · Share

57 38



Sprinkles Cupcakes  
May 4, 2009

The next 10 people to whisper "Sprinkles Addict" when ordering at each Sprinkles location will receive a free carrot cupcake!

Like · Comment · Share

61 32



Sprinkles Cupcakes  
May 3, 2009

Happy Sunday! The next 10 people to whisper "Sprinkles Addict" when ordering at each Sprinkles will receive a free red velvet!

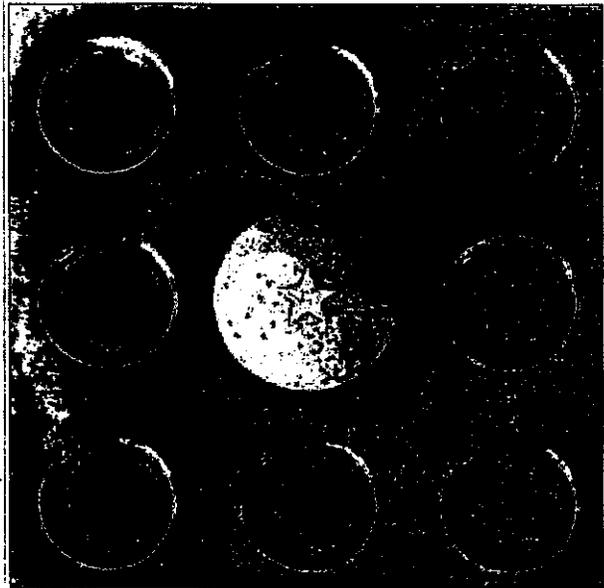
Like · Comment · Share

64 39



Sprinkles Cupcakes  
May 1, 2009

Missed Elvis' birthday? Saturday (5/2) our banana cake with peanut butter frosting is available off-the-menu. Just order "The King!"



Like · Comment · Share

58 22



March 2009



Sprinkles Cupcakes  
March 19, 2009

HOP for Cupcakes

Like · Comment · Share



Sam Patrick, Anna Barbarossa Gould and 11 others like this.



Jasbeen Paige PLEASE COME TO SPOKANE WA  
March 19, 2009 at 11:52pm



Erik Waldahl Sprinkles.. ATLANTA is waiting...  
March 21, 2009 at 9:48am



Sam Patrick COME TO Phoenix!!!!!!!  
April 2, 2009 at 5:45pm



Sprinkles Cupcakes  
March 9, 2009

paints the town GREEN!



Like · Comment · Share



Nicole Fourdes, Chris Arrigals and 6 others like this.



Nury Mandujano I love Sprinkles, can't wait to try the Green Velvet and the Irish Chocolate!!!  
March 13, 2009 at 10:12am



Aria Lee Irish was amazing :)  
March 15, 2009 at 9:54pm



Kristen Nolan Irish chocolate was fabobulous!!!  
March 17, 2009 at 6:08pm



Mariana Elizabeth Loved both the Green Velvet and the Irish Chocolate  
March 18, 2009 at 7:19pm

January 2009



Sprinkles Cupcakes  
January 19, 2009

Hello and thank you for your questions!  
Mutia, you can order our mixes (as well as cupcakes, apparel, and gift cards) at [www.sprinklescupcakes.com/order.php](http://www.sprinklescupcakes.com/order.php)  
Nadim, we are not located in Kuwait, but we are very excited to be expanding and are hoping to open internationally soon!

2008



Joined Facebook

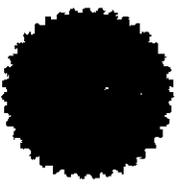
December 22, 2008

2007



**Founded in 2003**

# **EXHIBIT E**



# Sprinkles Cupcakes

@sprinkles

official winner of Sprinkles Cupcakes, The Original Cupcake Bakery  
The Original Cupcake Bakery <http://sprinkles.com>

Follow

1,992 TWEETS

15 FOLLOWING

87,892 FOLLOWERS

## Follow Sprinkles Cupcakes

Full name

Email

Password

**Sign up**

## Tweets

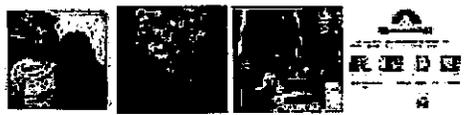
Following

Followers

Favorites

Lists

Recent images



© 2012 Twitter About Help Terms Privacy  
 Blog Status Apps Resources Jobs  
 Advertisers Businesses Media Developers

## Tweets

**Sprinkles Cupcakes** @sprinkles 37m  
 Cool down with Sprinkles! The first 50 people to whisper "sweet advisory" at each Sprinkles receive a free strawberry! [ow.ly/i/GhBq](http://ow.ly/i/GhBq)  
 Collapse Reply Retweet Favorite

9:25 AM - 6 Jun 12 via HootSuite Details

**Sprinkles Cupcakes** @sprinkles 22m  
 Check out tips to expand a small business from @sprinklescandac [tinyurl.com/ceqbhux](http://tinyurl.com/ceqbhux)  
 Collapse Reply Retweet Favorite

11:27 AM - 7 Jun 12 via HootSuite Details

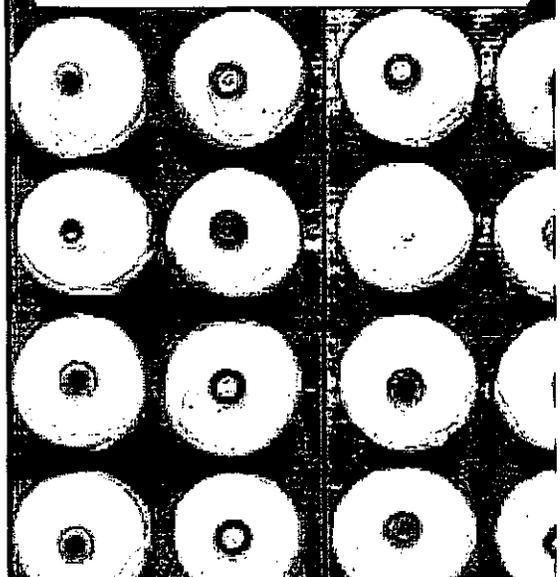
**Sprinkles Cupcakes** @sprinkles 7 Jun  
 What is a popular flavor at Sprinkles? The first 50 people to whisper "limelight" at each Sprinkles receive a free key lime!  
 Collapse Reply Retweet Favorite

9:16 AM - 7 Jun 12 via HootSuite Details

**Sprinkles Cupcakes** @sprinkles 6 Jun  
 Join @sprinklescandac now for small business tips at [bitly.com/sbchat155](http://bitly.com/sbchat155). #SmallBizChat!  
 Collapse Reply Retweet Favorite

9:03 PM - 8 Jun 12 via HootSuite Details

**Sprinkles Cupcakes** @sprinkles 8 Jun  
 First 50 to whisper "triple cinnamon" receive a free buttermilk cinnamon cake with cinnamon cream cheese frosting rolled in cinnamon sugar!  
 Collapse Reply Retweet Favorite



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

	)	<b>Opposition No.</b>
	)	<b>91194188 (parent)</b>
	)	Opposition No.
	)	91195669
	)	Opposition No.
	)	91195985
SOFT SERVE, INC. d/b/a	)	Opposition No.
SPRINKLES,	)	91195986
	)	Opposition No.
Opposer/Petitioner,	)	91196035
	)	Opposition No.
v.	)	91196061
	)	Opposition No.
SPRINKLES CUPCAKES,	)	91196087
INC.,	)	Cancellation No.
	)	92053109
Applicant/Respondent.	)	
	)	<b>Cancellation No.</b>
	)	<b>92054376 (parent)</b>
	)	Cancellation No:
	)	92054401

DECLARATION OF DONNA MARKS

I Donna Marks, declare:

I am the owner of Sprinkles of Palm Beach, an ice cream and sandwich shop located at 279 Royal Poinciana Way, Palm Beach, Florida. I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would testify competently thereto.

I purchased the Sprinkles of Palm Beach business, including all trademark rights associated with the Sprinkles name, on October 1, 2002. A true and correct copy of the purchase agreement is attached to this declaration as Exhibit A.

Eve and Therese Williams were licensed to open the Sprinkles ice cream shop in 1984, and opened the shop shortly thereafter. A true and correct copy of the original owners' 1984 occupational license, as provided to me when I purchased the business, is attached to this declaration as Exhibit B.

After purchasing the Sprinkles business in 2002, I started using the name "Sprinkles of Palm Beach," in addition to "Sprinkles," in connection with the business. Many customers and media outlets routinely have referred to the name of the business as just "Sprinkles."

Since I started operating the store in 2002, I have always sold baked goods at the store. I have consistently sold muffins, croissants, biscotti, cakes, cupcakes, cookies, and other baked

goods. I was a frequent customer at the Sprinkles store before I purchased the business in 2002, and I am aware that the prior owners of the store sold baked goods at the Sprinkles store as well.

On November 13, 2002, I filed a federal trademark application for SPRINKLES OF PALM BEACH. This application matured to registration on April 5, 2005. A true and correct copy of the U. S. trademark registration for SPRINKLES OF PALM BEACH is attached to this declaration as Exhibit C.

On July 16, 2003, I filed a federal trademark application for the Sprinkles of Palm Beach logo (SPRINKLES PALM BEACH & Design). This application matured to registration on October 4, 2005. A true and correct copy of the U. S. trademark registration for SPRINKLES PALM BEACH & Design is attached to this declaration as Exhibit D.

Sprinkles of Palm Beach was featured in the September 8, 2003 issue of *People* magazine, which voted Sprinkles of Palm Beach's Triple Chocolate Supreme flavor the #1 ice cream in the U.S.

Sprinkles of Palm Beach is still a tourist destination, located on a main shopping strip in Palm Beach and featured in numerous guide books to Palm Beach. Sprinkles of Palm Beach still receives visitors from all across the U.S. and from any countries around the world, including visitors from the Washington D.C. metropolitan area. Sprinkles has always received visitors from all across the U.S. and from many countries around the world, including visitors from the greater Washington, D.C. metropolitan area.

Numerous celebrities and public figures have visited Sprinkles when in Palm Beach. A list of such celebrities is attached as Exhibit E.

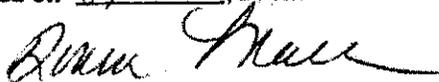
On July 21, 2009, I entered into an agreement to transfer trademark rights in the SPRINKLES OF PALM BEACH and SPRINKLES PALM BEACH & Design trademarks, together with the goodwill associated with those trademarks, to Sprinkles Cupcakes, Inc. Sprinkles Cupcakes, Inc. licensed the trademarks back to me for use with my Palm Beach ice cream and sandwich shop. A true and correct copy of this agreement is attached to this declaration as Exhibit F.

I have used the SPRINKLES and SPRINKLES OF PALM BEACH and SPRINKLES PALM BEACH & Design marks continuously since adopting the name and logo in 2002. The SPRINKLES name and trademark has been in use continuously by me and my predecessors-in-interest since at least as early as 1985. In 2009, there was a fire at the Sprinkles of Palm Beach location. I had to close the shop for a brief time (approximately six months) to make repairs; during that time, I made clear to the community and the press that the store would re-open as soon as possible, under the same Sprinkles or Sprinkles of Palm Beach name. I commented in several news articles that the store would re-open soon, and I posted a sign at the location stating that "Sprinkles will be reopening soon!" True and correct copies of these articles, including a photo of the sign that appeared at the location, are attached as Exhibit G.

On August 29, 2011, at Sprinkles Cupcakes, Inc.'s request, I sent samples of ice cream from the Sprinkles store in Palm Beach to an employee of Sprinkles Cupcakes, Inc. On 5/17, 2012, I sent samples of ice cream and various baked goods (cupcakes, donuts, and bagels) to an employee of Sprinkles Cupcakes, Inc.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Palm Beach, Florida on 5/17/12, 2012.

By:



A handwritten signature in black ink, appearing to read "Donna Marks", with a stylized, cursive script.

**DONNA MARKS**

# **EXHIBIT A**



# **EXHIBIT B**

Information furnished  
will not be returned.

# TOWN OF PALM BEACH

P.O. Box 2000, Palm Beach, Fl. 33480

## APPLICATION FOR OCCUPATIONAL LICENSE

Point of information

Legal name of firm or business: Sandwiches (Phone Number)

Hours of business: Ice Cream - Take Out

APPLICANT: Full first, middle and last name with date of birth: Eve Meredith Williams 5-15-59 (Date of Birth)

Address: Full name and date of birth of officer holding name required: Therese Marie Williams 7-6-53 (Date of Birth)

Business address: 253 A Royal Poinciana Way PB (Date of Birth)

Home address of applicant (including name of a firm or business): 111 Seabreeze Ave. P.B. 888-7277 (Phone Number)

Additional applicant: name and address of your last business establishment

Name and address of your last employer: Richard Biv 8774 So. Ocean Blvd 622-2285 (Phone Number)

Becky Strauss The Australian 1-55-380 (Phone Number)

Eva Kimani Weather House (Phone Number)

I certify that the information given in this application is true and correct to the best of my knowledge. I agree to comply with all Town Ordinances governing the occupation described herein.

Date: Oct 25, 54 Signature of applicant: Eve M. Williams

In building files the application is to be signed by Building Department.

Please clearly specify nature of household item used, if applicable

Business category: Resident (401-2000 appl) 200.00

Business code: 63B Ann. fee: 200.00 10/5

License number: 03435 Date issued: 1954 (mail 1/1)

Number of employees: (500 appl)

ICE CREAM TAKE OUT

COUNTY OCCUPATIONAL LICENSE  
PALM BEACH COUNTY, STATE OF FLORIDA  
COUNTY ORDINANCE NUMBER 72-7

CLASSIFIED

OR-014

88-01454  
SPRINKLES  
WILLIAMS FRENCH & SWEET  
111 SEA BREEZE  
PALM BEACH FL 33480

LOCATED AT:  
253 A ROYAL POINCIANA WAY  
PALM BEACH FL

COUNTY \$ 30.00

[REDACTED]

TOTAL \$ 30.00

THIS LICENSE VALID ONLY WHEN DISPLAYED BY THE LICENSEE

RETAIL STORE

ALLEN G. CLARK  
PALM BEACH COUNTY TAX COLLECTOR

JO A. C. CLARK, TAX COLLECTOR OF  
\$20.00 DEC 68 10/15/88  
7-0 17

ISSUED BY THE COUNTY TAX COLLECTOR AT THE PLACE OF BUSINESS

ICE CREAM TAKE OUT

COUNTY OCCUPATIONAL LICENSE  
PALM BEACH COUNTY, STATE OF FLORIDA  
COUNTY ORDINANCE NUMBER 72-7

CLASSIFICATION

OR-014

85-01454  
SPRINKLES  
WILLIAMS THERESA E RVE W  
111 SEA BREEZE  
PALM BEACH FL 33460

\*\*LOCATED AT:  
255 A ROYAL POINCIANA WAY  
PALM BEACH FL

COUNTY: 8 30.00



TOTAL \$ 30.00  
THIS LICENSE VALID ONLY WHEN RECEIVED BY TAX COLLECTOR

RETAIL STORE

ALLEN G. CLARK  
PALM BEACH COUNTY TAX COLLECTOR

70 A.C. CLARK, TAX COLLECTOR OF  
\$30.00 DEC 03 1978/79  
70 17

LICENSE MUST BE DISPLAYED PROMINENTLY AT ESTABLISHMENT OR PLACE OF BUSINESS

# **EXHIBIT C**

**Int. Cl.: 30**

**Prior U.S. Cl.: 46**

**United States Patent and Trademark Office**

**Reg. No. 2,938,800**  
**Registered Apr. 5, 2005**

**TRADEMARK**  
**PRINCIPAL REGISTER**

**SPRINKLES OF PALM BEACH**

**THERAPY TOO, INC. (FLORIDA CORPORATION), DBA SPRINKLES OF PALM BEACH,  
322 VALENCIA ROAD  
WEST PALM BEACH, FL 33401**

**NO CLAIM IS MADE TO THE EXCLUSIVE  
RIGHT TO USE "OF PALM BEACH", APART FROM  
THE MARK AS SHOWN.**

**FOR: ICE CREAM, IN CLASS 30 (U.S. CL. 46).**

**SN 78-184,899, FILED 11-13-2002.**

**FIRST USE 10-0-2002; IN COMMERCE 10-0-2002.**

**JOHN E. MICHOS, EXAMINING ATTORNEY**

**Trade Secret/  
Commercially Sensitive**

**67000761**

# **EXHIBIT D**

Int. CL: 35

Prior U.S. Cls.: 100, 101, and 102

United States Patent and Trademark Office

Reg. No. 3,004,757

Registered Oct. 4, 2005

**SERVICE MARK  
PRINCIPAL REGISTER**



THERAPY TOO, INC. (FLORIDA CORPORATION)  
322 VALENCIA RD.  
WEST PALM BEACH, FL 33401

NO CLAIM IS MADE TO THE EXCLUSIVE  
RIGHT TO USE "PALM BEACH", APART FROM  
THIS MARK AS SHOWN.

FOR: RETAIL STORE SERVICES FEATURING  
ICE CREAM, IN CLASS 35 (U.S. CLS. 100, 101 AND  
102).

SN 76-529,862, FILED 7-16-2003.

FIRST USE 10-0-2002; IN COMMERCE 10-0-2002.

ODESSA BIBBINS, EXAMINING ATTORNEY

Trade Secret/  
Commercially Sensitive

# **EXHIBIT E**

**PARTIAL LIST OF CELEBRITIES WHO HAVE VISITED**  
**SPRINKLES OF PALM BEACH**

Michael Jackson

Rudy Giuliani

Al Melnick

Robert Kraft

Brett Ratner

Rod Stewart

# **EXHIBIT F**

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

SOFT SERVE, INC. d/b/a SPRINKLES,	)	
	)	<b>Opposition No. 91194188 (parent)</b>
Opposer/Petitioner,	)	Opposition No. 91195669
	)	Opposition No. 91195985
v.	)	Opposition No. 91195986
	)	Opposition No. 91196035
SPRINKLES CUPCAKES, INC.,	)	Opposition No. 91196061
	)	Opposition No. 91196087
Applicant/Respondent.	)	Cancellation No. 92053109
	)	
	)	<b>Cancellation No. 92054376 (parent)</b>
	)	Cancellation No: 92054401

---

**EXHIBIT F TO THE DECLARATION OF DONNA MARKS**

**CONFIDENTIAL – ATTORNEYS’ EYES ONLY**  
**RESTRICTED DOCUMENTS PURSUANT TO 37 C.F.R. § 2.126**

**FILED UNDER SEAL SUBJECT TO PROTECTIVE ORDER**

This exhibit has been designated confidential, pursuant to a Protective Order, and are not to be disclosed or revealed except to the Trademark Trial and Appeal Board and counsel for the parties, or by order of the Board.

# **EXHIBIT G**

# Palm Beach Daily News

## FK doctors praise speed, accuracy of CyberKnife

By DAVID ROGERS  
Daily News Staff Writer

A key weapon in physicians' arsenal of cancer-fighting tools at K Medical Center is a \$5 million robot with an intimidating name. The hospital installed its CyberKnife system recently and JFK doctors are praising the system's ability to speed the process of delivering radiation therapy. The CyberKnife's computer

uses on-the-fly imaging to continually track the movement of patients on its table and adjust its own movements so high-dose blasts of radiation are delivered to tumors, not the healthy tissue or organs nearby. While the treatments are categorized as surgery, the device is non-invasive.

JFK is the only hospital in Palm Beach County with a Cy-

*Please see JFK Page 5*



## Sprinkles back soon

Donna Marks, owner of Sprinkles Ice Cream & Sandwich Shop, finishes a sign announcing that the shop on Royal Poinciana Way will reopen soon.

Marks expects to reopen at the end of the month. The popular ice cream parlor has been closed since an Aug. 1 fire.

Daily News Photo  
by Ruth Cincontia

Copyright 2010  
Palm Beach Daily News  
Vol. 114, No. 114

Look for mostly sunny skies today with a high near 61. Details, Page 2.

**WEATHER**

Bits 'N' People... 3 Horoscope..... 5  
Classified..... 4 Movie Times..... 4  
Crossword..... 5 Today..... 2

**INSIDE**





# Palm Beach Daily News

50 cents

## Author doesn't hold to old writing saws

By JAN SJOSTROM  
Daily News Arts Editor

'I am a huge proponent of work,' author Ann Patchett tells Society of the Four Arts audience.

Who's that hiding under the covers beside Renee Fleming at the start of the third act of *La Traviata*? Could it be Ann Patchett?

The author of *Bel Canto* and four other novels arrived at that unlikely position on the Metropolitan Opera stage because she writes novels about subjects that have nothing to do with her own life.

Speaking without notes and prowling the stage with a wireless mike, Patchett talked about her writing process Tues-

Please see PATCHETT, Page 6

Classified..... 12 Movie Times..... 9  
Crossword..... 7 Review..... 5  
Horoscope..... 11 Today..... 2

## Worth Avenue jewelry store pays old debt

By MARGIE KACIHA  
Daily News Staff Writer

Members of the Palm Beach County Sheriff's Office Court Services Division descended on Worth Avenue Tuesday morning to execute a Miami/Dade County civil order to seize property at Kaufmann de Suisse Jewelers.

About a half-dozen members of the PBSO unit, some dressed in black tactical gear, were involved in the operation at 210 Worth Ave. It began around 10 a.m.

By 3 p.m. it was over, with no jewelry

Please see KAUFMANN, Page 8

## Fresh start for Sprinkles



Daily News Photo by Meghan McCarthy

Sloane, 11, and Kole Rosin, 10, eat ice cream at Sprinkles Ice Cream & Sandwich Shop, which reopened Wednesday afternoon. The shop on Royal Poinciana Way had been closed since an Aug. 1 kitchen fire.

Copyright 2010  
Palm Beach Daily News  
Vol. 114, No. 138



7 2804 130000 1

Today should be sunny and breezy with a high temperature near 76. Details, Page 2.

### WEATHER

INSIDE

**Int. Cl: 30**

**Prior U.S. Cl: 46**

**Pat. No. 2,000,000**

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

SOFT SERVE, INC. d/b/a SPRINKLES,	)	Opposition No. 91194188 (Parent)
	)	Opposition No. 91195669
Opposer/Plaintiff,	)	Opposition No. 91195985
v.	)	Opposition No. 91195986
	)	Opposition No. 91196035
SPRINKLES CUPCAKES, INC.,	)	Opposition No. 91196061
	)	Opposition No. 91196087
Applicant/Defendant.	)	Cancellation No. 92053109
	)	

**DECLARATION OF JOHN LOJPERSBERGER**

I, John Lojpersberger, declare:

1. I am the General Manager of the WILLIAM-SONOMA store located at the Mazza Gallerie at 5300 Wisconsin Ave NW, Washington, DC. I have worked at this store since September 2009.

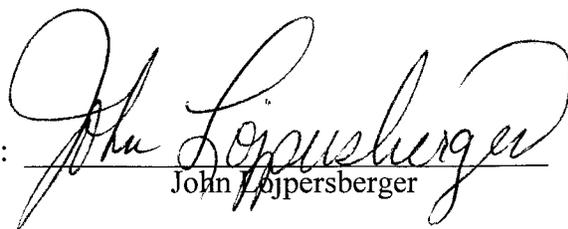
2. This WILLIAMS-SONOMA store has sold cupcake mixes under the SPRINKLES brand during the entire duration that I have worked at the store.

3. I would expect the WILLIAMS-SONOMA sales associates working at this store to share with me any reports of customer confusion concerning the source or naming of any products that the store has available for sale.

4. I am not aware of any customers at our store ever being confused about the source or naming of the SPRINKLES cupcake mixes. I have asked other employees at the store and they, too, are unaware of any such confusion.

5. I had never heard of a business called "Sprinkles" or "Soft Serve" in or near Potomac, Maryland until this legal proceeding was called to my attention in April 2012.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Washington, DC, on May 7<sup>th</sup>, 2012.

By:   
John Lojpersberger



6. Insofar as customers have identified local competitors to the store, those competitors have included Georgetown Cupcake, Cake Love, Red Velvet, and Hello Cupcakes, but not any store in or near Potomac called "Sprinkles" or "Soft Serve."

7. Our store routinely donates any leftover cupcakes to local homeless shelters, Crowder Owens Food Bank and Central Union Mission.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Washington, D.C., on June 7, 2012.

By: *Terra Marsden*  
TERRA MARSDEN

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

SOFT SERVE, INC. d/b/a SPRINKLES,	)	<b>Opposition No. 91194188 (parent)</b>
	)	Opposition No. 91195669
Opposer/Petitioner,	)	Opposition No. 91195985
	)	Opposition No. 91195986
v.	)	Opposition No. 91196035
	)	Opposition No. 91196061
SPRINKLES CUPCAKES, INC.,	)	Opposition No. 91196087
	)	Cancellation No. 92053109
Applicant/Respondent.	)	
	)	
	)	
	)	

---

**DECLARATION OF ANDREA WILLIAMS**

1. I am a former owner of the SPRINKLES business in Palm Beach, Florida. I have personal knowledge of the facts in this declaration, and, if called as a witness, I could competently testify to them.

2. My mother Therese Williams and my sister Eve Williams founded the SPRINKLES business in September 1985. I took over management of the business shortly thereafter, in 1986.

3. The SPRINKLES business sold ice cream, sandwiches, candy and baked goods to customers at its store in Palm Beach. Examples of baked goods that we sold at the store are gourmet cake slices, brownies, and muffins.

4. We promoted the business under the name SPRINKLES using signage, stickers for packaging, and advertising.

5. The SPRINKLES business routinely attracted customers from across the country and from other countries. Over half of our customers were from out of state. Among the well-known customers who came to the store were Bob Hope, Brooke Shields, Jimmy Buffett, Donald Trump, Cliff Robertson, Dina Merrill and members of the Kennedy family.

6. The SPRINKLES store was publicized in press reports, such as in *People* magazine and on worldwide television and radio programs.

7. For some of the time the business had a second retail location called SPRINKLES TOO.

8. In 2001 I sold the SPRINKLES business, including the trademarks and trade names and associated goodwill, to Thomas Walsh. At the time my married name was Andrea Reickel.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Palm Beach, Florida on may 25, 2012.

Andrea Williams  
ANDREA WILLIAMS

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

SOFT SERVE, INC. d/b/a SPRINKLES,	)	Opposition No. 91194188 (Parent)
	)	Opposition No. 91195669
Opposer/Plaintiff,	)	Opposition No. 91195985
v.	)	Opposition No. 91195986
	)	Opposition No. 91196035
SPRINKLES CUPCAKES, INC.,	)	Opposition No. 91196061
	)	Opposition No. 91196087
Applicant/Defendant.	)	Cancellation No. 92053109
	)	

**DECLARATION OF MATTHEW WALLACE**

I, Matthew Wallace, declare:

1. I am the General Manager of the WILLIAM-SONOMA store located at the White Flint Mall at 11301 Rockville Pike, North Bethesda, Maryland. I have worked at this store since November 2008.

2. This WILLIAMS-SONOMA store has sold cupcake mixes under the SPRINKLES brand during the entire duration that I have worked at the store.

3. I would expect the WILLIAMS-SONOMA sales associates working at this store to share with me any reports of customer confusion concerning the source or naming of any products that the store has available for sale.

4. I am not aware of any customers at our store ever being confused about the source or naming of the SPRINKLES cupcake mixes. I have asked other employees at the store and they, too, are unaware of any such confusion.

5. I had never heard of a business called "Sprinkles" or "Soft Serve" in or near Potomac, Maryland until this legal proceeding was called to my attention in late August 2011.

I declare under penalty of perjury that the foregoing is true and correct. Executed at North Bethesda, Maryland, on April 13, 2012.

By:   
Matthew Wallace

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

SOFT SERVE, INC. d/b/a SPRINKLES,	)	<b>Opposition No. 91194188 (parent)</b>
	)	Opposition No. 91195669
Opposer/Petitioner,	)	Opposition No. 91195985
	)	Opposition No. 91195986
v.	)	Opposition No. 91196035
	)	Opposition No. 91196061
SPRINKLES CUPCAKES, INC.,	)	Opposition No. 91196087
	)	Cancellation No. 92053109
Applicant/Respondent.	)	
	)	
	)	
	)	

**DECLARATION OF THOMAS WALSH**

1. I am a former owner of the Sprinkles business in Palm Beach, Florida. I have personal knowledge of the facts in this declaration, and, if called as a witness, I could competently testify to them.

2. I acquired the Sprinkles business, together with the "Sprinkles" name and the goodwill associated with it, on or about September 11, 2001. A copy of the purchase agreement is attached hereto as Exhibit A. I subsequently put the business under a Florida corporation with the name Sprinkles, Inc.

3. I promoted the business under the name "Sprinkles" and the business was routinely referred to by others as "Sprinkles."

4. Sprinkles sold, among other things, premium ice cream, sherbet and baked goods such as croissants, sticky buns and cakes.

5. Palm Beach, Florida is an internationally popular travel destination. The Sprinkles store, in particular, regularly attracted customers from throughout the United States, including from the District of Columbia. Not infrequently, for example, Sprinkles was visited by members of the U.S. Congress. I also recall other well-known, out-of-state visitors to the store such as Michael Jackson, Faye Dunaway and Rod Stewart.

6. On or about October 1, 2002, Sprinkles, Inc. sold the business, including the "Sprinkles" name and the goodwill associated with it, to Therapy Too, Inc., whose principal was a woman named Donna Marks. A copy of the sale agreement is attached hereto as Exhibit B. A copy of the corresponding trademark assignment is attached hereto as Exhibit C.

I declare under penalty of perjury that the foregoing is true and correct. Executed at

Rancho Madera, California on 5/19, 2012.

By: Thomas Walsh  
THOMAS WALSH

# **EXHIBIT A**



THE RONALD LAWRENCE GROUP

1601 Belvedere Road West Palm Beach, Florida 33406

Offer For Purchase and Sale, Assets, Earnest Money Receipt and Agreement

1. Received from Thomas Walsh on Sept 11 2001 (date), at 10:30 AM DPM, hereinafter referred to as PURCHASER, the sum of Five Thousand DOLLARS (\$5,000) in the form of a check as a deposit on the purchase price of all the equipment, fixtures, goodwill, inventory, trademarks, trade names, lease and other tangible assets of that certain business known as: Spunkle 279 Royal Pinesway Blvd (city) Palm Beach (county) FL (state) 33480 located at 279 Royal Pinesway Blvd (city) Palm Beach (county) FL (state) FL 33480
2. The total purchase price of \$50,000 shall be paid as follows:
a. \$5,000 Deposit on the date of this agreement included in down payment.
b. \$ Additional deposit on acceptance by Seller included in down payment.
c. \$45,000 Balance of down payment to be deposited with escrow holder at the settlement (through escrow) in cash or certified funds.
d. \$ Total Down Payment.
e. \$ Assumption of existing obligation, or paid through Seller, payable as follows: \$ per month (including % interest), evidenced by a Secured Promissory Note.
f. \$ Balance of purchase price to be paid to Seller pursuant to a Secured Promissory Note in said amount, payable at \$ or more per month, with interest thereon at % per annum, together with a security agreement and a financing statement as provided by the Uniform Commercial Code of Florida, which shall be filed with the appropriate State agency.
g. \$ Additional Payment Terms.
3. Additional Conditions of Sale: See Addendum A
TOTAL PURCHASE PRICE \$50,000

4. For the purpose of completing this transaction, escrow shall be opened at the office of Ronald Lawrence Group and closing shall take place on or before 9 PM o'clock AM PM on Oct 24 2001.
5. The full purchase price shall include inventory of \$1,000-1,500 at SELLER'S cost. If the actual amount is more or less, the down payment or note to seller shall be adjusted accordingly.
6. Pre-paid expenses, if any, shall be paid by the PURCHASER at closing and all other taxes and expenses including work in progress shall be pro-rated as of the date of transfer of ownership.
7. SELLER warrants that at the time physical possession is delivered to PURCHASER, all equipment will be in working order and that the premises will pass all inspections necessary to conduct such business. Possession date shall be at settlement (closing).
8. PURCHASER and SELLER agree to execute all documents necessary to consummate this transaction, including, where applicable, such documents as are necessary to comply with the Bulk Transfer provisions of the Uniform Commercial Code of Florida.
9. PURCHASER and SELLER do hereby, jointly and severally, acknowledge and authorize broker to deposit amounts of earnest money and hold same in Ronald Lawrence Group trust account.
10. A. This document contains the entire understandings between the parties and, should there be any conflict between the provisions of this agreement and any escrow instructions executed pursuant hereto, the provisions of this agreement shall control.
B. This agreement, and any other exhibits and/or addenda attached hereto and signed by the parties, constitutes the entire agreement; there are no oral agreements, understandings or representations being relied upon by the parties. Any modifications must be in writing and signed by all parties to this agreement.
11. The SELLER warrants that it has a good, clear and recorded, marketable title to the business being sold.
12. In the event this offer involves the transfer of SELLER's leasehold interest, SELLER hereby guarantees to deliver to PURCHASER a valid lease assignment of existing lease or a new lease by the date of closing. SELLER's failure to so deliver shall relieve PURCHASER from its purchase agreement hereunder, in which event all funds deposited by PURCHASER shall be returned to PURCHASER forthwith.
13. PURCHASER, SELLER and broker agree that in the event any litigation is instituted to collect any sum due Broker to enforce or interpret any of the provisions of this agreement, the prevailing party or parties shall be entitled to recover from the other(s) their reasonable attorney's fees and court costs, including appeals, as determined by the Court in such action or suit.
14. PURCHASER shall examine the equipment, fixtures, stock on hand, leasehold improvements and other assets of the business and shall rely solely on his personal examination in making this offer and not upon any statements or representations made by the Broker, SELLER, or their agents in deciding to purchase or value the business.
15. When signed by PURCHASER, this deposit receipt is an offer on the part of PURCHASER to purchase the above business on the terms stated and, should the SELLER fail to accept this offer by his signature hereon prior to 6:00 PM Sept 11 2001, the PURCHASER shall revoke this offer and deposit will be returned by Broker to PURCHASER.
16. SELLER irrevocably authorizes escrow agent to pay such fee to Broker as denoted in Commission agreement, or 50% of the deposit in case such deposit is forfeited by PURCHASER, provided such payment shall not exceed the full amount of Broker's fee in cash at close of escrow, all in accordance with the signed Listing Agreement, if any, previously entered into by Broker and SELLER.
17. Upon SELLER(s) acceptance of this offer to purchase, SELLER(s) does/ do hereby direct Broker not to advise or present SELLER(s) with any subsequent offer(s) received by Broker until after forfeiture by the PURCHASER or other nullification of this Purchase contract.

AS TO PURCHASER: By signing this agreement, PURCHASER hereby acknowledges that PURCHASER is relying solely on PURCHASER'S own inspection of the business and the representations of SELLER not of Broker with regards to the prior operating history of the business, the value of the assets being purchased and all other material facts of SELLER in making this offer. PURCHASER acknowledges that Broker has not verified, and will not verify, the representations of SELLER and should any such representations be untrue, PURCHASER agrees to look solely to SELLER for relief and to indemnify Broker and hold Broker harmless in connection with all losses and damages caused PURCHASER thereby.
AS TO SELLER: SELLER acknowledges that Broker has made no representations concerning the credit-worthiness or ability of PURCHASER to complete this transaction, and relies solely on PURCHASER representations and not Broker with respect thereto.
PURCHASER and SELLER individually acknowledge receipt of a copy of this agreement. This is a legally binding document.
Read it carefully. If you do not understand it, consult an attorney. Broker is not authorized to give legal advice.

PURCHASER hereby agrees to buy on the terms set forth above.
Date: 9/14/01
Purchaser: [Signature]
Address:
City, State, Zip:
Phone ( ):

SELLER hereby agrees to sell on the terms set forth above, and to pay a Broker's Commission as per separate agreement.
Date: 9/14/01
Seller: [Signature]
Address:
City, State, Zip:
Phone ( ):
Agent for Broker: [Signature]



ADDENDUM - A

To a certain contract dated Sept. 11, 2001, identified below between: Thomas Walsh as Purchaser and: \_\_\_\_\_ as Seller

on that business known as: Sprinkler and located at: 279 Royal Poinciana Way (Street, City, State, Zip)

This ADDENDUM is executed this 11 day of Sept, 2001, and shall constitute an integral part of the Offer for Purchase and Sale of Assets, Earnest Money receipt and Agreement executed by the undersigned on the date thereof:

- 1. This agreement is contingent upon Purchaser's inspection of Seller's financial records. Seller shall make financial records available to Purchaser for his inspection during a seven (7) day period. Purchaser shall examine the records within seven (7) days of receipt of Seller's Financial Records. Failure of the Purchaser to remove this contingency in writing within seven (7) days of receipt of records shall render this agreement null and void and earnest money deposit shall be returned to Purchaser.
2. Seller to discharge all liabilities, including taxes.
3. Seller to indemnify Buyer against all claims arising out of operation prior to closing.
4. Purchase Money to have right of set-off.
5. As part of the consideration herein paid, the Seller and it's Principals does covenant that they will not engage, directly or indirectly, in this type of business within a radius of 15 miles, from the subject premises for a term of 5 years from date of Purchaser's possession.
6. Purchaser reserves the right to take title in the name of his/her corporation providing the Purchaser agrees to remain personally responsible for all conditions of this agreement including signing the promissory note referenced herein - Husband and Wife Signatures.
7. Seller to remain with Purchaser, without compensation, for 30 days to enable the Purchaser to become acquainted with the business. Seller's duties during this period will be for training and transition.
8. Sale is contingent upon Buyer's and Seller's attorney's acceptance of final closing documents.

Handwritten notes: 9. \$5,000.00 borrow for 30 days for 3rd party payment in vendors. 10. 10 day manager leaves before the 2 weeks over sup, will be responsible for the rest of the training.

Date: 9/11/01 at: \_\_\_\_\_ am pm. Purchaser: Thomas Walsh

Date: 9/14/01 at: \_\_\_\_\_ am pm. Seller: A. Reichel

Purchaser \_\_\_\_\_ Seller \_\_\_\_\_

# **EXHIBIT B**

### AGREEMENT FOR PURCHASE AND SALE OF ASSETS

THIS AGREEMENT for Purchase and Sale of Assets (the "Agreement") is entered into as of this 1 day of Oct, 2002, by and between Sprinkles, Inc., a Florida corporation, ("Seller"), and Therapy Too, Inc. ("Purchaser") with respect to the following facts:

#### RECITALS

WHEREAS, Seller owns and operates an ice cream/sandwich shop known as Sprinkles, ("Business"), located at 279 Royal Poinciana Way, Palm Beach, Florida, 33480, ("Business Premises"); and

WHEREAS, upon the terms and conditions set forth herein, Purchaser desires to purchase the assets of Seller's business and Seller desires to sell such assets to Purchaser.

NOW, THEREFORE, in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration and the mutual covenants herein contained, the parties hereto hereby mutually agree as follows:

#### I

##### RECITALS

1.1 The foregoing Recitals are true and correct and incorporated herein by reference.

#### II

##### PURCHASE AND SALE

2.1 Purchase and Sale of Assets. Upon and subject to the terms and conditions hereinafter set forth, Purchaser hereby agrees to purchase from Seller and Seller hereby agrees to sell to Purchaser all of the following assets that are owned by Seller and used in connection with the Business, together with any rights to the name "Sprinkles" that Seller owns, (collectively the "Purchased Assets"): (a) such assets listed on Exhibit "A" attached hereto; (b) an assignment of the leasehold interest in the Premises; (c) all furniture, fixtures, and equipment utilized in connection with the Business set forth on Exhibit "A"; (d) all trade names, "Sprinkles", and logos related to the Business; (e) all books, financial reports, customer lists and vendor lists of the Business; (f) all marketing materials and programs; and (g) all existing inventory on the date of Closing.

2.2 Purchase Price. The Purchase Price to be paid by Purchaser and accepted by Seller for the Purchased Assets shall be Three Hundred Fifty Thousand and No/100 (\$350,000.00) Dollars, subject to adjustments herein, including, but not limited to, those for the inventory adjustment.

2.3 Payment of Purchase Price. The Purchase Price for the Purchased Assets shall be payable as follows:

- (A) A FIVE THOUSAND DOLLAR (\$5,000.00) Deposit ("Initial Deposit") to be paid by Purchaser upon execution hereof and held in escrow in an interest bearing account for the benefit of Purchaser by Cohen, Norris, Scherer, Weinberger & Wolmer ("Escrow Agent").
- (B) A THIRTY THOUSAND DOLLAR (\$30,000.00) additional Deposit ("Additional Deposit") to be paid by Purchaser by the end of the Inspection Period as hereinafter described and held in escrow by Cohen, Norris, Scherer, Weinberger and Wolmer in an interest bearing account for the benefit of Purchaser.
- (C) THREE HUNDRED FIFTEEN THOUSAND DOLLARS (\$315,000.00) in cash or local cashier's check at Closing, subject to adjustments as further described below.

*to be returned within two days of the closing date.*

The Initial Deposit and Additional Deposit are collectively referred to as "Deposits" or "Deposit".

If Purchaser fails to terminate this transaction in writing within the Inspection Period in accordance with Paragraph V, then the Initial Deposit and Additional Deposit are nonrefundable, subject to and provided that Seller performs all of its obligations as set forth in this Agreement.

**III  
INVENTORY**

3.1 The parties agree that the Purchased Assets include all inventory in existence of the date of Closing. Prior to the Closing Date, Seller shall be permitted to use the inventory in accordance with customary and ordinary operation of the Business. At Closing, the remaining inventory shall become the property of the Purchaser at no additional cost to Purchaser.

**IV  
LEASE**

4.1 Purchaser's and Seller's obligation hereunder are contingent upon and subject to the Purchaser receiving by Closing (i) approval of an assignment of the present lease of the Business Premises ("Lease") by the landlord under same ("Approval Contingency"), (ii) Seller being released of all obligations thereunder including, but not limited to, the release from any Guaranty obligations of Seller or any other parties currently obligated under the Guaranty (collectively "Release Contingency"), and (iii) Purchaser receiving an estoppel from the landlord under said Lease in a form satisfactory to Purchaser, stating that there are no outstanding defaults by the tenant thereunder (the "Landlord Estoppel"). If the contingencies and estoppel referenced above fail, are not satisfied at Closing, or are not waived by Seller and/or Purchaser as set forth hereafter as to the Release Contingency or the Landlord Estoppel respectively, the Seller or Purchaser may cancel this Agreement upon which the Deposits and all interest earned thereon shall be returned to Purchaser. It is understood that Seller may waive the "Release Contingency" and that Purchaser may waive the Landlord Estoppel. If the Approval Contingency is satisfied and the Release Contingency is satisfied or Seller elects to waive the Release Contingency or Purchaser elects to waive the Landlord Estoppel then, all parties shall proceed to Closing in accordance with the terms hereof. Purchaser shall make its best efforts to obtain all approvals herein from the landlord under the Lease including, but not limited to, submitting all requested information to the landlord, which may include financial reports and the financial information of Purchaser. If the Landlord Estoppel is not received and Purchaser does not elect in its sole discretion to waive it, then Purchaser shall have no obligation to proceed to Closing and Purchaser shall be entitled to a refund of all Deposits and interest earned thereon.

**V  
INSPECTION PERIOD**

5.1 Purchaser shall have fourteen (14) days ("Inspection Period") from the Effective Date (the date when the last of Seller and Purchaser have signed this Contract and delivered same to the other party) in which to make such inspections as Purchaser shall desire. If for any reason whatsoever Purchaser determines that the Purchased Assets are not satisfactory to Purchaser, at Purchaser's sole discretion, Purchaser shall have the absolute right to terminate this transaction within the Inspection Period, said termination to be evidenced by Purchaser's delivery of written notice to Seller within the Inspection Period, and immediately thereafter, this transaction, this Agreement shall be deemed null and void, of no further force and effect, and the Initial Deposit and all interest earned thereon shall be returned to Purchaser. Purchaser's failure to terminate this Contract within the Inspection Period shall constitute Purchaser's acceptance on the Purchased Assets in their present condition.

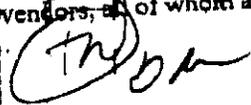
Furthermore, in such case, Purchaser shall have no further rights to cancel the contract provided that Seller complies with all of its obligations under this Agreement.

**VI  
CLOSING**

6.1 **Place of Closing.** The Closing for the purchase of all of the Purchased Assets shall be held in the offices of Cohen, Norris, Scherer, Weinberger and Wolmer, 712 U.S. Highway One, 4th Floor, North Palm Beach, Florida (Telephone 561-844-3600).

6.2 **Date and Time of Closing.** The Closing for the purchase of all of the Purchased Assets (the "Closing Date" or "Closing") shall occur on October 28, 2002, or on such other date as the parties mutually agree in writing. If the Approval Contingency and/or Release Contingency is not satisfied by the Closing Date (or waived by Seller in accordance with Paragraph 4.1), Seller may extend the Closing Date to obtain same for a period not to exceed thirty (30) days from the Closing Date.

6.3 **Costs of Closing.** Seller shall pay all expenses of documentary stamps, transfer fees, and intangible taxes, if any.

6.4 **Documents of Closing.** Seller shall execute and deliver to Purchaser a Bill of Sale with Warranty of Title, assignment of the name "Sprinkles", an assignment of the Lease for the Business Premises, assignment of the telephone number all in forms satisfactory to Purchaser, and a list of relevant contact and other information for all customers and vendors, all of whom are listed on Exhibit "C" attached heretofore to be attached at closing. 

**VII  
LIABILITIES**

7.1 With the exception of the Seller's interests in the Lease, Purchaser is assuming no liabilities whatsoever. As to any and all claims arising from the operation of the Business and/or the Purchased Assets prior to Closing, Seller shall indemnify and hold Purchaser harmless from such claims. As to any and all claims arising from the operation of the Business and/or the Purchased Assets arising on the date of Closing or thereafter, Purchaser indemnifies Seller and holds Seller harmless from such claims. Seller will not execute any contracts for the Business or take any action on behalf of the Business (except as set forth hereafter) after Closing, and to the extent Seller does, Seller indemnification hereunder applies to said acts. Said indemnifications shall include reimbursement of any attorneys' fees and costs accrued in the defense of any claims. This paragraph shall survive Closing.

**VIII  
ACCOUNTS RECEIVABLES**

8.1 As to any and all Accounts Receivables due Seller prior to Closing, but not yet paid at Closing, Purchaser shall be obligated to forward same immediately to Seller after receipt of such monies to the extent Purchaser receives same. This paragraph survives Closing. In the event of any litigation arising out of Seller's collection of these monies from Purchaser, the prevailing party shall be entitled to recover its attorneys' fees and costs incurred. Seller may also seek recovery directly from the party responsible for the Accounts Receivable.

**IX  
OTHER AGREEMENTS**

9.1 Seller and Purchaser understand and agree that except for those representations expressly contained herein, there have been no representations, either oral or written, made by either

party to the other, which have been or shall be relied upon. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and may not be changed, modified or altered except by an instrument in writing signed by all the parties hereto.

**X**

**FURTHER INSTRUMENTS AND ASSURANCES**

10.1 Seller and Purchaser will, as reasonably required at any time and from time to time after the Closing, execute, acknowledge, and deliver, or cause to be executed, acknowledged, or delivered, any and all documents as may be reasonably necessary in order to carry out the intent and purposes of this Agreement.

**XI**

**DEFAULT**

11.1 In the event that this transaction fails to close due to a refusal or default on the part of the Seller, then in such event, at the option of the Purchaser, the Purchaser may (i) obtain the return of the Deposit(s), all interest earned thereon and reimbursement of all reasonable expenses incurred by the Purchaser in connection with the transaction contemplated herein, or (ii) seek specific performance plus all costs of enforcing the same, such remedies constituting Purchaser's sole remedies hereunder. Upon the filing of such lawsuit for specific performance, as a condition to maintaining same [within two (2) days of filing], Purchaser shall deposit with the Registry of the Court the entire Purchase Price less any Deposit received by Escrow Agent. In the event of a default on the part of the Purchaser, the Initial Deposit paid or to be paid and the Additional Deposit paid or to be paid by Purchaser may be retained by and for the account of Seller along with all interest earned thereon as agreed upon liquidated damages and released from escrow to Seller forthwith, consideration for the execution of this Agreement and in full settlement of any claims whereupon Purchaser and Seller shall be relieved of all obligations. If the Initial Deposit and/or Additional Deposit has not been made, Purchaser will immediately deliver those monies to Seller directly.

**XII**

**MISCELLANEOUS**

12.1 All personal property taxes shall be prorated at Closing. All utility deposits will remain the property of Seller. Any security deposits and prepaid rent related to the Lease shall be paid to Seller at Closing from Purchaser and Seller will assign the rights to same to Purchaser at Closing. Purchaser shall be responsible for establishing its own utility accounts and shall have no obligation to Seller for any deposits relating thereto. Time is of the essence as to this Agreement. This Agreement may be executed in any number of counterparts, any one and all of which shall constitute the Agreement of the parties. The execution of this Agreement may be by actual or facsimile signature. No modification or amendment of this Agreement shall be of any force or effect unless in writing executed by both Purchaser and Seller. This Agreement shall be interpreted in accordance with the laws of the State of Florida, and jurisdiction for any litigation hereunder shall lie in Palm Beach County. In connection with any litigation, action, suit or dispute including appellate proceedings, arising out of or in any manner relating to this Agreement, the prevailing party shall be entitled to recover all costs and expenses, including but not limited to, reasonable attorney's fees and costs. This Agreement and the terms and provisions hereof shall inure to the benefit of and be binding upon the respective heirs, executors, personal representatives, successors, or assigns of the parties hereto. Risk of loss until the date of Closing shall be that of the Seller. The Purchased Assets shall be conveyed to Purchaser in the same condition as of the date of this Agreement, ordinary wear and tear excepted.

**XIII  
BROKER'S COMMISSION**

13.1 Purchaser and Seller each warrant to the other that no real estate broker or agent ("Broker") has been used or consulted in connection with the purchase and sale of the Purchased Assets. The parties hereto covenant to each other and agree to defend, indemnify and save harmless from and against any actions, damages, real estate commissions, fees, posts and expenses (including reasonable attorney's fees), resulting or arising from any commissions, fees, costs and expenses due to any broker or agent because of the purchase and sale of the Purchased Assets and the execution and deliver of this Agreement, due to the acts of the indemnifying party.

**XIV  
NOTICE**

14.1 Notice. Notice, request, demand, instruction or other communication to be given to any party hereunder shall be in writing and sent by registered or certified mail, telegram or facsimile (hard copy to follow by certified or registered mail) as follows:

If to Seller:	Sprinkles, Inc. Attn: Tom Walsh 2415 Medina Way West Palm Beach, FL 33401 Fax #561 832-0561	With a copy to
If to Purchaser	Therapy Too, Inc. c/o Donna Marks 322 Valencia Road West Palm Beach, FL 33401 Fax # 561 366-8116	With a copy to

Gregory R. Cohen 712 U.S. Highway One Suite 400 North Palm Beach, FL 33408 Fax # 561 842-4104
Jordan C. Paul c/o Aquila Property Company. Inc. 3111 North University Drive, Suite 725 Coral Springs, FL 33065 Fax # 954 340 0420

14.2 Notice shall be deemed to have been given upon receipt of said notice. The addressees and addresses for the purpose of this section may be changed by giving written notice pursuant hereto. Unless and until such written notice is received, the last addressee and address stated herein shall be deemed to continue in effect for all purposes hereunder.

**XV  
TIME AND ACCEPTANCE AND EFFECTIVE DATE**

15.1 If this offer is not executed by the Seller and Purchaser by \_\_\_\_\_ this offer shall thereafter be deemed null and void. The date of this Agreement ("Effective Date") shall be the date when the last of Seller and Purchaser have signed this Agreement. Time is of the essence of this Agreement.

**XVI  
ADDITIONAL**

16.1 All Closing Fees and other costs and expenses of Seller's Closing Agent, counsel, and representatives shall be paid by Seller. All fees, costs, and expenses of Purchaser's counsel, agents, and representatives shall be paid by Purchaser.

16.2 If a release is not obtained of Seller under those leases with Soft Serve and for aprons and towels, Purchaser will pay the balance due under those leases at Closing.

16.3 Purchaser assumes responsibility for all gift certificates outstanding as of the Effective Date. To the extent Seller issues any new gift certificates prior to Closing (except as set forth below), Seller will credit that amount to Purchaser at Closing.

16.4 Advertising:

Chamber of Commerce - Seller will make a payment of only Two Hundred Seventy and No/100 (\$270.00) Dollars for the advertising.

Official Guide to Palm Beach - There is a bill of Nine Hundred Thirty Five and No/100 (\$935.00) Dollars with an obligation to provide additional Two Hundred Fifty and No/100 (\$250.00) Dollars of gift certificates. If Seller is released of all obligations for said advertising by Passport Publications and Media Corporation (the party to the advertising contract), Purchaser will assume all such obligations (including those for the gift certificates). If Seller is not released of all obligations for said advertising by Passport Publications and Media Corporation, Seller will remit payment of Nine Hundred Thirty Five and No/100 (\$935.00) Dollars at Closing to Passport Publications and Media Corporation and provide Passport Publications and Media Corporation gift certificates up to Two Hundred Fifty and No/100 (\$250.00) Dollars, and Purchaser shall reimburse Seller Nine Hundred Thirty Five and No/100 (\$935.00) Dollars at Closing and Purchaser shall be responsible for honoring the gift certificates (in such instance no credit will be provided from Seller to Purchaser for the gift certificates).

Palm Beach Illustrated - There is a balance as of September 22, 2002 of Two Thousand One Hundred Two and No/100 (\$2,102.00) Dollars. Seller will remit September and October payments and be reimbursed such October payment at Closing. In addition, if Seller is released of all obligations for said advertising by Palm Beach Media Group, Inc. (the party to the advertising contract), Purchaser will assume all such obligations. If Seller is not released of all obligations for said advertising by Palm Beach Media Group, Seller will remit the balance of One Thousand Two Hundred Seventy Five and No/100 (\$1,275.00) Dollars at Closing to Palm Beach Media Group, Inc. and Purchaser will reimburse these monies to Seller at Closing.

16.5 Purchaser acknowledges that Purchaser has been advised that the Town of Palm Beach has stated that maintaining chairs in the Business Premises has been grandfathered to the Business Premises and no written consent has been obtained. Purchaser can conduct investigations during the Inspection Period including conducting conversations with Brian House, if Purchaser elects. If Purchaser is not satisfied, Purchaser may terminate this Contract within the Inspection Period. If Purchaser is satisfied, Purchaser will proceed to Closing and accept the situation in its present state.

16.6 At Closing, Seller will deliver to Purchaser proof of sales tax remittance to the Department of Revenue for the month of September.

XVII

**SELLER'S REPRESENTATIONS**

Representations and Warranties of Seller. Seller represents and warrants to Purchaser that the statements contained in this Paragraph 17 are correct and complete as of the Effective Date and will be correct and complete as of the Closing Date (as though made then and as though the Closing Date were substituted for the Effective Date throughout this Section 17). All representations and warranties herein will survive the Closing Date.

17.1 Organization of Company. Seller is a corporation duly organized, validly existing, and in good standing under the laws of the jurisdiction of its incorporation.

17.2 Authorization of Transaction. Seller has full power and authority to execute and deliver this Agreement and to perform its obligations hereunder. Without limiting the generality of the foregoing, the board of directors and the shareholders of Seller have duly authorized the execution, delivery, and performance of this Agreement and this Agreement constitutes the valid and legally binding obligation of Seller enforceable in accordance with its terms and conditions.

17.3 Litigation. To the best of Seller's knowledge, Seller represents and warrants that Seller is not aware of any actual or threatened litigation relating to the Seller, the Business, or the Assets.

17.4 Legal Compliance. Except as described in Section 16.5 above, to the best of Seller's knowledge, Seller has complied with all applicable laws (including rules, regulations, codes, plans, foreign governments (and all agencies thereof).

### XVIII MISCELLANEOUS

18.1 Escrow Agent receiving funds or equivalent is authorized and agrees by acceptance thereof to disburse same in accordance with the terms and conditions of this Agreement. Failure of clearance of funds shall not excuse performance by the Purchaser. In the event of doubt as to Escrow Agent's duties or liabilities under the provisions of this Agreement, the Escrow Agent may in Escrow Agent's sole discretion continue to hold the subject matter of this escrow until the parties mutually agree to the disbursement thereof, or until a judgment of a court of competent jurisdiction shall determine the rights of the parties thereto, or Escrow Agent may deposit same with the Clerk of the Circuit Court having jurisdiction of the dispute, and upon notifying all parties concerned of such action, all liability on the part of the Escrow Agent shall fully terminate, except to the extent of accounting for any items theretofore delivered out of escrow. In the event of any suit between Seller and Purchaser wherein the Escrow Agent is made a party by virtue of acting as Escrow Agent hereunder, or in the event of any suit wherein Escrow Agent interpleads the subject matter of this escrow, the Escrow Agent shall be entitled to recover reasonable attorneys' fees and costs incurred, said fees and costs to be charged and assessed as court costs in favor of the prevailing party, if Escrow Agent does not represent Seller. All parties agree that the Escrow Agent shall not be liable to any party or person whomsoever for mis-delivery to Seller or Purchaser of items subject to this escrow, unless such mis-delivery shall be due to willful breach of this Agreement or gross negligence on the part of the Escrow Agent. The parties acknowledge that Escrow Agent represents Seller in connection with the Contract. The parties further acknowledge and agree that Escrow Agent shall have the right to represent Seller in connection with any disputes arising between Purchaser and Seller in connection with this Agreement or the Contract.

IN WITNESS WHEREOF, the parties have executed this Agreement, for themselves, their respective heirs, executors, personal representative, successors and assigns, as of the date and year first above written.

Signed, sealed and delivered  
in the presence of:

Print: \_\_\_\_\_

Print: \_\_\_\_\_

Print: \_\_\_\_\_

Print: \_\_\_\_\_

SELLER

SPRINKLES, INC., a Florida corporation

By: [Signature]

Print: THOMAS J. WALKER

Its: PRESIDENT

PURCHASER

THERAPY TOO, INC

By: [Signature]

Print: DOUGLAS MARKS

Its: PRESIDENT

**Exhibit "A"**  
**Purchased Assets**



# **EXHIBIT C**

**ASSIGNMENT**

THIS ASSIGNMENT made this 28<sup>th</sup> day of January, 2002, by and between Sprinkles, Inc., a Florida corporation (hereinafter referred to as the "Assignor"), and Therapy Too, Inc. (hereinafter referred to as the ("Assignee")) provides as follows:

WHEREAS, Assignor and Assignee entered into a certain Asset Purchase Agreement dated on or about 10 / 1, 2002 (the "Agreement"), which is incorporated herein by reference and made a part hereof), for the sale by Assignor to Assignee of all Assignor's right, title and interest in and to certain of the assets owned by Assignor and used by the Assignor in its business conducted at 279 Royal Poinciana Way, Palm Beach, Florida 33480 ("Business); and

WHEREAS, as a condition to the sale, Assignee has required Assignor to execute and deliver this Assignment.

NOW, THEREFORE, in consideration of the sum of \$10.00 and other good and valuable consideration, the receipt and sufficiency are hereby acknowledged, and intending to be legally bound, Assignor transfers to Assignee, all its rights, title, and interest in and to the following items:

- a The Name "Sprinkles" and any deviations thereof.
- b Telephone Exchange Number - 561 659 1140 and  
Facsimile Number - 561 659 3192

IN WITNESS WHEREOF, Assignor has caused this Assignment to be duly executed on the date first above written

Signed, sealed and delivered  
in the presence of:

WITNESSES

[Signature]  
Print: Gregy Lohme

Print: \_\_\_\_\_

ASSIGNOR:

SPRINKLES, INC., a Florida corporation

By: [Signature]  
Thomas Walsh, President

Dated: \_\_\_\_\_

ASSIGNEE:

THERAPY TOO, INC.

By: [Signature]  
Donna Marks, President

Dated: 12/28/02

[Signature]  
Print: Donna C. Marks

Print: \_\_\_\_\_