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

Proceeding	91194188
Party	Plaintiff Soft Serve, Inc. dba Sprinkles
Correspondence Address	THOMAS J VANDE SANDE HALL & VANDE SANDE LLC 10220 RIVER ROAD, SUITE 200 POTOMAC, MD 20854 UNITED STATES tv@hvsllc.com, tlhesq@gmail.com
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Date	03/13/2013
Attachments	Response to Motion to Amend.pdf (6 pages)(421526 bytes) Thomas J. Vande Sande Declaration.pdf (1 page)(54816 bytes) Exhibit 1.pdf (5 pages)(216183 bytes) Exhibit 2.pdf (24 pages)(928070 bytes) Exhibit 3.pdf (21 pages)(1521512 bytes)

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**
	)	Opposition No. 91195669
Opposer/Petitioner,	)	Opposition No. 91195985
vs.	)	Opposition No. 91195986
	)	Opposition No. 91196035
	)	Opposition No. 91196061
Sprinkles Cupcakes, Inc.	)	Opposition No. 91196087
Applicant/Registrant.	)	Cancellation No. 92053109
	)	Cancellation No. 92054376
	)	Cancellation No. 92054401

OPPOSER'S/PETITIONER'S RESPONSE IN OPPOSITION TO APPLICANT'S MOTION FOR LEAVE TO AMEND ANSWER

Soft Serve, Inc. d/b/a Sprinkles, Plaintiff in each of the above identified proceedings, hereby opposes Defendant's Motion for Leave to Amend its Answer and its related attempt to reopen discovery in these proceedings.

I. INTRODUCTION

Discovery is these consolidated proceedings closed, finally, on February 22, 2013. Tha same day Defendant served interrogatories, production requests, and requests for admissions relating to the defenses of unclean hands, laches, estoppel, waiver and acquiescence which it seeks to add through its Motion for Leave to Amend its Answer, served the day before the close of discovery, specifically, on February 21, 2013.

The defenses which Defendant looks to add have all previously been urged by Defendant and found lacking by the Board. The assertion of these defenses at this juncture in these long delayed proceedings is unwarranted, untimely, and prejudicial. Consequently, Plaintiff urges the Board to deny Defendant's Motion to Amend, to decline Defendant's request to reopen discovery, and to strike, or at the very least to provide substantial additional time for Plaintiff to

respond to, Defendant's discovery. In the alternative, should the Board grant Defendant's Motion to Amend, Plaintiff requests an Order prohibiting Defendant's attempt to again depose Mr. Orban and a further Order allowing Plaintiff the opportunity to propound discovery relating to the defenses Defendant seeks to raise through its Motion to Amend.

II. ARGUMENT

A. Defendant's Belated Reassertion Of Unclean Hands Provides No Basis For Its Motion To Amend.

Defendant seeks to further delay these proceedings, to reopen discovery, and to reassert defenses already urged, explored, and rejected. As to the proffered unclean hands defense, Defendant again asserts that Plaintiff's having joined the millions of other businesses promoting themselves through social media, for the purpose of selling cupcakes (which Plaintiff has every right to sell), constitutes unclean hands. Defendant's argument is substantively unavailing and provides no basis for the further delay of these proceedings.

Additionally, the timing of Defendant's attempt to amend its Answer leads to the inevitable conclusion that Defendant's purpose is to further delay these proceedings. Defendant was informed by Plaintiff of its social media advertising at least as early as August 10, 2010. (Plaintiff's Answer to Interrogatory 10, Vande Sande Dec. Ex. 1). Note also that of the 12 allegedly offensive social media promotions referred to by Defendant at pp. 6-7 of its Motion, 9 occurred as long ago as 2011 and the remaining 3 are from April 2012. Defendant has failed to exercise the diligence required of it by Rule 15.

While Defendant alleges a need to further depose Plaintiff's Mr. Orban in order "to probe further about his marketing and promotion of cupcakes" (Def. Br. p. 15) this case has already been delayed so that Defendant could depose Mr. Orban, for seven hours, concerning the nature

and operation of his business and his offering of various baked goods through that business. Significantly, through that deposition Defendant pursued the very subject matter it again seeks to explore through yet another deposition of Mr. Orban. See, for instance, Orban Dep. Tr. pp. 1, 271, 224-227, 256, 262-264, 272-273, 287, 289, 290-292, 294-295, 297-300, 304 appended collectively hereto as Vande Sande Dec. Ex. 2 evidencing dozens of Defendant's inquiries and Mr. Orban's deposition testimony relating to Plaintiff's marketing of cupcakes through various channels, including his use of social media.

The further delay of these proceedings that would be occasioned by the grant of Defendant's Motion to Amend, and its related request for the reopening of discovery, is unwarranted and would be prejudicial to Plaintiff. Plaintiff should not be required to incur further expense or time in connection with discovery and litigation of issues that have been previously raised by Defendant and that could have been, but were not, more fully and timely pursued by Defendant during the years that these cases have been pending. Accordingly, Plaintiff asks the Board to deny Defendant's Motion to Amend to add the defense of unclean hands.[1]

B. Defendant's Belated Reassertion Of The Delay-Related Defenses Of Laches, Estoppel, Waiver And Acquiescence Provides No Basis For The Granting Of Its Motion To Amend.

As Defendant acknowledges, its delay-related defenses of laches, waiver, acquiescence and estoppel were stricken by the Board in an Order dated March 13, 2012. Those very defenses were dismissed *sua sponte* as being insufficient "because they set forth no factual basis therefor." (Board's Order of 3/15/2012 @ pp. 2-3). Defendant did not appeal nor ask for reconsideration of

[1] The interrogatories, production requests and requests for admissions (without exhibits) served by Defendant on the last day of discovery (collectively Vande Sande Dec. Ex. 3 hereto) relate to the defenses Defendant seeks to add to this case. Plaintiff requests the Board, in denying Defendant's Motion to Leave to Amend, to include within its Order an acknowledgement that Plaintiff need not respond to this discovery.

the dismissal of these defenses. Defendant failed to attempt to reassert these defenses until the day before the close of discovery. It can only be concluded that Defendant has not pursued nor requested amendment of its Answer with the diligence required of it by Rule 15.

Moreover, Defendant's proposed amendment seeking to once again assert delay-related defenses offers no specificity with respect to the essence of those defenses other than to promote the vague assertion that Plaintiff possessed constructive notice of Defendant's rights as of 2007. Neither Defendant's proposed amendment, the accompanying Declaration of its counsel, or its related briefing asserts what occurred in 2007 to provide Plaintiff with constructive notice. While Plaintiff should not be left to guess, and especially at this late date, as to Defendant's assertions, if it is Defendant's intent to hint at the existence of a Morehouse defense, it is noted that such a defense cannot be premised upon a registration which is itself the subject of a pending inter parties proceeding.

Defendant has offered no explanation, justification or basis for the reintroduction of the delay-related defenses previously dismissed by the Board. Moreover, Defendant's tardy attempt to reintroduce these defenses still fails to provide any adequate explanation for the basis of these defenses. Consequently, it can only be concluded that Defendant's proposed amendment with respect to these defenses is not only untimely in not having been promptly asserted but is also, on its face, totally lacking in substance.

Finally, as noted above in connection with Defendant's attempt to reintroduce an unclean hands defense, Plaintiff would be prejudiced by the further unnecessary delay, effort and expense involved in contesting delay-related defenses previously inadequately asserted and properly dismissed by the Board.

III. CONCLUSION

For the reasons set forth herein Plaintiff moves the Board to (1) deny Defendant's Motion for Leave to Amend, (2) deny Defendant's Motion for the reopening of discovery to further explore the defenses of unclean hands, laches, estoppels, waiver, and acquiescence, (3) to acknowledge that Plaintiff need not respond to Defendant's related discovery, and (4) to enter a new scheduling Order which takes into account the delays created as a result of the filing and pendency of Defendant's Motion for Leave to Amend.

Respectfully submitted,

Date: 3/13/13

Thomas J. Vande Sande
HALL & VANDE SANDE, LLC
Attorneys for Petitioner
10220 River Road, Suite 200
Potomac, Maryland 20854
(301) 983-2500

CERTIFICATE OF SERVICE

The undersigned, Thomas J. Vande Sande, attorney for Plaintiff/Opposer/Petitioner hereby certifies that one copy of the foregoing "OPPOSER'S/PETITIONER'S RESPONSE IN OPPOSITION TO APPLICANT'S MOTION FOR LEAVE TO AMEND ANSWER" was this day served on Applicant by mailing same, first class mail, to:

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

&

Richard Ben-Veniste, Esquire
Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101

Date: 3/13/13

Thomas J. Vande Sande
HALL & VANDE SANDE, LLC
Attorneys for Opposer
10220 River Road, Suite 200
Potomac, Maryland 20854
(301) 983-2500

DECLARATION OF THOMAS J. VANDE SANDE

1. I, Thomas J. Vande Sande, counsel for Soft Serve, Inc. d/b/a Sprinkles in connection with various pending Trademark Trial and Appeal Board proceedings, have firsthand knowledge of the facts set forth below and would, if required, testify thereto.

2. Attached hereto as Ex. 1 is a true and accurate copy of Opposer's Answer to Applicant's Interrogatory 10, served on Applicant's counsel on August 10, 2010.

3. Attached hereto as Ex. 2 is a true and accurate copy of pp. 1, 271, 224-227, 256, 262-264, 272-273, 287, 289, 290-292, 294-295, 297-300, 304 of the May 2012 deposition transcript of Thomas John Orban.

4. Attached hereto as Ex. 3 are true and accurate copies of Applicant's Third Set of Interrogatories to Opposer, Applicant's Third Set of Requests for Production to Opposer, and Applicant's Second Set of Requests for Admission to Opposer (without exhibits) as served on Registrant's counsel on February 22, 2013.

I declare under penalty of perjury that the foregoing is true and accurate. Executed at Potomac, Maryland on March 13, 2013.

By: _____
Thomas J. Vande Sande

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

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

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

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

GENERAL OBJECTIONS

GENERAL OBJECTION NO. 1:

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

Notwithstanding Opposer Sprinkles' objections, Opposer Sprinkles will produce in response to Production Request No. 12 a tabulation on a yearly basis indicating advertising expenditures. Substantial promotional activity, such as involvement in various community and civic activities and other activities, for example, the dissemination of coupons to D.C. bound commuters are, of course, promotional activities not reflected in a calculation of advertising expenditures.

INTERROGATORY NO. 10

For each product and service requested to be identified in Interrogatory No. 2, identify the nature and title (if applicable) of the media in which all advertisements of the product or service have appeared, including the date of, and geographic scope of such advertisements.

ANSWER

Advertisements and other promotional items and events, such as press coverage and television media directed to Opposer Sprinkles has appeared in various newspapers, magazines and direct mailing pieces, as well as at least one Facebook page. The geographic scope of these promotional activities and items includes the Washington, D.C. metropolitan area, specifically, Washington, D.C. and its surrounding environs. Representative documents will be produced in response to Applicant's Production Request No. 2.

INTERROGATORY NO. 11

For each product and service requested to be identified in Interrogatory No. 2, identify each location, retail outlet, catalog, and Internet web site or other electronic means, to or through which SPRINKLES products or services have been or are intended to be offered for sale, distributed, sold, or rendered.

ANSWER

Opposer Sprinkles has used the mark SPRINKLES, as defined by Applicant, for a number of years in connection with various goods specifically recited, and closely related to the goods recited in the '541 application. Consequently, as a result of Opposer Sprinkles' long and successful usage of the mark and trade name SPRINKLES, the purchasing public has come to recognize the mark SPRINKLES as referring to Opposer Sprinkles.

INTERROGATORY NO. 39

Identify each person who provided information on which your responses to these Interrogatories and based, specifying the interrogatory or interrogatories for which each person provided information.

ANSWER

Thomas Orban, President and owner of Opposer Sprinkles, as to all Interrogatory answers.

Soft Serve, Inc. d/b/a Sprinkles

Date: Aug 26, 2010

Thomas Orban

As to objections:

Hall & Vande Sande, LLC

Date: 8/10/10

Thomas J. Vande Sande
Attorney for Opposer
10220 River Road, Suite 200
Potomac, Maryland 20854
Phone: (301) 983-2500

CERTIFICATE OF SERVICE

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

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

Date: 8/10/10

Thomas J. Vande Sande
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Potomac, Maryland 20854
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1 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

2 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

3 Consolidated Proceeding No. 91194188

4 Cancellation No. 92053109

5

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

7)

8 Petitioner,)

9 v.)

10 Sprinkes Cupcakes, Inc.,)

11)

12 Respondent,)

13)

14

15

16

17 The video and oral deposition of THOMAS JOHN ORFAN

18 taken on Friday, May , 2012, commencing at 9:00 a.m., held

19 at the offices of Mayer Brown LLP, 1999 K Street NW,

20 Washington, DC 20001, before T. S. Hubbard, Jr., Court

21 Reporter and Notary Public for the District of Columbia.

22

COPY

1 Cupcakes until you saw this one article about
2 some controversy involving --
3 A That is correct. When I was
4 Googling for Sprinkles, Sprinkles Cupcakes
5 didn't exist.
6 Q Do you remember when you started
7 offering the discounts for some giveaway to
8 customers if they were to repeat a particular
9 word or phrase?
10 A Oh, you mean on Twitter and
11 Facebook?
12 Q Yes.
13 A I don't remember when I started
14 doing that.
15 Q Were you aware that Sprinkles
16 Cupcakes uses these promotional activities?
17 A I have become aware of that, yes.
18 Q When did you first learn about
19 Sprinkles Cupcakes using those techniques?
20 A Most of what I know about Sprinkles
21 Cupcakes or learned has been in the last
22 couple of years.

1 A No.

2 MR. BEN-VENISTE: Let's lock at

3 Exhibit 27.

4 (Whereupon, Respondent's

5 Exhibit Number 27 is marked for

6 Identification.)

7 THE REPORTER: Presenting Exhibit

8 27 to the witness.

9 BY MR. BEN-VENISTE:

10 Q Can you identify Exhibit 27 as a

11 photograph of a more recent iteration of your

12 exterior signage with a small sign that says

13 cupcakes underneath the perpendicular sign

14 that you have just described in Exhibit 26?

15 A Yes.

16 Q When was that sign hung?

17 A Perhaps in 2009 is my estimate.

18 Q You have produced no photograph

19 yourself of this cupcakes sign, correct?

20 A I'm not sure I understand your

21 question.

22 Q Well, we have asked you to produce

1 photographs of your signage and you haven't
2 produced any photographs of the sign that has
3 this cupcakes smaller sign on it.
4 A Oh, we didn't produce this one?
5 Q No, you did not.
6 A Oh, well, sorry. It must have been
7 an oversight if we didn't produce this one.
8 Q Did you have a photograph of it?
9 A I don't know.
10 Q So 2009, we don't have an invoice
11 for either these two signs that comprise
12 Exhibit 27. Is there some reason why you
13 didn't produce that?
14 A No particular reason. It may have
15 just been an oversight if we have it and I
16 didn't produce it.
17 Q We asked you for all of your
18 photographs of exterior signage.
19 A Well, I don't have a photograph of
20 this. I may have a Facebook or, what is the
21 other one, anyway it may exist on the
22 electronic on one of those.

1 Q So you think you hung up the
2 cupcakes --
3 A Social websites.
4 Q -- part of that sign in 2009 and
5 you don't have a recollection of when you
6 hung the larger sign to which the cupcakes
7 sign is attached, is that right?
8 A That is right.
9 Q Have you searched for invoices for
10 these signs?
11 A Yes.
12 Q Was the cupcake sign a freebie or
13 do you think you paid for that?
14 A I paid for it.
15 Q Who made it?
16 A Sterico.
17 Q Is that a colonial design Cupcakes?
18 A I don't know.
19 Q Do you think it might be?
20 A It is so simple that it might not
21 be a violation. I don't know and I don't
22 know how much they adhere to this colonial

1 theme today. They have gone off it a bit.
2 Q They may have?
3 A They may have.
4 Q But you don't know?
5 A I don't.
6 Q What makes you think that this
7 Cupcakes piece was added in 2009?
8 A Because that is a little later than
9 when we introduced cupcakes into our line of
10 baked goods.
11 Q That is your only basis for your
12 estimate?
13 A Yes.
14 Q You have no specific recollection?
15 A No.
16 Q Can you tell us why you waited
17 until November 2002, to file with Maryland
18 for the name Sprinkles if in fact you are
19 using that name earlier?
20 A There is no reason. There is no
21 law that compels me to make that filing at
22 all. I thought it was something that a bit

1 days." 5157, "A Little Thing like an Ice
2 Cream Store is at the Heart of the
3 Community." Did you object to that
4 characterization?
5 A No.
6 Q 5150, "Local Ice Cream Shop
7 Temporally Saved by Public Support."
8 Did you object to that?
9 A No.
10 Q 5156, "Sprinkle Stays from the
11 Potomac Almanac, March 2, 2010, "Ice Cream
12 Store Owner Says New Lease Will Keep Locally
13 Owned Store in Present Location for Years to
14 Come." Did you object to that?
15 A No, it also has a picture of me and
16 Angela with a plate of cupcakes.
17 Q That's a no answer with a very
18 helpful description of other things. 5140,
19 "Ice Cream Stores Late Night Hotspot," from
20 the Gazette. July 22, 2009. Did you object
21 to that characterization?
22 A No.

1 depending on where you are going in Potomac.
2 I mean my store is three miles off the
3 Beltway and that is well inside Potomac.
4 Q It is correct, is it not, that the
5 majority of sales at your store are for ice
6 cream or yogurt products, correct?
7 A More than half, yes.
8 Q Take a look. Sticking with Exhibit
9 4 at 5156, do you know someone by the name of
10 Angela Zyre?
11 A Yes, I do.
12 Q According to this article on April
13 15, 2009, Ms. Zyre was making cupcakes for
14 sale at your store, is that accurate?
15 A Yes.
16 Q How did you come to do business
17 with Ms. Zyre?
18 A Oh, I had been making cupcakes for
19 quite some time in the store and Bob Roode
20 who owned the Flaps Restaurant around the
21 corner from me referred her to me as somebody
22 who I might be interested in doing business

1 with.

2 Q You were baking cupcakes?

3 A Yes. Actually, we had been baking

4 all kinds of things for at least a decade.

5 Q Are you capable of listening to my

6 question and answer --

7 A Was I baking cupcakes? Yes.

8 Q So in the article where it says the

9 first big change in Sprinkles has already

10 taken place last week they started selling

11 home made cupcakes?

12 A That is just inaccurate.

13 Q Did you complain?

14 A No, it is just a newspaper article.

15 Q You have been baking cupcakes in

16 your store for quite some time. That is your

17 testimony?

18 A Before Angela came on board, yes.

19 Have you ever read anything accurate in a

20 newspaper? About yourself even?

21 Q You have yet to take my deposition,

22 but not today. So when did you install an

1 oven for the purpose of baking?

2 A We had an oven in there for -- we

3 have always had an oven in the store even

4 during the period of "I Can't Believe It's

5 Yogurt" period.

6 Q Who was in charge of baking the

7 cupcakes before Ms. Zyre came along?

8 A Some of the staff including me. We

9 did it in-house.

10 Q So who on the staff?

11 A I don't remember.

12 Q Did the sign that announced

13 cupcakes for sale, the first sign that

14 announced cupcakes for sale on your exterior

15 signage was the cupcakes sign for which we

16 have no invoice which you estimate was

17 installed in 2009?

18 A After Angela came on board, yes,

19 some time after that.

20 Q So Angela Zyre came on board unless

21 the article is erroneous you know more about

22 March 2000, sorry, in April 2009?

1 Q Do you remember when you first
2 learned that?
3 A I don't.
4 Q About their use sales techniques?
5 A No, I don't.
6 Q Is it correct that since Sprinkles
7 Georgetown opened, you have increased your
8 promotion of cupcakes?
9 A That's accurate.
10 Q Is it correct that your sales of
11 cupcakes has increased since the opening of
12 Sprinkles of Georgetown?
13 A I don't think that is true, no.
14 Q So your efforts to promote the sale
15 of cupcakes hadn't been successful?
16 A They have not met my expectations.
17 Q They have not been successful?
18 A Well, you know, I am sorry, but
19 what is "successful"? They are nowhere close
20 to my expectations, so limited success.
21 Q What were your expectations for the
22 increase in the sale of cupcakes for 2011?

1 A I had hoped to be in the six
2 figures for cupcake sales instead of in the
3 five figures.
4 Q So where were you at the beginning
5 of 2011?
6 A Maybe $1,000 a month if I can
7 hazard a guess.
8 Q In gross sales?
9 A Of cupcakes?
10 Q Yes?
11 A Yes.
12 Q And at the end of 2011?
13 A Not much more than that.
14 Q In 2012?
15 A It is pretty flat.
16 Q So your sales of cupcakes in your
17 view?
18 A (Non-verbalized response.)
19 Q Have remained steady?
20 A Yes.
21 Q At $1,000 a month?
22 A Roughly, yes.

1 store, right?

2 A Their wording was not an inquiry.

3 It was a statement that needed me to clarify.

4 They said, "Your other store in D.C., is in

5 Georgetown, isn't it?"

6 Q Right?

7 A Yes.

8 Q You don't have your clarification,

9 but presumably you said, "No, we are not

10 affiliated."

11 A Yes, that is right.

12 Q Then you note that these folks

13 bought six cupcakes and some Oreo and

14 chocolate ice cream?

15 A That is right.

16 Q So presumably that didn't hurt you?

17 A It hurts me.

18 Q Financially?

19 A Oh, financially?

20 Q You think they might have bought

21 two dozen of your cupcakes if they had just

22 walked in and hadn't heard about Sprinkles of

1 The time is 5:45:16.

2 MR. BEN-VENISTE: Just to complete

3 the housekeeping on Exhibit 48. The second

4 page which I had referred to which is 5394

5 has now been added to the exhibit.

6 BY MR. BEN-VENISTE:

7 Q And you have seen that, Mr. Orban?

8 A Yes.

9 Q That appears to be a column

10 reflecting the witnesses whose notes are

11 reflected in this summary by you?

12 A Yes, sir.

13 Q With respect to pricing cupcakes

14 once you started selling them, let's say, in

15 2009, once the homemade cupcakes were being

16 offered, how did you determine the price to

17 charge people?

18 A By doing a survey of what others in

19 the business were charging for cupcakes at

20 that time.

21 Q Who did you look at?

22 A I believe there was one survey in

1 the Washington Post that quoted some prices.
2 I did go to Georgetown down on Potomac Street
3 to see what they were charging and is
4 probably all I did.
5 Q So you made an exception to your
6 boycott of the Washington Post?
7 A It is not a boycott.
8 Q You did some research and you found
9 comparable prices and how did you then decide
10 the price point for your cupcakes?
11 A You know, I don't remember what
12 Georgetown's prices were, but we were pretty
13 close so.
14 Q We have asked you to produce the
15 retail prices that you charged by way of
16 documents so we haven't received anything
17 from you in that regard.
18 A Didn't you get a copy of the menu
19 board?
20 MR. VANDE SANDE : Yes.
21 MR. BEN-VENISTE: Menu board?
22 MR. VANDE SANDE : Yes.

1 THE WITNESS: Yes, the screen that
2 has the menu items and the prices.
3 BY MR. BEN-VENISTE:
4 Q So that was at one point in time?
5 A It was at one point in time, but I
6 don't believe our prices have changed. We
7 have run promotions, but I think our prices
8 have been pretty consistent.
9 Q That's the only documentary
10 evidence you have of the pricing for your
11 cupcakes?
12 A No, I mean, that's an easy one to
13 provide based on recent sales. I know what
14 it is. It is $2.85 for a cupcake.
15 Q How many for quantity?
16 A For four?
17 Q Whatever you offer.
18 A Yes, the breaks are at six and at
19 12. It is $2.39 a piece if you're buying 12
20 and $2.59 a piece if you are buying six.
21 Q That has been the same since?
22 A I think so. I think so.

1 Q When you say you fixed those prices
2 based on the comparison with what other
3 outlets we are charging?
4 A Primarily Georgetown. That was our
5 reference.
6 Q Georgetown Cupcakes we are talking
7 about?
8 A Yes.
9 Q A different store than Sprinkles
10 Cupcakes located in Georgetown?
11 A Yes.
12 Q Now Request 33, and that is in
13 Exhibit 1, and I will read it: "Documents
14 sufficient to identify the gross sales of
15 baked goods including cupcakes sold annually
16 at the Potomac store."
17 We have not received documents that
18 show the sales of cupcakes on an annualized
19 basis. Is that because you do not maintain
20 them?
21 A I have not broken out cupcakes as a
22 separate total.

1 51 to the witness.

2 THE WITNESS: Thank you.

3 BY MR. BEN-VENISTE:

4 Q Exhibit 51 is OP 5442. What does

5 this purport to show?

6 A Gross sales, tax.

7 Q Let's start with what year is this?

8 A 2012.

9 Q That is the upper right hand?

10 A Yes.

11 Q Corner?

12 A (Non-verbalized response.)

13 Q The date?

14 A I don't know. I just see 1

15 through 28.

16 Q Through 28.

17 A Yes.

18 Q Where does it show the sales of

19 cupcakes?

20 A It's the first number in the baked

21 column.

22 Q Baked?

1 A The 66 will be dollars of cupcakes
2 on Wednesday the 15th.
3 Q There is nothing baked by cupcakes?
4 A No, the other number, 4, is
5 something else in the baked category,
6 separate from donuts and bagels.
7 Q What is that?
8 A Oh, muffins.
9 Q So on Wednesday you have got 66
10 cupcakes sold for muffins?
11 A $4.00 worth of muffins.
12 Q $4.00?
13 A $4.00.
14 Q Oh, these are all dollars?
15 A These are all dollars, $94.
16 Q Expresso costs a dollar?
17 A No, because I round. I round off.
18 Q How much is an Expresso?
19 A I think it is $1.50 or $1.25, I
20 don't remember.
21 Q So all of this is dollars?
22 A Yes.

1 the sales tax department should I ever be
2 audited.
3 Q Have you ever been audited?
4 A Yes.
5 Q When?
6 A Very early in my business. I
7 wasn't more than a year or two old when I was
8 audited.
9 Q Have you ever been audited for the
10 Potomac store?
11 A Maybe because it was the Maryland
12 Tax Department that audited me and I just
13 don't know whether Potomac was opened by then
14 or not. They came to the house in Olney. I
15 think it was. I think it was by then open.
16 Q Why don't you just show cupcakes?
17 Why it wasn't this baked? You have bagels,
18 donuts, coffee, soft drinks.
19 A Yes, because I have sold other
20 things. I have sold pies. I have sold any
21 number of baked goods that don't fall within
22 the narrow category of bagel or donut or

1 cupcake.

2 So I just throw them all in there

3 and cupcakes I was always interested in, I

4 think there is great potential in cupcakes.

5 Q But it doesn't say cupcakes?

6 A No, it doesn't because it is for

7 me. It is not for anybody else.

8 Q If I look at Thursday the 16th, the

9 13 would reflect $13 worth of what?

10 A Thursday, the 23rd?

11 Q No, Thursday the 16th?

12 A Oh, the 16th. Oh, $13 worth of

13 baked, I omitted the cupcake number for some

14 reason. Sometimes I miss one. I missed one

15 that day. It doesn't mean zero.

16 Q Friday the 17th, that looks like a

17 zero.

18 A It is a zero, yes.

19 Q And $7.00 worth of what?

20 A Muffins, primarily.

21 Q What else besides muffins could it

22 be?

1 A That is probably all lately.
2 Things that we have sold over the years like
3 croissants and pies, apple pies.
4 Q Help me out here. You're on Friday
5 the 17th. You haven't sold any cupcakes but
6 you baked cupcakes in the morning?
7 A Yes, we do. Just every day we bake
8 them.
9 Q Then what happened to the cupcakes
10 you baked on Friday?
11 A Well, they probably got eaten by
12 somebody. I give it away.
13 Q You had a reduced section for sale,
14 right, a reduced price in your showcase?
15 A We do lately sell bagels and donuts
16 at a reduced price. Some in the showcase and
17 some in front of the register.
18 Q But not cupcakes?
19 A Only very rarely have we sold
20 reduced cupcakes. What I have been doing
21 because I am there a lot in the evening, is I
22 take all the day old cupcakes and I wait for

1 a crowd of kids to assemble in the front of
2 the store and I throw them the microwave for
3 30 seconds which is just enough and I just
4 give them away for free and it is a great
5 promotion.
6 Q On Sunday, and I am just sticking
7 with the same week, you had $3.00 sales of
8 cupcakes?
9 A Yes.
10 Q Then on Monday, $3.00 sales?
11 A (Non-verbalized response.)
12 Q Then on Tuesday, $120 sale?
13 A Yes, probably an order.
14 Q You have compared the sales for
15 2009, 2010, 2011 and 2012 to come up with
16 your answers. Is that what you're saying or
17 are you just --
18 A You mean the non-growth? Is that
19 what you're referring to?
20 Q Yes.
21 A Yes.
22 Q Or are you just ball parking?

1 Exhibit Number 50 is marked for
2 Identification.)
3 BY MR. BEN-VENISTE:
4 Q This has the handwritten notation
5 from someone who called asking whether you
6 were Sprinkles Cupcakes. Can you tell who
7 answered this?
8 A Juliette.
9 Q And the answer was, "We are
10 Sprinkles and we do sell cupcakes."
11 A Yes.
12 Q And the response was, "Great, I
13 will see you in a few minutes." Yes?
14 A Yes.
15 MR. BEN-VENISTE: I don't have
16 anything further at this time. I think we
17 need to clean up the record because we have
18 omitted some premarked exhibits.
19 THE REPORTER: Let me announce that
20 into the record because I kept a track. What
21 I have here that you have not used are
22 Exhibits 30, 31, 32, 33, 34, 26, 37, 38, 39,

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

Soft Serve, Inc. d/b/a/ Sprinkles, Opposer, v. Sprinkles Cupcakes, Inc., Applicant.	**Opposition No. 91194188** Opposition No. 91195669 Opposition No. 91195985 Opposition No. 91195986 Opposition No. 91196035 Opposition No. 91196061 Opposition No. 91196087 Cancellation No. 92053109 Cancellation No. 92054376 Cancellation No. 92054401

APPLICANT'S THIRD SET OF INTERROGATORIES TO OPPOSER

Pursuant to Trademark Rule of Practice 2.120 (37 C.F.R. § 2.120), Trademark Trial and Appeal Board Manual of Procedure § 405, and Federal Rule of Civil Procedure 33, Applicant Sprinkles Cupcakes, LLC, successor-in-interest to Sprinkles Cupcakes, Inc. requests that Opposer Soft Serve, Inc. d/b/a Sprinkles answer the following Interrogatories separately and fully, in writing, under oath within thirty (30) days after date of service.

For the purpose of these Interrogatories, the following definitions and instructions shall apply:

DEFINITIONS

1. The terms "Soft Serve," "Opposer," "you," "your," and "yourself" refer to Opposer Soft Serve, Inc. d/b/a Sprinkles, and include any persons controlled by or acting on behalf of that entity, including but not limited to all partners, officers, directors, owners, employees, agents, representatives, and attorneys, and any predecessors, subsidiaries, parent companies, affiliated companies or joint venturers.

2. The terms "Sprinkles Cupcakes" and "Applicant" refer to Applicant Sprinkles Cupcakes, LLC, and include any persons controlled by or acting on behalf of that entity, including but not limited to all officers, directors, employees, agents, representatives, and attorneys, and any predecessors, subsidiaries, parent companies, affiliated companies, or joint venturers.

3. The terms "SPRINKLES" and "the mark SPRINKLES" means any word, name, symbol or device or other designation of origin incorporating the letter string SPRINKLES, or its phonetic equivalent, or any domain name incorporating the letter string SPRINKLES.

4. The term "frozen desserts" refers to ice cream, frozen yogurt, ice cream sundaes, sherbets, ices, sorbets, milk shakes, or ice cream cakes.

5. The term "store name" means the name of any retail or wholesale establishment owned or operated by you.

6. The term "your store" refers to the business at 10148 River Rd., Potomac, Maryland, currently bearing the name SPRINKLES and formerly bearing other names or marks.

7. The term "person" means any natural person or any business, legal or governmental entity, or association.

8. Unless otherwise stated, the scope of these Interrogatories is the United States.

9. The term "document" as used herein is synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34, any "writings and recordings" and "photographs" as defined by Federal Rule of Evidence 1001, and its interpretation by the courts, and includes, without limitation, all originals, drafts, and non-identical copies of any written, printed, typed, recorded, electronic, magnetic, optical, punched, copied, graphic or other tangible thing in, upon or from which information may be conveyed, embodied, translated, or stored (including, but not limited to, papers, records, books, correspondence, contracts, minutes of meetings, memoranda, notes on desk calendars and appointment books, intra-office communications, canceled checks, invoices, telegrams, telexes, dictation or other audio tapes, video tapes, studies, electronic mail, information stored in

computer readable form, on a compact disc, or any other type of data storage device or medium, computer printouts, microfilm, microfiche, laser disks, diaries, calendars, photographs, charts, viewgraphs, drawings, sketches and all other writings or drafts thereof), as well as all other tangible things subject to production under Federal Rule of Civil Procedure 34.

10. The term "identify," when referring to:

a. a natural person, means to give his or her full name, present or last known address and telephone number, last known place of employment and job title;

b. a public or private corporation, partnership, association, agency or other entity, means to give its present or last known address and telephone number, and state of incorporation, if applicable;

c. a document, means to state its general character, title, date, addressee or recipient, author or signatory, present location, and who has possession, custody or control of the document;

d. a product, means to provide a description of the item which is offered for sale, and the intended customer groups, channels of trade, approximate price, and market for the product;

e. a service, means to describe the service and the intended customer groups, channels of trade, approximate price, and market for the service.

11. The term "communication" is defined as any transmission or exchange of information between two (2) or more persons, orally or in writing, and includes, without limitation, any conversation or discussion, whether face-to-face or by means of telephone, letter, facsimile, electronic, digital or other media.

12. The terms "relating to" and "related to" mean concerning, containing, evidencing, describing, constituting, referring to, explaining, discussing or reflecting.

13. The terms "and" and "or" and the term "and/or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request all responses that might otherwise be construed to be outside its scope.

14. The use of a present tense shall include past tenses.

15. The use of the singular form of any word also includes the plural and vice versa.

16. The terms "all" and "each" shall each be construed to include the other.

INSTRUCTIONS

1. In answering these Interrogatories, furnish all information, including information contained in or on any document that is known or available to you, including all information in the possession of your attorneys or other persons acting on your behalf or under your attorneys' employment or direction.

2. If you cannot answer any interrogatory fully and completely after exercising due diligence to make inquiries and secure information necessary to do so, so state, and answer each such interrogatory to the full extent you deem possible; specify the portion of such interrogatory that you claim you are unable to answer fully and completely; state the facts on which you rely to support your contention that you are unable to answer such interrogatory fully and completely; and state what knowledge, information and/or belief you have concerning the unanswered portion of each such interrogatory.

3. If there is any item of information that you refuse to disclose on grounds of privilege or work-product immunity, answer so much of the interrogatory as does not request information for which you claim privilege, state the nature of the privilege you claim, and provide sufficient details, including the nature of the information, its source, its subject matter, and the names of all persons to whom that information was disclosed, such as would enable the claim of privilege or immunity to be adjudicated.

4. If the response to any interrogatory consists, in whole or in part, of an objection relating to burdensomeness, then with respect to such response:

a. Provide such information as can be ascertained without undue burden;

b. State with particularity the basis for such objection including:

i. a description of the process or method required to obtain any fact responsive to the interrogatory; and

ii. the estimated cost and time required to obtain any fact responsive to the interrogatory.

5. These interrogatories are continuing and require further answer and supplementation, as provided by Federal Rule of Civil Procedure 26(e).

INTERROGATORIES

Consistent with the foregoing definitions and instructions, please answer the following Interrogatories:

INTERROGATORY NO. 50:

Describe in detail when and how you first learned of Sprinkles Cupcakes or Sprinkles Cupcakes' stores or products including, but not limited to, the date you first became aware of Sprinkles Cupcakes or Sprinkles Cupcakes' stores or products.

INTERROGATORY NO. 51:

Describe in detail when you first became aware that cupcake mix products, promoted under a SPRINKLES mark, are sold at Williams-Sonoma stores or via Williams-Sonoma's website.

INTERROGATORY NO. 52:

Describe in detail any marketing efforts considered or enacted by you—including but not limited to: print advertisements, online advertisements, press releases, coupons, interviews with third-party media, social media campaigns, signage, change of cupcake vendor, change in cupcake prices, change in cupcake flavors, point-of-sale displays, changes in location of products within your store or advertising circulated by your landlord promoting you —relating to the sale of cupcakes at your store including the substance of the marketing efforts, the medium of

distribution, and the dates such plans were considered, conceived of, and enacted. Identify the documents evidencing such marketing efforts related to cupcakes.

INTERROGATORY NO. 53:

Describe in detail each third-party vendor who has provided cupcakes to be sold at your store, including but not limited to, the identity of each vendor, the number of cupcakes provided to you, the cost of cupcakes provided to you, the types of cupcakes provided to you and the dates all cupcakes were provided to you.

Dated: February 22, 2013

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: _____
John L. Slafsky
Hollis Beth Hire

Attorneys for Applicant
SPRINKLES CUPCAKES, LLC

CERTIFICATE OF SERVICE BY MAIL

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 mailing with the United States Postal Service. In the ordinary course of business, correspondence would be deposited with the United States Postal Service on this date.

On this date, I served **APPLICANT'S THIRD SET OF INTERROGATORIES TO OPPOSER** on each person listed below, by placing the document(s) described above in an envelope addressed as indicated below, which I sealed. I placed the envelope(s) for collection and mailing with the United States Postal Service on this day, following ordinary business practices at Wilson Sonsini Goodrich & Rosati.

Thomas J. Vande Sande
Timothy Harker
Hall & Vande Sande, LLC
10220 River Road, Suite 200
Potomac, MD 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 February 22, 2013.

Elvira Minjarez

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**
	)	Opposition No. 91195669
Opposer,	)	Opposition No. 91195985
	)	Opposition No. 91195986
v.	)	Opposition No. 91196035
	)	Opposition No. 91196061
Sprinkles Cupcakes, Inc.,	)	Opposition No. 91196087
	)	
Applicant.	)	Cancellation No: 92053109
	)	Cancellation No. 92054376
	)	Cancellation No. 92054401
	)	

APPLICANT'S THIRD SET OF REQUESTS FOR PRODUCTION TO OPPOSER

Pursuant to Trademark Rule of Practice 2.120 (37 C.F.R. § 2.120), Trademark Trial and Appeal Board Manual of Procedure § 406, and Federal Rule of Civil Procedure 34, Applicant Sprinkles Cupcakes, LLC, successor-in-interest to Sprinkles Cupcakes, Inc., requests that Opposer Soft Serve, Inc. d/b/a Sprinkles produce for inspection and copying the documents and things listed below within thirty (30) days of the date of service hereof, at the offices of counsel for Sprinkles Cupcakes, LLC or at another mutually agreeable location.

For the purpose of this request for production, the following definitions and instructions shall apply:

DEFINITIONS

1. The terms "Soft Serve," "Opposer," "you," "your," and "yourself" refer to Opposer Soft Serve, Inc. d/b/a Sprinkles, and include any persons controlled by or acting on behalf of that entity, including but not limited to all partners, officers, directors, owners, employees, agents, representatives, and attorneys, and any predecessors, subsidiaries, parent companies, affiliated companies, or joint venturers.

2. The terms "Sprinkles Cupcakes" and "Applicant" refer to Applicant Sprinkles Cupcakes, LLC and include any persons controlled by or acting on behalf of that entity, including but not limited to all officers, directors, employees, agents, representatives, and attorneys, and any predecessors, subsidiaries, parent companies, affiliated companies, or joint venturers.

3. The terms "SPRINKLES" and "the mark SPRINKLES" means any word, name, symbol or device or other designation of origin incorporating the letter string SPRINKLES, or its phonetic equivalent, or any domain name incorporating the letter string SPRINKLES.

4. The terms "Opposer's SPRINKLES product or service" and "Opposer's SPRINKLES products or services" means any product or service offered for sale, offered for distribution, sold, distributed, advertised, marketed, promoted or rendered in the U.S. by you in connection with the mark SPRINKLES.

5. The terms "Applicant's SPRINKLES product or service" and "Applicant's SPRINKLES products or services" means any product or service offered for sale, offered for distribution, sold, distributed, advertised, marketed, promoted or rendered in the U.S. by Applicant in connection with the mark SPRINKLES.

6. The term "your store" refers to the business at 10148 River Rd., Potomac, Maryland, currently bearing the name SPRINKLES and formerly bearing other names or marks.

7. The term "frozen desserts" refers to ice cream, frozen yogurt, ice cream sundaes, sherbets, ices, sorbets, milk shakes, or ice cream cakes.

8. The term "person" means any natural person or any business, legal or governmental entity, or association.

9. Unless otherwise stated, the scope of these Requests For Production is the United States.

10. The term "document" as used herein is synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34, any "writings and recordings" and "photographs" as defined by Federal Rule of Evidence 1001, and its

interpretation by the courts, and includes, without limitation, all originals, drafts, and non-identical copies of any written, printed, typed, recorded, electronic, magnetic, optical, punched, copied, graphic or other tangible thing in, upon or from which information may be conveyed, embodied, translated, or stored (including, but not limited to, papers, records, books, correspondence, contracts, minutes of meetings, memoranda, notes on desk calendars and appointment books, intra-office communications, canceled checks, invoices, telegrams, telexes, dictation or other audio tapes, video tapes, studies, electronic mail, information stored in computer readable form, on a compact disc, or any other type of data storage device or medium, computer printouts, microfilm, microfiche, laser disks, diaries, calendars, photographs, charts, viewgraphs, drawings, sketches and all other writings or drafts thereof), as well as all other tangible things subject to production under Federal Rule of Civil Procedure 34.

11. The term "communication" is defined as any transmission or exchange of information between two (2) or more persons, orally or in writing, and includes, without limitation, any conversation or discussion, whether face-to-face or by means of telephone, letter, facsimile, electronic, digital or other media.

12. The terms "relating to" and "related to" mean concerning, containing, evidencing, describing, constituting, referring to, explaining, discussing or reflecting.

13. The terms "and" and "or" and the term "and/or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request all documents that might otherwise be construed to be outside its scope.

14. The use of a present tense shall include past tenses.

15. The use of the singular form of any word also includes the plural and vice versa.

16. The terms "all" and "each" shall each be construed to include the other.

INSTRUCTIONS

1. You are requested to produce for inspection and copying all responsive documents and things in your possession, custody or control, including all documents and

things in the custody of your attorneys, consultants, agents, other representatives, and other persons or entities subject to your control.

2. You are to produce the documents and things as they are kept in the ordinary course of business, with appropriate markings or designations so that it may be determined to which request they are responsive.

3. You are to produce the original and all non-identical copies of each requested document or thing, including all copies which bear any additional file stamps, marginal notes or other additional markings or writings that do not appear on the original. The production shall include the file, envelope, folder, binder, or other container in which the responsive documents and things are kept. If, for any reason, the container cannot be produced, you are to produce copies of all labels or other identifying markings.

4. Documents that exist in digital format and constitute or comprise databases or other tabulations or collections of data or information should be produced in their native format. Documents that exist in digital format and constitute or comprise written communications between natural persons (e.g., e-mail messages, internal memos, letters, etc.) should be produced in OCR (optical character recognition) TIFF file format with a Concordance load-file.

5. If you cannot fully respond to any request after a diligent attempt, respond to the request to the extent possible and specify the portion of the request to which you are unable to respond.

6. If you claim that any request, definition or instruction is ambiguous, state the language you claim is ambiguous and the interpretation you have used to respond to the request.

7. If you contend that any document or thing has been lost or destroyed, set forth the contents of the document or thing, the location of any copies, the date of loss or destruction, the name of the person who ordered or authorized the destruction, if any, and the authority and reasons for such destruction.

8. If you decline to produce any information, document, or thing on the basis of the attorney-client, work product, or other privilege, respond to so much of the discovery request as is not subject to the claimed objection, and for each document or thing, provide the following information:

a. the type and title of the document or thing;

b. the general subject matter of the document or description of the thing;

c. the date of its creation;

d. the identity of the document's author(s), addressee(s) and recipient(s);

e. the nature of the privilege being claimed; and

f. in detail, all facts upon which you base your claim of privilege.

9. Complete production is to be made on the date and at the time indicated above.

10. You have a duty to supplement your responses from now until the time of hearing or trial, as provided by Federal Rule of Procedure 26(e).

DOCUMENTS AND THINGS REQUESTED

Consistent with the foregoing definitions and instructions, please provide the following documents and things:

DOCUMENT REQUEST NO. 63:

All documents relating to the circumstances under which you first became aware of Sprinkles Cupcakes' use of a SPRINKLES mark.

DOCUMENT REQUEST NO. 64:

All documents relating to the circumstances in which you first became aware that cupcake mix products, promoted under a SPRINKLES mark, are sold at Williams-Sonoma stores or via Williams-Sonoma's website.

DOCUMENT REQUEST NO. 65:

All documents relating to monitoring by you of trademark applications filed by third parties, including Sprinkles Cupcakes, for marks incorporating the term SPRINKLES.

DOCUMENT REQUEST NO. 66:

All documents, including communications with outside vendors, related to any plans you considered or enacted to introduce the sale of cupcakes, or to increase the sale of cupcakes, at your store including—but not limited to—the dates such plans were considered, conceived of, or enacted.

DOCUMENT REQUEST NO. 67:

All documents, including communications with outside vendors, related to marketing efforts considered or enacted by you—including but not limited to: print advertisements, online advertisements, press releases, coupons, point-of-sale displays, interviews with third-party media, social media campaigns, signage, change of cupcake vendor, change in cupcake prices, change in cupcake flavors, changes in location of products within your store or advertising circulated by your landlord promoting you—to promote the sale of cupcakes at your store including, but not limited to, the dates such plans were considered or enacted.

DOCUMENT REQUEST NO. 68:

All documents reflecting or related to any third-party vendor who has provided to you cupcakes to be sold at your store.

DOCUMENT REQUEST NO. 69:

Documents sufficient to identify all websites, social media websites or other third-party websites on which you promote your store.

DOCUMENT REQUEST NO. 70:

All documents which relate to or reflect that you have taken steps to encourage consumer confusion between yourself and Sprinkles.

DOCUMENT REQUEST NO. 71:

All documents which relate to or reflect that you have taken steps to more-closely resemble Sprinkles or its business model.

DOCUMENT REQUEST NO. 72:

All documents which relate to or reflect that you have refrained from taking steps to discourage confusion consumer confusion between yourself and Sprinkles.

DOCUMENT REQUEST NO. 73:

Each document reviewed, consulted, or on which you relied, to draft your answers to Opposer's Third Set of Interrogatories to Applicant.

DOCUMENT REQUEST NO. 74:

Each document requested to be identified in Applicant's Third Set of Interrogatories to Opposer.

Dated: February 22, 2013

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: _____
John L. Slafsky
Hollis Beth Hire

Attorneys for Applicant
SPRINKLES CUPCAKES, LLC.

CERTIFICATE OF SERVICE BY MAIL

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 mailing with the United States Postal Service. In the ordinary course of business, correspondence would be deposited with the United States Postal Service on this date.

On this date, I served **APPLICANT'S THIRD SET OF REQUESTS FOR PRODUCTION TO OPPOSER** on each person listed below, by placing the document(s) described above in an envelope addressed as indicated below, which I sealed. I placed the envelope(s) for collection and mailing with the United States Postal Service on this day, following ordinary business practices at Wilson Sonsini Goodrich & Rosati.

Thomas J. Vande Sande
Timothy Harker
Hall & Vande Sande, LLC
10220 River Road, Suite 200
Potomac, MD 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 February 22, 2013.

Elvira Minjarez

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

Soft Serve, Inc. d/b/a/ Sprinkles, Opposer, v. Sprinkles Cupcakes, Inc., Applicant.	**Opposition No. 91194188** Opposition No 91195669 Opposition No 91195985 Opposition No 91195986 Opposition No 91196035 Opposition No 91196061 Opposition No 91196087 Cancellation No. 92053109 Cancellation No. 92054376 Cancellation No. 92054401

APPLICANT'S SECOND SET OF REQUESTS FOR ADMISSIONS TO OPPOSER

Pursuant to Trademark Rule of Practice 2.120 (37 C.F.R. § 2.120), Trademark Trial and Appeal Board Manual of Procedure § 407, and Federal Rule of Civil Procedure 36, Applicant Sprinkles Cupcakes, LLC, successor-in-interest to Sprinkles, Inc., requests that Opposer Soft Serve, Inc. d/b/a Sprinkles make the following admissions for the purpose of this proceeding.

For the purpose of this request, the following definitions shall apply:

DEFINITIONS

1. The terms "Soft Serve," "Opposer," "you," "your" and "yourself" refer to Soft Serve, Inc. d/b/a Sprinkles, and include any persons controlled by or acting on behalf of that entity, including but not limited to all partners, officers, directors, owners, employees, agents, representatives, and attorneys, and any predecessors, subsidiaries, parent companies, affiliated companies or joint venturers.

2. The terms "Sprinkles Cupcakes" and "Applicant" refer to Applicant Sprinkles Cupcakes, LLC and include any persons controlled by or acting on behalf of that entity, including but not limited to all officers, directors, employees, agents, representatives, and

attorneys, and any predecessors, subsidiaries, parent companies, affiliated companies, or joint venturers.

3. The term "SPRINKLES" and "the mark SPRINKLES" means any word, name, symbol or device or other designation of origin incorporating the letter string SPRINKLES, or its phonetic equivalent, or any domain name incorporating the letter string SPRINKLES.

4. The term "your store" refers to the business at 10148 River Rd., Potomac, Maryland, currently bearing the name SPRINKLES and formerly bearing other names or marks.

5. Unless otherwise stated, the scope of these Requests for Admission is the United States.

6. The terms "relating to" and "related to" mean concerning, containing, evidencing, describing, constituting, referring to, explaining, discussing or reflecting.

7. The terms "and" and "or" and the term "and/or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request all responses that might otherwise be construed to be outside its scope.

8. The use of a present tense shall include past tenses.

9. The use of the singular form of any word also includes the plural and vice versa.

10. The terms "all" and "each" shall each be construed to include the other.

INSTRUCTIONS

Opposer is required to admit or deny each request below based on the information available to Opposer.

REQUESTS FOR ADMISSIONS

96. You did not sell cupcakes under the mark SPRINKLES before March 12, 2010.

97. You took steps to promote the sale of cupcakes after March 12, 2010.

98. You added a sign reading "cupcakes" to your store's exterior sign after March 12, 2010.

99. You began using Twitter to promote your store after March 12, 2010.

100. You began using Facebook to promote your store after March 12, 2010.

101. After March 12, 2010, you began using Twitter to promote the sale of cupcakes at your store.

102. An outside vendor provides cupcakes to be sold at your store.

103. After March 12, 2010 you began using an outside vendor who provided cupcakes to be sold at your store.

104. After March 12, 2010 you changed the vendor who provided cupcakes to be sold at your store.

105. After March 12, 2010 you raised the price on cupcakes sold at your store.

106. After March 12, 2010 you raised the price on cupcakes sold at your store by a dollar or more per cupcake.

107. After March 12, 2010 you changed or added flavors to the cupcakes sold at your store.

108. After March 12, 2010 you took steps to make cupcakes sold at your store more closely resemble Sprinkles cupcake products.

109. You have taken steps to purposefully make your promotional efforts more closely resemble Sprinkles promotional efforts.

110. After March 12, 2010 you took steps to make your promotional efforts more closely resemble Sprinkles promotional efforts.

111. You have purposefully refrained from taking steps to discourage consumer confusion between yourself and Sprinkles.

112. Since March 12, 2010, you have purposefully refrained from taking steps to discourage consumer confusion between yourself and Sprinkles.

113. You registered the domain name <sprinklespotomac.com> on or about July 18, 2012.

114. The website hosted at the <sprinklespotomac.com> domain name is used to promote your store.

115. The screenshots of the website hosted at <sprinklespotomac.com>, attached hereto as Exhibit A, are an accurate representation of how the website appeared on or about February 11, 2013.

116. You use a Facebook page to promote your store that is located at http://www.facebook.com/sprinklesdmv#!/pages/SprinklesDMV/125371474202518?fref=ts.

117. In or about February 2011, you began use of the Facebook page at: http://www.facebook.com/sprinklesdmv#!/pages/SprinklesDMV/125371474202518?fref=ts.

118. The screenshots, attached as Exhibit B, are an accurate representation of how the Facebook page hosted at: http://www.facebook.com/sprinklesdmv#!/pages/SprinklesDMV/125371474202518?fref=ts appeared on or about February 12, 2013.

119. You use a Twitter feed to promote you store that is located at: https://twitter.com/SprinklesDMV.

120. In or about February 2011, you began use of the Twitter feed located at: https://twitter.com/SprinklesDMV.

121. The screenshots, attached as Exhibit C, are an accurate representation of how the Twitter feed hosted at https://twitter.com/SprinklesDMV appeared on or about February 15, 2013.

122. The screenshots, attached as Exhibit D, are an accurate representation of how the Twitter feed hosted at https://twitter.com/SprinklesDMV appeared on or about May 18, 2013

123. You have held a promotion where you gave visitors to your store a free cupcake if they were one of the first ten to say, "I'll gladly pay you Tuesday for a cupcake today."

124. You have held a promotion where you gave visitors to your store a free cupcake if they were one of the first ten to say, "give me something hot that's really cool."

125. You have held a promotion where you gave visitors to your store a free cupcake if they were one of the first ten to say, "I would like a Sprinkles cupcake a la mode."

Dated: February 22, 2013

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: _____
John L. Slafsky
Hollis Beth Hire

Attorneys for Applicant
SPRINKLES CUPCAKES, LLC

CERTIFICATE OF SERVICE

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 mailing with the United States Postal Service. In the ordinary course of business, correspondence would be deposited with the United States Postal Service on this date.

On this date, I served the **APPLICANT'S SECOND SET OF REQUESTS FOR ADMISSIONS TO OPPOSER** on each person listed below, by placing the document(s) described above in an envelope addressed as indicated below, which I sealed. I placed the envelope(s) for collection and mailing with the United States Postal Service on this day, following ordinary business practices at Wilson Sonsini Goodrich & Rosati.

Thomas J. Vande Sande
Timothy Harker
Hall & Vande Sande, LLC
10220 River Road, Suite 200
Potomac, MD 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 February 22, 2013.

Elvira Minjarez