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

Proceeding	91183799
Party	Defendant Butter Licensing LLC
Correspondence Address	Kenneth Sussmane McCue, Sussmane & Zapfel, P.C. 521 Fifth Avenue, 28th Floor New York, NY 10175-2199 UNITED STATES
Submission	Other Motions/Papers
Filer's Name	Craig M. Spierer
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Signature	/craigspierer/
Date	06/03/2009
Attachments	spierer rule 56f af_20090603191557.pdf (21 pages)(623727 bytes)

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

In the Matter of Trademark Application Serial No. 77/071,279
Filed December 26, 2006
For the Mark BUTTER LOUNGE
Published in the Official Gazette on January 1, 2008
and Trademark Registration No. 3380349 for the Mark
BUTTER RESTAURANT Registration Date February 12, 2008

PURE ENTERTAINMENT, LLC, Opposer, v. BUTTER LICENSING, LLC, Applicant	Opposition No.: 91183799 Cancellation No. 3380349 AFFIDAVIT OF CRAIG M. SPIERER FOR CONTINUANCE TO CONDUCT DISCOVERY PURSUANT TO FRCP §56(f)

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

I, Craig M. Spierer, being duly sworn, depose and say, that:

1. I am an attorney with McCue Sussmane & Zapfel, P.C., the attorneys for Applicant Butter Licensing LLC in the above referenced Opposition and Cancellation Proceeding (collectively the "Consolidated Action"), and I am fully familiar with the facts of this Consolidated Action.

2. This affidavit is submitted for the purpose of moving the Board pursuant to Rule 56(f) of the Federal Rules of Civil Procedure and Rule 2.127 of the Trademark Rules of Practice (37 C.R.R. §2.127) for a continuance to conduct discovery in response to Opposer's Motion for Summary Judgment ("Opposer's Motion"). The factual record is not complete as discovery has not been completed as the noticed depositions of principals of Opposer and the prior principals of Opposer each of whom have submitted declarations in support of Opposer's Motion, have not

been conducted. There is information in the sole possession of the current and prior principals of Opposer which is relevant to showing that there are genuine issues of material fact with regard to (i) Opposer's standing to bring this motion; (ii) Opposer's alleged continuous and uninterrupted use of the stylized mark *Butter with Design* ("Opposer's Mark") from 1999 to the present; (iii) likelihood of confusion between Opposer's Mark and Applicant's mark including but not limited specifically to any allegations of similarity in services, channels of distribution and prospective customers; and (iv) Applicant's affirmative defenses including claims of abandonment and fraud with respect to Opposer's prior but now cancelled registration, estoppel, laches and acquiescence. Alternatively, Applicant requests that either Opposer's Motion be denied as premature for the reasons set forth herein or that the Board grant Applicant an additional thirty (30) days in which to sufficient prepare a response to Opposer's Motion.

FACTS

3. Opposer alleges that it first adopted the stylized mark *Butter with Design* for use in commerce in any around 1999 and thereafter filed an application with the United States Patent and Trademark Office ("USTPO") for the same. At such time, the principals of Opposer were Christoper Solle and Carle Solle (the "Solles"). Under Registration No. 2395741 on October 17, 2000, Opposer was granted registration for the stylized *Butter with Design* for "restaurant and bar services featuring the provision of food and drink, both alcoholic and non-alcoholic" in which Opposer did not make any standard character claim and in which Opposer made no claim to the exclusive right to use "*Butter*" apart from the mark as shown ("Opposer's Registration"). *Solle Decl.* ¶ *6,7* Ex. 1.

4. To the best of Applicant's knowledge, Opposer's services do not have national acclaim or fame, and at all times while in use consisted of a casual low-scale bar which served minimal food consisting of less than 20 fast food items which are "prepared" by a bartender via a

microwave or deep fryer only. Its menu features tater-tots®, spagetthios® and similar items and which require no skill or advanced culinary training, with desserts consisting of pre-packaged baked goods normally found in a convenience store. With minimal décor, Opposer's services cater to unsophisticated, non-celebrity clientele to which Opposer bills itself as a "white trash bistro" and otherwise has used the slogan to describe itself as "two turntables and a microwave" ("Opposer's Establishment"). *Sartiano Dec. ¶ 4.*

5. In and around 2001, Opposer learned that the parties who are now the principals of Applicant, intended to open a restaurant in New York City with a name utilizing the word "Butter." Shortly thereafter, Opposer's wrote to Applicant. In a series of communications by letter and phone from December 2001 through April 2002 attorneys for Applicant's predecessor-in-interest vigorously disputed Opposer's claims and allegations of likelihood of confusion based on, among other things, the differences in the marks, nature of services and potential customers and channels of distribution and advised that Applicant's predecessor-in-interest would be proceeding as planned. *Solle Dec. ¶ 13-18, Ex.2-7.*

6. Thereafter, on or about April 2002, Applicant's predecessor-in-interest opened a high-end restaurant, bar and nightclub utilizing the trademark *Butter Restaurant* in New York to great publicity and acclaim. Applicant's establishment features a constantly changing menu of upscale dining designed and prepared by a noted pastry chef and an acclaimed executive chef. The executive chef Alex Guarnaschelli is a frequent expert appearing in television and print media and was trained in French culinary schools and in the kitchens of some of the most highly regarded restaurants in the United States, including world renowned Chef Daniel Boulud's Michelin rated restaurant Daniel. Applicant's services cater to sophisticated consumers who are often celebrities, world renowned entertainers, professional athletes, and CEOs of major corporations. Applicant's Monday night exclusive events are well documented, covered by

national media, with paparazzi camped outside its establishment. It should be noted that Opposer is not even open for business on Mondays. Applicant's services and venue are in high demand, and as such have become part of the cultural zeitgeist as evidenced by multiple features or mention in top rated network television programming as well as in national tabloid television shows, and has been retained for high-end private events for famous individuals, brands and companies. Applicant's services and brand extension has been sought after for expansion in multiple markets and by major hotel and entertainment businesses, in the United States and abroad ("Applicant's Establishment"). *See Sartiano Dec. ¶ 6, Ex. A.*

7. Applicant's services and use of its trademarks has not changed substantially since the opening of Applicant's Establishment in 2002, and Applicant has not been contacted by Opposer, nor has Opposer raised any objection or taken any action related to Applicant's services or use of its trademarks since prior to the opening of Applicant's Establishment. *See Sartiano Dec. ¶ 7.*

8. Applicant has vigorously attempted to guard against infringement of its trademark rights and has taken actions against third parties who were planning to open establishments under the name "Butter" or "Butter Restaurant" including most recently a restaurant planning to open under the name Butter in Los Angeles, California. Upon information and belief, Opposer not only took no action to prevent such infringement. *See Sartiano Dec. ¶ 8.*

9. In or about late 2006, Applicant became aware that Opposer may have ceased providing services and/or ceased utilizing the trademark as provided in Opposer's Registration. These beliefs became supported by (i) Opposer's failure to file a Section 8 Affidavit of Continued Use which was to be filed between October 17, 2005 and October 17, 2006; (ii) inability to reach Opposer by telephone despite multiple attempts in and around 2006 and 2007; (iii) review of Opposer's website www.smoothasbutter.com which displayed (a) no recent

upcoming or prior events in the "Events" and "News" sections; or (b) no photographs from events subsequent to 2004 in the "Photos" section; and (iv) Opposer's failure to communicate with Applicant or take any actions regarding Applicant's operation of a restaurant, bar and lounge despite frequent and continued articles, stories, and other mentions or Applicant's Establishment in national print and television media.

10. After conducting the above referenced due diligence, nearly three months after the deadline for Opposer to file the Section 8 Affidavit of Continued Use, on January 15, 2007 Applicant filed a wholly original use based application for the trademark *Butter Restaurant* for "nightclub, bar and restaurant services" ("Butter Restaurant Application") and an intent to use application for *Butter Lounge* on December 26, 2006 for "nightclub, bar, lounge and restaurant services" ("Butter Lounge Application"). On or about April 19, 2007, Applicant received an office action from the USPTO raising the possibility of a likelihood of confusion with Opposer's Registration. Despite the fact that Opposer's deadline for filing its required Section 8 Affidavit of Continued Use was October 17, 2006, the USPTO did not officially abandon Opposer's Registration until July 21, 2007, which was 10 months later. Applicant again performed additional due diligence as described above including a review of the USPTO's database to see if Opposer or any other parties had filed a new application. After such due diligence and waiting nearly two months after the USPTO officially abandoned Opposer's Registration, Application responded to the USPTO's office action simply that "Applicant believes there is no likelihood of confusion with the mark cited by Examiner as the registration has been cancelled under Section 8 as no statement of continued use has been filed."

11. The Butter Restaurant Application was published for opposition on November 7, 2007, over one year from the deadline for Opposer to file the Section 8 Declaration of continued use and prior to any new application by Opposer. No party including Opposer opposed the

Butter Restaurant Application, and accordingly it registered on February 2, 2008 ("Applicant Registration"). The Butter Lounge Application was published for opposition on December 12, 2007, and Opposer waiting until January 11, 2008 to request an extension of time to oppose. It should be noted that Opposer filed a new application on December 28, 2007 for the *Butter with Design* trademark citing continuous use from the date first alleged for use in the original Opposer Registration ("Opposer New Application"). The Opposer New Application was filed over one year after Opposer failed to file a Section 8 Affidavit and over five months after the Opposer Registration had been officially abandoned by the USPTO. Opposer's Opposition to the Butter Lounge Application and Petition to Cancel Applicant's Registration commenced on April 29, 2008 and August 6, 2008 respectively (collectively "Consolidated Action"). .

12. During the pendency of the Consolidated Action, the parties have served and answered document production requests and interrogatories, the last of which was served on or about January 2009. The parties additionally endeavored in good faith to set up mutually agreeable times for depositions of the principals of the parties. Due to the fact that principals and attorneys for Applicant were located in New York, principals of Opposer were located in California and attorneys for Opposer were located in Mississippi, scheduling mutually agreeable deposition dates was more difficult than normal. From on or about September 2008 through February 2009, I consistently communicated by phone and email with counsel for Opposer in an attempt to set up dates and locations for depositions, with the initial intention to set up the depositions of the two principals of Applicant and at least one of the principals of Opposer on consecutive days in New York first. Additionally, at least as early as October 24, 2008, I advised that I intended to depose the prior principals of Opposer Mr. Christopher Solle and Mr. Carlton Solle, the later of which has submitted a Declaration in support of Opposer's Motion.

Further, the parties mutually agreed to extend the deadlines for discovery multiple times to address the difficulty in finding mutually acceptable dates for depositions.

13. On or about late February 2009, it was agreed that the first set of depositions would take place from April 6, 2009 through April 9, 2009 in New York, and would include the two principals of Applicant and one of the principals of Opposer, with the parties working to determine the dates and time for the deposition of the other principal of Opposer and the prior principals.

14. On or about March 25, 2009, by motion pursuant to mutual agreement of the parties, the close of discovery was extended to May 29, 2009 in recognition of the need to conduct depositions.

15. Late Thursday evening, April 2, 2009, in response to a confirmation email I sent the prior day, counsel for Opposer advised that the depositions scheduled to begin the following Monday would be cancelled due to Opposer's plan to file a dispositive motion "early next week" and citing a personal matter for Opposer's counsel. By letter sent that very evening, I advised that we would be willing to reschedule depositions, but requested that depositions of the principals of Opposer were necessary and that any dispositive motions based on affidavits of any witnesses that Applicant had not had an opportunity to depose would be inappropriate. Opposer never responded to my correspondence and did not file a dispositive motion the next week as advised in their April 2, 2009 email. After nearly three weeks, Opposer had failed to file its dispositive motion or respond to my letter and on April 21, 2009 by letter I reiterated the request to schedule the depositions of the principals of Opposer. Opposer failed to respond and a week later, Opposer filed Opposer's Motion. *See Ex. 1.*

The Court Should Grant Applicant's Rule 56(f) Motion as Applicant has not had an adequate opportunity to conduct discovery through no inaction on Applicant's part.

16. A party who believes that it has not had an adequate opportunity to conduct discovery in opposing a motion for summary judgment must seek relief pursuant to FRCP §56(f), which requires that the opposing party show the specific facts further discovery may unveil. In response the court may order a continuance to permit further discovery, refuse to grant summary judgment or make such other order as is just. *U.S. ex rel Bernard v. Casino Magic Corp.*, 293 F.3d 419 (8th Cir. 2002); *Stanback v. Best Diversified Products, Inc.* 180 F.3d 903 (8th Cir. 1999).

17. The purpose of FRCP §56(f) is to provide an additional safeguard against an improvident or premature grant of summary judgment. It is the policy of the courts to grant Rule 56(f) motions fairly freely and liberally so as to adjudicate cases on their merits, and where, as is here, the nonmoving party has not had an opportunity to discover information essential to its opposition a Rule 56(f) motion should be granted. *US ex rel Bernard* at 426; *Harrods Ltd. v. Sixty Internet Domain Names,* 302 F.3d 214 (4th Cir. 2002); *Campagnolo S.R.L. v. Full Speed Ahead Inc.*, 209 U.S. Dist. LEXIS 22863 (W.D. Wash. 2009) citing *Burlington Northern Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation* 323 F.3d 767 (9th Cir. 2003).

18. Opposer has submitted the declaration of current principal Oliver Paine ("Paine") and prior principal Carlton Solle ("Solle") in support of Opposer's Motion. Both declarations include vague and/or conclusory statements without support for Opposer's claims that (i) it has continuous and uninterrupted use of Opposer's Mark from 1999 to the present for restaurant, bar and nightclub services; and (ii) there is a likelihood of confusion between Opposer's Mark and Applicant's Registration and the Applicant's mark "Butter Lounge" including but not limited to allegations of similarity of services, or prospective customers. Depositions of the principals of Opposer including Paine, along with prior principals of Opposer, including Solle are necessary to obtain information which is solely in their possession as to the material facts on which they rely,

including to claims regarding continuous and uninterrupted use and Applicant's affirmative defenses including claims of abandonment and fraud with respect to Opposer's prior but now cancelled registration, estoppel, laches and acquiescence.

Opposer's Allegations of Continued Use

19. Opposer alleges that it has continuously and interrupted use of Opposer's Mark from 1999 to present for restaurant, bar and nightclub services and that the failure to file the Section 8 Affidavit of Continued Use and substantial and lengthy delay in filing a new application was due to its lack of knowledge of the requirement to file such Affidavit. *Solle Decl. ¶ 10; Paine Dec ¶ 7.* Applicant's substantial due diligence in and around 2006 and 2007 resulted in (i) an inability to reach Opposer by telephone despite multiple attempts; (ii) no recent upcoming or prior events in the "Events" and "News" sections of Opposer's website www.smoothasbutter.com; and (iii) no photographs from events subsequent to 2004 in the "Photos" section of Opposer's website www.smoothasbutter.com. In light of such contradiction, it is necessary for Applicant to be able to depose the principals of Opposer to ascertain whether indeed Opposer had continuous and uninterrupted use, the nature and scope, if any, of Opposer's use of Opposer's Mark including but not limited to the operation of its website and the inability to reach it by phone. This information along with information as to Opposer or its representatives knowledge of its responsibilities with respect to filing the Section 8 Affidavit are solely within the possession of Opposer.

20. Depositions are also required to determine the trademarks, if any that have been used by Opposer, in particular depositions are necessary to determine whether Opposer used *Butter with Design, Smooth As Butter, White Trash Bistro,* or some other trademark.

Likelihood of Confusion

21. Opposer, makes allegations supported only by declarations of principals and the USPTO's initial position that there may be a likelihood of confusion between Opposer's Mark and Applicant's Butter Restaurant Application and Butter Lounge Application. Such position was not dispositive and may likely have been overcome even if Opposer's Registration had not abandoned. Applicant's operates an internationally known high-end restaurant, bar and lounge which features a constantly changing menu prepared by a classically trained and award winning chef. Opposer's food is "prepared" by the bartender using a microwave and deep fryer only. Applicant's Establishment caters to a high-end clientele and is frequented by celebrities, athletes, and CEOs of major corporations; is booked for private events by major fashion brands and corporations. Opposer bills itself as a "white trash bistro." Further, Opposer's Mark is a stylized mark, in which there was no standard character claim and in which Opposer specifically disclaimed the word "Butter" apart from the mark as registered, while Applicant's marks are both two word marks. Depositions are necessary for Applicant to determine not only the nature and basis for Opposer's claim that there is a likelihood of confusion, but additionally full information related to the similarity or dissimilarity of the services and prospective customers of Opposer, the channels of distribution, the conditions under which and buyers to whom sales are made, and further the basis for the allegations of fame and notoriety of Opposer's services.

Affirmative Defenses:

22. Applicant's answers in the Consolidated Action assert numerous affirmative defenses including but not limited to claims of abandonment of Opposer's Mark, no like likelihood of confusion, unclean hands, laches and estoppel. There is information within Opposer's sole possession which is needed to accurately support such affirmative defenses, including facts and information (i) related to Opposer's potential abandonment of Opposer's Mark and/or lack of strength in Opposer's Mark due to Opposer's failure to police and protect its

mark from potential and actual infringers; (ii) related to Opposer's failure to take any actions against Applicant or its predecessor-in-interest from the time initial communications were exchanged between the parties in 2001 until the present Consolidated Action; (iii) the full nature and scope of Opposer's use, or lack therefore of Opposer's Mark including any alterations after the initial principals of Opposer transferred all right, title and interest to the current principals of Opposer; (iv) the strength of Opposer's Mark, namely whether the current principals of Opposer purchased Opposer due to the fame and goodwill associated with Applicant's services and use of its trademarks, if any; and (v) fraudulent conduct by Opposer in the procurement of Opposer's Registration or in Opposer's New Application in which despite having knowledge of Applicant's services, and constructive notice of Applicant's Registration, Opposer declared that "to the best of his/her knowledge and belief no other person, firm, corporation or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion or to cause mistake, or to deceive." In light of the declarations of Paine and Solle, it is evident that both have information in their possession which is necessary for Applicant to provet its affirmatives defenses.

23. Moreover, the discovery deadline in this Consolidated Action had not been closed at the time of Opposer's Motion, as the parties by mutual stipulation had extended the discovery deadline in anticipation of the need to conduct depositions.

No fault of Applicant.

24. Applicant was not dilatory in arranging depositions and the parties engaged in numerous and consistent good faith discussions over a period of five months to schedule depositions in a manner which was convenient and acceptable to both parties. The initial set of depositions were scheduled over a month in advance, and were unilaterally cancelled by Opposer

after normal business on the Thursday night prior to the Monday depositions. At all times, including immediately after Opposer cancelled depositions, Applicant made its intention known to Opposer that it intended to conduct depositions of the current and past principals of Opposer. Further, Opposer's filing of the instant Motion for Summary Judgment three weeks after cancelling depositions and only after Applicant's additional demands to schedule depositions is indicative of Opposer's attempt to prevent Applicant from obtaining necessary information to support its defenses which would have been obtained during such depositions.

Opposer Presents an Incomplete Factual Record and its Motion is Premature

25. A party is entitled to prevail on summary judgment only if upon all the pleadings, deposition, answer, interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *FRCP § 56(c); Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). The burden is on the moving party to establish that there is no genuine issue of material fact that a reasonable fact finder could decide the question in favor of the non-moving party, and thus any and all doubts as to whether any factual issues are genuinely in dispute must be resolved against the moving party and all inferences must be viewed in a light most favorable to the non-moving party. *Norac, Inc. v. Elementis Specialties, Inc.,* 2005 TTAB LEXIS 416 (TTAB 2005) citing *Opryland USA Inc. v. Great American Music Show, Inc,* 970 F.2d 847 (Fed. Cir. 1992); *Old Tyme Foods, Inc. v. Roundy's Inc.,* 961 F.2d 200 (Fed Cir. 1992). The court may not weight the evidence or make factual determinations, but may only determine whether there is a genuine issue that must be resolved by a fact-finder. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Fireman's Fund Ins. Co. v. Thien,* 8 F.3d 1307 (8th Cir. 1993).

26. Opposer's Motion is premature as discovery is not complete. As mentioned above, the depositions have not been conducted and such depositions are necessary to obtain

information as to whether Opposer's Mark was abandoned, the likelihood of confusion between Opposer's Mark and Applicant's marks, and to prove Applicant has any affirmative defenses.

CONCLUSION

27. Based on the foregoing reasons, summary judgment is not appropriate as discovery has not been completed. There is information relevant and necessary to Applicant's defense of this action which is solely in the possession of Opposer. Applicant respectfully requests a continuance pursuant to FRCP §56(f). In the event the Board does not grant Applicant's motion pursuant to FRCP §56(f), Applicant respectfully requests that Opposer's Motion be denied or alternatively the Board grant Applicant thirty (30) days in which to fully and more complete respond to Opposer's Motion.

28. The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C.§ 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his own knowledge are true and all statements made on information and belief are believed to be true.

Dated June 3, 2009

Respectfully submitted,

McCUE SUSSMANE & ZAPFEL, P.C.
By: _____
Ken Sussmane
Craig M. Spierer
John A. Dalley
521 Fifth Avenue, 28th Floor
New York, New York 10175
Telephone: (212) 931-5500
Facsimile: (212) 931-5508
E-Mail: ksussmane@mszpc.com
cspierer@mszpc.com
Attorneys for Butter Licensing, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by Express Mail and Electronic mail, on the following counsel, this the 3rd day of June, 2009:

Debra M. Brown
Phelps Dunbar, LLC
111 East Capitol Street
Suite 600
Jackson, Mississippi 39201

Craig M. Spierer

Exhibit A

Craig Spierer

From: Debra M. Brown (3352) [BROWND@phelps.com]
Sent: Thursday, April 02, 2009 8:37 PM
To: Craig Spierer
Cc: jdalley1@nyc.rr.com; Anne Turner (3725)
Subject: RE: Pure Entertainment v. Butter Licensing - Stipulated Motion

Craig,

We plan to file a dispositive motion early next week, and understand that such a filing would stay discovery, including depositions. We therefore think it would be prudent to cancel the depositions at this juncture. Even had we not made this decision, the depositions will have likely needed to be postponed anyway as my grandmother was just hospitalized and I would not have wanted to be away for any length of time until more is learned about her condition. I apologize for any inconvenience.

From: Craig Spierer [mailto:cspierer@mszpc.com]
Sent: Wednesday, April 01, 2009 6:02 PM
To: Debra M. Brown (3352)
Cc: jdalley1@nyc.rr.com; Anne Turner (3725)
Subject: RE: Pure Entertainment v. Butter Licensing - Stipulated Motion

Debra,
Our clients are all set for depositions next week. Please advise as to the exact dates you plan to hold the depositions of Scott and Richie. Additionally, please confirm whether or not your client Mark Ligman will be in NY and will be sitting for a deposition, and if so, what day(s) he is available. Per our previous conversations and your earlier emails (including emails as late of February 26), you had stated that Mark Ligman's deposition would also be held in NY during the April 6-9 window, but in our conversation from last week, you had intimated that this may have changed. We would expect that if Mr. Ligman is in NY that he will sit for a deposition. Either way, please advise as soon as possible so that we have sufficient time to schedule and prepare for his deposition.

Additionally, please advise if the April 22 and May 5 and 6 dates for the deposition of Oliver Paine are still open. If so, please advise where you propose the deposition of Mr. Paine will take place and direct Mr. Paine hold those dates free so that we may make our travel arrangements.

Thank you.

Kind regards,
Craig M. Spierer, Esq.
McCue Sussmane & Zapfel, P.C.
521 Fifth Avenue, 28th Floor
New York, New York 10175
(212) 931-5500 - tel
(212) 931-5508 - fax

From: Debra M. Brown (3352) [mailto:BROWND@phelps.com]
Sent: Tue 3/24/2009 3:48 PM

To: Craig Spierer
Cc: jdalley1@nyc.rr.com; Anne Turner (3725)
Subject: RE: Pure Entertainment v. Butter Licensing - Stipulated Motion

Please call our general number - 601.352.2300 - and tell them that you are calling for me and the call will be transferred. Thanks.

From: Craig Spierer [mailto:cspierer@mszpc.com]
Sent: Tuesday, March 24, 2009 12:46 PM
To: Debra M. Brown (3352)
Cc: jdalley1@nyc.rr.com; Anne Turner (3725)
Subject: RE: Pure Entertainment v. Butter Licensing - Stipulated Motion

Debra,
That works, please advise what number is best for us to call.

Kind regards,
Craig M. Spierer, Esq.
McCue Sussmane & Zapfel, P.C.
521 Fifth Avenue, 28th Floor
New York, New York 10175
(212) 931-5500 - tel
(212) 931-5508 - fax

From: Debra M. Brown (3352) [mailto:BROWND@phelps.com]
Sent: Tue 3/24/2009 11:23 AM
To: Craig Spierer
Cc: jdalley1@nyc.rr.com; Anne Turner (3725)
Subject: RE: Pure Entertainment v. Butter Licensing - Stipulated Motion

Yes. We are available at 3 pm CT today if that works for you all.

From: Craig Spierer [mailto:cspierer@mszpc.com]
Sent: Tuesday, March 24, 2009 8:25 AM
To: Debra M. Brown (3352)
Cc: jdalley1@nyc.rr.com; Anne Turner (3725)
Subject: Re: Pure Entertainment v. Butter Licensing - Stipulated Motion

Debra,
Are you and/or Anne available to speak today or tomorrow regarding Anne's March 13th letter?

Thank you.

Kind regards,
Craig M. Spierer

*Sent via Blackberry

From: Debra M. Brown (3352)
To: Craig Spierer
Cc: John Dalley ; Anne Turner (3725)
Sent: Mon Mar 09 13:02:52 2009
Subject: RE: Pure Entertainment v. Butter Licensing - Stipulated Motion

Craig -- I apologize for the delayed response. We have no problem with your changes and will make them and then submit the Stipulation. Thanks.

From: Craig Spierer [mailto:cspierer@mszpc.com]
Sent: Friday, March 06, 2009 12:39 AM
To: Debra M. Brown (3352)
Cc: John Dalley; Anne Turner (3725)
Subject: RE: Pure Entertainment v. Butter Licensing - Stipulated Motion

Debra,
Thank you for preparing the Stipulation. It all looks fine to us, except one small language issue we would like revised. In the third line of section 2, please delete "involve virtually identical pleadings" and replace it with language something to the effect of "involve substantially similar claims, defenses and issues.'

Other than that, the Stipulatoin looks acceptable to us.

Thank you.

Kind regards,
Craig M. Spierer, Esq.
McCue Sussmane & Zapfel, P.C.
521 Fifth Avenue, 28th Floor
New York, New York 10175
(212) 931-5500 - tel
(212) 931-5508 - fax

From: Debra M. Brown (3352) [mailto:BROWND@phelps.com]
Sent: Wed 3/4/2009 12:53 PM
To: Craig Spierer
Cc: John Dalley; Anne Turner (3725)
Subject: Pure Entertainment v. Butter Licensing - Stipulated Motion

Craig,

See attached stipulated motion for consolidation and extension of deadlines. The proposed extension dates presume that the last deposition dates I sent you (Apr. 22, May 5 & 6) are all available from your end. If that's not the case, the extension dates will need to be adjusted to accommodate mutually available dates thereafter. Let me know as soon as you can.

Thanks.

<<Stipulated Motion to Consolidate and Extend Deadlines.DOC¤>>
Debra M. Brown
Phelps Dunbar LLP
111 East Capitol Street
Suite 600
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(601) 352-2300
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TELEPHONE: (212) 931-5500
FACSIMILE: (212) 931-5508

April 3, 2009

Copy by Email
Original by Mail
Phelps Dunbar LLP
Attn: Debra Brown
111 East Capitol Street
Suite 600
Jackson, Mississippi 39201-2122

Re: Pure Entertainment, LLC v. Butter Licensing, LLC
Opposition No. 91183799
Cancellation No. 92049767

Dear Ms. Brown:

We have received your email correspondence of April 2, 2009. We certainly understand the importance of a family emergency and are willing to change the discovery schedules to take into account this emergency.

However, as you are aware, we still do not have firm dates to take the depositions of Mr. Ligman and Mr. Paine, which have been duly noticed. Unless you provide us with firm dates for these depositions, we will move to compel this discovery. In addition, any dispositive motion based on affidavits of any witnesses we have not had an opportunity to depose would be wholly inappropriate.

While we do not object to your waiver of your right to depose our clients, we insist on scheduling the depositions of Mr. Ligman and Mr. Paine.

Sincerely,

Craig M. Spierer

McCue Sussmane & Zapfel, P.C.
521 Fifth Avenue
28th Floor
New York, New York 10175

TELEPHONE: (212) 931-5500
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April 21, 2009

Copy by Email
Original by Mail
Phelps Dunbar LLP
Attn: Debra Brown
111 East Capitol Street, Suite 600
Jackson, Mississippi 39201-2122

Re: Pure Entertainment, LLC v. Butter Licensing, LLC
Opposition No. 91183799
Cancellation No. 92049767

Dear Ms. Brown:

This letter is written in furtherance of our letter of April 3, 2009, to which you failed to respond. Pursuant to our request to confirm timing for the depositions of our client and Mr. Ligman, by email dated as of April 2, 2009, on the eve of the deposition dates, you cancelled such depositions and advised that you planned to file a dispositive motion early the next week. Not only was no such motion filed last week, but we still do not have firm dates to take the depositions of Mr. Ligman and Mr. Paine, which have been duly noticed. While we do not object to your waiver of your right to depose our client, we reiterate our insistence on scheduling the depositions of Mr. Ligman and Mr. Paine.

Please be advised that should we not receive an appropriate response to this letter by the end of this week, we will have no alternative but to conclude that Pure Entertainment, LLC does not wish to meaningfully cooperate in the discovery process and we will be forced to move to compel this discovery.

Sincerely,

Craig M. Spierer

cc: Anne Turner