

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI**

IHOP IP, LLC et al.,)	
)	
)	
Plaintiffs,)	
)	
vs.)	
)	Case No.: 4:11-cv-00548-JTM
INTERNATIONAL HOUSE OF PRAYER)	
et al.,)	
)	
Defendants.)	

PROPOSED DISCOVERY SCHEDULE AND TRIAL ORDER

Pursuant to Fed. R. Civ. P. 26(f), a discovery and case management conference was held on September 16, 2011 by telephone and was attended by Mark Iba and Elizabeth Tassi (counsel for plaintiffs) and Keith Grady(counsel for defendants International House of Prayer, Friends of the Bridegroom, Inc, Shiloh Ministries, Inc. and Mike Bickle).

The parties have agreed to serve their initial disclosures under Fed. R. Civ. P. 26(a)(1) on or before November 15, 2011. The parties expect to request a protective order and plaintiffs have agreed to serve a proposed protective order and stipulation for its entry no later than November 15, 2011 pursuant to Local Rule 16.1(f)(7).

Disclosure or discovery of electronically stored information (ESI) will be treated the same as paper discovery. In other words, each party intends to rely on the opposing party to conduct the same diligent search of ESI as it will conduct of paper materials. The parties do not intend to impose on the opposing party any additional requirements beyond the good faith obligation to conduct a diligent search for responsive information.

If the disclosing party inadvertently produces privileged or trial preparation materials, it must notify the requesting party of such disclosure. After the requesting party is notified, it must return, sequester, or destroy all information and copies and may not use or disclose this information until the claim of privilege or protection as trial preparation materials is resolved. If the receiving party recognizes that a production includes privileged or trial preparation materials, it must notify the producing party of such disclosure, giving the disclosing party the opportunity to request its return. The parties have agreed that privilege or protection is not waived if the responding party produces privileged or protected materials, without intending to waive privilege or protection, and so long as the responding party identifies the materials mistakenly produced.

The parties jointly propose to the Court the following discovery plan and trial order:

A. DISCOVERY SCHEDULE

NOTICE TO ALL COUNSEL: Counsel are advised to read this Order carefully. Suggestions in support of or in opposition to a motion shall be no longer than 15 double spaced typewritten pages, exclusive of facts presented in accordance with Local Rule 56.1, without permission of the Court. Reply suggestions shall be limited to 10 double spaced pages, unless otherwise authorized by the Court. Suggestions exceeding 10 pages in length shall have a table of contents and table of authorities.

Pursuant to Fed. R. Civ. P. 16(b) and 26(f), and upon consideration of the parties' proposed scheduling order, this Court finds that the following time limits are appropriate:

- I. Any motion to join additional parties will be filed on or before December 2, 2011.
- II. Any motion to amend the pleadings will be filed on or before December 2, 2011.
- III. All other non-dispositive motions except motions in limine will be filed on or before October 31, 2012. Notwithstanding the above, **no motion relating to a discovery dispute shall be filed until the following steps have been taken:**
 - A. Counsel for the moving party has in good faith conferred or attempted to confer by telephone or in person with opposing counsel concerning the matter prior to the filing of the motion. Merely writing a demand letter is not

sufficient. Counsel for the moving party shall certify compliance with this rule in any discovery motion. See Fed. R. Civ. P. 26(c).

B. If the issues remain unresolved after the attorneys have conferred in person or by telephone, counsel shall arrange with the Court for an immediate telephone conference with the judge and opposing counsel. No written discovery motion shall be filed until this conference has been held. See Local Rule 37.1.

IV. All dispositive motions, except those under Fed. R. Civ. P. 12(h)(2) or (3), will be filed on or before November 30, 2012.

A. Dispositive Motions:

All dispositive motions shall have a separate section wherein each statement of fact is individually numbered, so that any party opposing such motions may specifically point to a genuine issue of material fact.

B. Summary Judgment Motions:

1. The suggestions in support of a motion for summary judgment shall begin with a concise statement of uncontroverted material facts. Each fact shall be set forth in a separately numbered paragraph. Each fact shall be supported by reference to where in the record the fact is established. See Fed. R. Civ. P. 56(e).
2. Suggestions in opposition to a motion for summary judgment shall begin with a section that contains a concise listing of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be set forth in a separate paragraph, shall refer specifically to those portions of the record upon which the opposition party relies, and, if applicable, shall state the paragraph number in movant's listing of facts that is in dispute. All facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party.
3. All facts on which a motion or opposition is based shall be presented in accordance with Fed. R. Civ. P. 56. Affidavits or declarations shall be made on personal knowledge and by a person competent to testify to the facts stated. Where facts referred to are contained

in another document, such as a deposition, interrogatory answer or admission, a copy of the relevant excerpt from the document shall be attached.

- V. All pretrial discovery authorized by the Federal Rules of Civil Procedure will be completed on or before October 31, 2012. In support of their request that this Court permit discovery to continue past 180 days after a defendant has been served, the parties state: (1) the parties previously engaged in voluntary settlement negotiations for close to five months in an attempt to settle their dispute outside of Court and would like the opportunity to continue these discussions over the next several weeks without first expending substantial resources on discovery or prejudicing their opportunity to conduct thorough discovery; (2) there are complex issues in this case as it is primarily based on plaintiffs' trademark infringement and dilution claims, which will likely require survey evidence and it is counsel's experience that survey evidence can be time-consuming to obtain; and (3) the time frame accommodates anticipated maternity leave for counsel for plaintiffs.

Discovery is needed on the following specific subjects: (1) defendants' use of plaintiffs' marks at issue; (2) the effect of defendants' use of plaintiffs' marks at issue, including the likelihood of confusion and dilution it allegedly causes; (3) defendants' intent in adopting and using plaintiffs' marks at issue; (4) whether plaintiffs' marks are indeed famous; (5) the basis for plaintiffs' claims that defendants' actions were willful and that this constitutes an "exceptional" case; (6) any damages allegedly suffered by plaintiffs and the basis for plaintiffs' request for equitable relief; (7) the products or services on which plaintiffs' and defendants' marks are used and the channels of trade for those products and services; (8) any actual confusion between plaintiffs' and defendants' marks; and (9) the basis for plaintiffs' claim that defendants actions falsely designated the origin of defendants' products and services.

- A. On or before May 30, 2012, the plaintiff will designate expert witnesses.
- B. On or before May 30, 2012, the defendant will designate expert witnesses.
- C. Disclosure of Expert Testimony:
1. With respect to a party who intends to call an expert for the purpose of supporting an affirmative claim for relief, Rule 26 expert witness reports shall be exchanged, and a Certificate of Service filed, no later than May 30, 2012; and shall, with respect to a party who intends to call an expert for the purpose of defending against an affirmative claim for relief, be exchanged, and a Certificate of Service filed, no later than May 30, 2012.

2. Each party shall disclose to every other party any evidence that the party may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in written affidavit form, prepared and signed by the witnesses and shall include a complete statement of all opinions to be expressed, and the basis and reasons therefor; the data or other information relied upon in forming such opinions; the qualifications of the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding five (5) years.
3. If any party after receiving the reports described in paragraphs D.(1) and D.(2) above from an opposing party wishes to submit evidence intended solely to contradict or rebut evidence on the same subject matter, they may do so in the same manner described above within thirty (30) days after the receipt of said reports from such other party. **Thereafter, the testimony of each party's expert witness shall be strictly limited at trial to the opinions and the bases for the opinions filed under this section.**

D. Daubert Motions

All motions to strike expert designations or preclude expert testimony premised on *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), shall be filed on or before November 30, 2012. The deadline for filing motions in limine does not apply to these motions. Failure to file a *Daubert* motion prior to this deadline will constitute a waiver of any arguments based on *Daubert*.

VI. Motions for Extension of Time:

All motions for extension of time, pursuant to Fed. R. Civ. P. 6(b), or to respond to request for discovery, pursuant to Fed. R. Civ. P. 31, 33, 34, and 36, must state:

- A. The date when the original pleading, response, or other action is or was first due;
- B. The number of previous extensions and the date the last extension expires;
- C. The cause for the requested extension, including a statement as to why the action due has not been completed in the allotted time; and
- D. Whether the requested extension is approved or opposed by opposing counsel (agreement by counsel of a requested extension is not binding on

the Court).

Any motion for an extension of time filed without first complying with these procedures will be denied.

VII. Certifications to the Court:

Prior to the close of discovery, counsel for all parties shall meet, at least once, in person, and discuss settlement. Upon completion of this requirement, counsel shall certify to this Court the time and place of such meeting, the names of parties and counsel present and the results of the meeting.

PLEASE NOTE: Counsel are directed to accompany all motions with a proposed order.

B. TRIAL ORDER

I. Trial Setting:

- A. Counsel for the parties will have this case will be ready for trial by February 15, 2013. It is estimated that nine (9) full trial days will be necessary to try this case after the jury is impaneled: four days for plaintiffs' case; three days for defendants' case; and two days for rebuttal testimony and closing arguments. This case is scheduled as the #2 case for a jury trial commencing _____. Counsel for the parties shall have the responsibility to maintain contact with the Court to ascertain if the #2 case will be tried on _____. The trial will be held in Courtroom 7E (7th Floor), Charles Evans Whittaker United States Courthouse, 400 E. 9th Street, Kansas City, Missouri.
- B. A final pretrial conference will be held one-half (1/2) hour before the trial in Courtroom 7E, Charles Evans Whittaker United States Courthouse, 400 E. 9th Street, Kansas City, Missouri.

II. Initial Pretrial Conference:

- A. An initial pretrial conference in this case will be held on _____, at _____ in CHAMBERS, Room 7662 (7th floor), Charles Evans Whittaker United States Courthouse, 400 E. 9th Street, Kansas City, Missouri.
- B. The agenda for the initial pretrial conference will include:
1. Identification of facts not in dispute to which the parties will stipulate, in

- order to save trial time;
2. Identification of factual and legal issues to be tried;
 3. Disposition of pending motions;
 4. Discussion of any legal questions which a party or parties believe must be resolved prior to trial;
 5. Discussion of any suggestions by counsel to simplify and expedite the trial;
 6. Discussion of the status of settlement negotiations;
 7. Notification of specific rules of trial procedures employed by the Court; and,
 8. Discussion of expert testimony expected to be presented at trial.

III. Post Discovery:

- A. Witness List: Ninety (90) days prior to trial, each party will file a list of the names of all persons the party anticipates calling as witnesses at trial. If a person is not listed by a party, that person will not be permitted to testify, absent leave of court and for the sole purpose of reasonably unanticipated rebuttal or impeachment. After the time for filing lists of witnesses has expired, no supplemental or amended list will be filed without leave of Court and for good cause.
- B. Exhibit List: Ninety (90) day prior to trial, each party shall serve and file a list of all exhibits which may be offered in evidence. It is not necessary to list exhibits to be used solely for reasonably unanticipated impeachment or rebuttal purposes.
1. Except by leave of Court for good cause, no exhibit will be received in evidence which is not so listed by the counsel offering the exhibit, and
 2. After the time for filing lists of exhibits has expired, no supplemental or amended list of exhibits will be filed without leave of Court for good cause.
- C. Making Exhibits Available to Opposing Party: Unless otherwise agreed to, the parties shall exchange copies of all trial exhibits, including documents, ten (10) days before trial, each party bearing the costs of producing their own exhibits. Any party having an authenticity objection to any exhibit shall file its objection

five (5) days before trial.

- D. Exhibit Index: All exhibits to be offered in evidence shall be listed on the court's Exhibit Index form which can be obtained from the Clerk's Office. The original and two copies of the completed index shall be delivered to the courtroom deputy at least one-half hour before trial.
- E. Exhibits Delivered to the Court: Each exhibit that may be offered into evidence should be properly marked with the court's exhibit sticker which can be obtained from the Clerk's Office. Plaintiff shall number its exhibits 1 through 499; defendant shall number its exhibits 500 through 999. Each party shall provide two binders containing copies of each exhibit that can be copied inexpensively to be used by the Judge and Law Clerk during trial. These binders shall be delivered to the courtroom deputy one-half hour before trial.
- F. Deposition Testimony:
1. At least ten (10) days prior to the date of the trial, each party shall designate the parts of each deposition which will be offered as evidence;
 2. At least seven (7) days prior to the date of the trial, each party shall designate deposition testimony in response to an opponent's designation; and
 3. At least five (5) days prior to the date of the trial, each party shall file its objections to any deposition testimony designated pursuant to paragraphs 1. and 2. above.
- G. Proposed Jury Instructions:
- Thirty (30) days prior to trial, each party shall file the original and one copy of each proposed jury instruction. The original of each proposed instruction should be entitled "Instruction No. ____" and have no citations of authority typed on it. Each copy, however, should reflect the authorities upon which the instruction is based. Proposed instructions in diversity cases where Missouri law applies should conform to MAI. In all other cases, the Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit should be followed if reasonably possible. If the proposed jury instructions have been prepared on a computer using Word Perfect, please submit the proposed instructions on a 3 1/2 inch disk as well as on paper.
- H. Filing of List of Voir Dire Questions in Jury Cases:
1. Thirty (30) days prior to trial, each party shall file proposed voir dire questions. Counsel will be afforded an opportunity to examine the panel.

Prior to the pretrial conference, counsel should confer regarding their proposed voir dire questions they plan to ask. If opposing counsel objects to a particular question, counsel should discuss and attempt to resolve the objection. If not resolved, counsel should bring the objection up at the pretrial conference, and

2. The Court will ask qualifying questions and questions from each party's prepared questions. At the conclusion of the Court's questioning, if time permits, each attorney will be allowed up to 20 minutes to direct questions to the entire jury panel. An Attorney may then direct follow-up questions to a juror who responds to a question directed to the entire panel.

I. Filing of Trial Briefs in Jury and Non-Jury Cases and Suggested Findings of Fact in Non-Jury Cases:

1. In actions to be tried with or without a jury, at least ten (10) days prior to the date of trial, counsel for each party shall file a trial brief stating separately the factual and legal contentions for the party for whom the trial brief is filed, with citations of authority relied upon in respect to each legal contention, and
2. In actions to be tried without a jury, each party will file suggested findings of fact and suggested conclusions of law separately stated in separately numbered paragraphs.

J. Pretrial Evidentiary Motions:

1. At least seven (7) days prior to the pretrial conference on _____, counsel shall file any motion seeking an evidentiary ruling before trial, and
2. Any responses to these motions shall be filed four (4) days prior to the pretrial conference.

K. Filing of Stipulation of Uncontroverted Facts:

1. Within twenty (20) days after the time fixed for the completion of discovery, counsel for each party will meet and enter into a stipulation of uncontroverted facts and waive objections to admissibility of exhibits which are based on lack of identification, when the identification thereof is not to be contested. At this conference, counsel will produce each exhibit listed, or to be listed, on behalf of his client for inspection by counsel for other parties. Notwithstanding the fact that the time for discovery will have closed by the time set for this meeting, a request to

stipulate, if preserved in the record, will constitute a request for admission under Fed. R. Civ. P. 36, and failure to stipulate may be subject to sanctions under Fed. R. Civ. P. 37(c). The Stipulation of Uncontroverted Facts will then be prepared by counsel for plaintiff, signed by counsel for all parties, and filed by counsel for plaintiff no more than forty (40) days after the date fixed for the close of discovery.

2. Counsel for plaintiff will initiate the arrangements for the meeting outlined in K.1. above.

Respectfully submitted,

/s/ Elizabeth A. Tassi

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