

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RICKY B. PERRITT, Individually; §
THE CUPCAKERY, LLC, a Texas Limited §
Liability Company; BUSTER BAKING, §
LLC, a Texas Limited Liability Company; §
THE WOODLANDS BAKING, LLC, §
a Texas Limited Liability Company; §
CUSTOM VERSION CORPORATION, §
a Texas Corporation §

Plaintiffs, §

Civil Action No. 4:11-CV-23

v. §

PAMELA F. JENKINS, Individually; and §
THE CUPCAKERY LLC, a Nevada §
Limited Liability Company §

Defendants. §

EDITOR’S NOTE: THE PORTIONS THAT ARE AGREEABLE TO BOTH PLAINTIFFS AND DEFENDANTS ARE IN BLACK COLORED TEXT. THE PORTIONS THAT ARE AGREEABLE TO PLAINTIFFS ONLY ARE IN RED COLORED TEXT. THE PORTIONS THAT ARE AGREEABLE TO DEFENDANTS ONLY ARE IN BLUE COLORED TEXT.

PROTECTIVE ORDER CONCERNING CONFIDENTIAL INFORMATION

Pursuant to Federal Rule of Civil Procedure 26(c) and good cause having been shown, ON THIS ___ DAY OF _____, 2011, **IT IS ORDERED THAT:**

1. **Applicability.** This Protective Order Concerning Confidential Information (referred to herein as the “Protective Order”) shall govern the disclosure, distribution, and use of all

Confidential Material, as defined herein, produced by Plaintiffs Ricky B. Perritt (“Perritt”), The Cupcakery, LLC, a Texas Limited Liability Company (the “Texas Cupcakery”), Buster Baking, LLC, a Texas Limited Liability Company (“BLLC”), the Woodlands Baking, LLC, a Texas Limited Liability Company (“WBLLC”), and Custom Version Corporation, a Texas Corporation (“CVC”) (collectively, Perritt, Texas Cupcakery, BLLC, WBLLC, and CVC are the “Plaintiffs”) and Defendant Pamela F. Jenkins (“Jenkins”) and Defendant The Cupcakery, LLC, a Nevada Limited Liability Company (“Nevada Cupcakery”) (collectively, Jenkins and The Nevada Cupcakery are the “Defendants”) (Plaintiffs and Defendants shall be referred to collectively as “parties”).

2. **Scope.** Any party, to the extent set forth in this Protective Order, may designate as “Confidential” or “Attorneys Eyes Only” all or any part of the following discovery material: (i) answers to interrogatories (ii) transcripts of depositions; (iii) documents produced by it or made available for inspection; and (iv) any other information produced or disclosed during the course of this litigation. The material designated as either “Confidential” or “Attorneys Eyes Only” is referred to herein as the “Confidential Material.” Material designated as “Confidential” shall include only that material which the designating party believes in good faith constitutes a trade secret, proprietary business or financial information, or other confidential information, including research, development, and/or commercial information **and which is timely designated as such hereunder.** Material designated as “Attorneys Eyes Only” shall include only that material which the designating party believes in good faith cannot be disclosed to non-attorney employees or representatives of Plaintiffs or Defendants without impairing the disclosing party’s legitimate interest in the designated material **and which is timely designated as such hereunder.**

3. **Designation of Confidential Material.** The designation of material as “Confidential” or “Attorneys Eyes Only” **shall be made either: must be made prior to disclosure of such material either:** (i) by stamping or otherwise marking such materials “Confidential” or “Attorneys Eyes Only,” or the equivalent, in a manner such that the legend is capable of being reproduced in the normal process of photocopying and will not interfere with the legibility of the document; or (ii) by notifying counsel of record for the parties in writing specifically identifying the material to be designated as “Confidential” or “Attorneys Eyes Only” **before it is disclosed.**

All information and/or documents that are inadvertently produced by either of the parties in connection with discovery proceedings in the lawsuit, which but for such inadvertent production would otherwise have been entitled to be protected from discovery by any privilege or immunity, shall continue to be protected by such privilege or immunity, subject to specific objections to the contrary that may be filed by the parties, and such inadvertent production shall not be deemed to be a waiver of any such privilege or immunity. Upon identification of any inadvertently produced information and/or documents, the producing party shall provide to the other party written notification identifying the document that has been inadvertently produced and stating the privilege or immunity under which such document is allegedly protected. Upon receipt of such written notification from the producing party, the other party shall, within seven (7) business days, return to the producing party each inadvertently produced document or item containing the information and any and all copies made of such document or item. To the extent that prior to such notice a party receiving the material may have disclosed it to persons other than authorized persons pursuant to this Protective Order, the party shall not be deemed to have violated this Protective Order in any respect, but the party shall make every reasonable

effort to retrieve any such material promptly from such persons and to limit any further disclosure pursuant to this Protective Order. The return of inadvertently produced documents shall not prevent any party from asserting specific objections to any claims of privilege or immunity regarding such documents as would normally be made.

Two alternative Paragraph number 4.

4. **Depositions.** Deposition transcripts (or portions thereof) may be designated “Confidential” or “Attorneys Eyes Only” by any party or third-party either: (i) during the deposition; or (ii) by written notice to the reporter and to all counsel of record given within twenty (20) days after the deposition transcript is received by the deponent or the deponent’s counsel, whichever is earlier. Pending the expiration of twenty (20) days after a deposition transcript is received by the deponent or the deponent’s counsel, all parties and persons shall treat the deposition transcript as if it has been designated “Confidential.” The April 12, 2011 deposition of Pamela Jenkins is hereby designated “Confidential.”

4. **Depositions.** Deposition transcripts (or portions thereof) may be designated “Confidential” or “Attorneys Eyes Only” by any party or third-party if during the deposition the party states on the record that particular testimony is being given pursuant to a protective order and is designated as “Confidential” or “Attorneys Eyes Only” as appropriate. Such designation(s) shall be made at the beginning of the testimony alleged to be confidential and at the end of such testimony alleged to be confidential it shall be stated that the alleged confidential portion of the testimony has ended. Only those portions of the testimony, and exhibits, that are expressly designated as confidential pursuant to this protective order are protected hereunder. Such designation(s) shall be made in good-faith to prevent the over-

inclusion of confidential information under the protective order.

5. **Restrictions on Use of Material.** Confidential Material produced by the parties shall be used and disclosed solely for the prosecution or defense of the claims in this action and any appeal thereof, and shall not be used or disclosed except by the party who produced such Confidential Material, for any business, commercial, competitive, personal, or other purpose unless otherwise agreed by the parties.

Notwithstanding anything to the contrary contained in this Protective Order, this Protective Order shall not limit the use of anything provided or obtained hereunder if it is obtained or was obtained by a party through other means and/or if the party was otherwise entitled to it by contract or otherwise.

6. **Access to Discovery Materials.** Confidential Material shall be maintained in confidence by the party to whom such material is produced or disclosed solely for use as provided in Paragraph 5 of this Protective Order and shall not be disclosed to any person except:

- a. The Court and its staff, which shall include the trial court and any appellate court, as well as any court reporters, stenographers, and video equipment operators who are retained for use in this case including for depositions;
- b. Counsel of record and employees of counsel of record;
- c. In-house counsel for a party and in-house counsel staff working on this litigation, provided that said counsel and staff members are not involved in the competitive activities of their company, and provided that they have signed a Certificate of Acknowledgment in the form of Exhibit "A" hereto;
- d. Plaintiffs, Defendants, and their partners, members, agents, officers, directors, and

employees;

e. Persons not employees of any party who are expressly retained to assist such party's counsel in the preparation of this action for trial and who have signed a Certificate of Acknowledgment in the form of Exhibit "A" hereto;

f. Deponents not otherwise authorized by this Protective Order, **who have signed a Certificate of Acknowledgement in the form of Exhibit "A" hereto**, to the extent necessary to prepare the person for deposition or to depose the person;

g. Material third-party witnesses who have signed a Certificate of Acknowledgment in the form of Exhibit "A" hereto;

h. The members of the jury venire, members of the jury, including any alternates, and such other persons as ordered by the Court; and

i. Any mediator agreed to by the parties or appointed by the Court.

Nothing herein shall prevent the use of such Confidential Material in the trial of this matter.

7. **Access to "Attorneys Eye Only" Materials.** Discovery materials designated "Attorneys Eyes Only" shall be maintained in confidence for use by counsel for the parties and solely for use as provided in Paragraph 5 of this Protective Order and shall not be disclosed to any persons other than those identified in subparagraphs 6(a)-(c), (e) and (g)-(i) above. Nothing herein shall prevent the use of Confidential Material in the trial of this matter and/or at depositions or for preparation for depositions, **in compliance with Paragraph 6 herein.**

8. **Copies and Summaries.** Any person who obtains access to material designated as "Confidential" or "Attorneys Eyes Only" under this Protective Order shall not make copies, abstracts, extracts, analyses summaries, or other materials which contain, reflect or disclose

Confidential Material, except for use in this litigation, and each such copy, abstract, extract analysis, summary, or other material which contains, reflects or discloses Confidential Material, is to be treated in accordance with the provisions of this Protective Order. All copies of material stamped “Confidential” or “Attorneys Eyes Only” in accordance with Paragraph 3 of this Protective Order shall again be stamped with the respective designation if the original stamp was not reproduced in the duplicating process.

9. **Filing Confidential Material.** A party filing any “Confidential” or “Attorneys Eyes Only” material with the Court shall file the same under seal in accordance with the local rules and governing procedures of the Eastern District of Texas and the parties hereby consent to any necessary motions to file under seal to accomplish such filing. This Protective Order shall neither apply to nor restrict the use or disclosure of any “Confidential” or “Attorneys Eyes Only” material as an exhibit at any mediation, hearing, the trial or any appeal in this litigation.

10. **Procedure for Contesting Designation of Confidential Material.** A party shall not be obligated to challenge the designation of material as confidential at the time the designation is made, and a failure to do so shall not preclude a subsequent challenge to the designation. In the event of a dispute with respect to the designation of any discovery material as “Confidential” or “Attorneys Eyes Only,” counsel shall attempt to resolve the dispute on an informal basis before presenting the matter to the Court for resolution. The party challenging any confidential designation shall notify the designating party in writing, stating that the confidential designation is being challenged, naming the specific material for which the designation is being challenged. Within five (5) business days of the designating party’s receipt of such written notice, the parties shall confer in an attempt to reach an agreement regarding the disputed designation. In the event that no

agreement is reached, the designating party shall have fourteen (14) days thereafter within which to move the Court to maintain the confidential designation, whether “Confidential” or “Attorneys Eyes Only.” In the event that the party that made the confidential designation does not so move the Court within such fourteen (14) days, then the confidential designation will automatically terminate and be of no force or effect as to the material described in the notice. The party challenging any confidential designation shall identify the subject material by its document identification number (its Bates number) or by other reasonable means of identification. Such “Confidential” or “Attorneys Eyes Only” information shall be maintained in accordance with this Protective Order until such time as the challenge is resolved either by agreement of the parties, by the expiration of the fourteen (14) day period provided above, or by the Court.

11. **Maintenance of Confidential Material.** All “Confidential” or “Attorneys Eyes Only” material produced by a party and delivered to another party shall be maintained under the control of each counsel of record who has received such material and who shall be responsible for preventing any disclosure thereof, except as permitted hereunder.

12. **Request for Disclosure of Confidential Materials in Another Proceeding.** If any party is requested or required (by oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand, or other process or otherwise in connection with any investigation or litigation) to disclose any Confidential Material produced by another party hereto pursuant to this Protective Order, such party shall provide to the other parties hereto prompt notice of any such request or requirement, unless otherwise prohibited by law. Court ordered disclosure of any information protected under this Protective Order shall not be considered a breach hereof.

13. **Protective Orders.** This Protective Order shall be without prejudice to the rights of the parties or third-parties to present a motion to the Court for a protective order as to any particular material, including a request for restrictions or disclosures that differ from those supplied herein. This Protective Order shall not be deemed to prejudice the parties or third-parties in any way in any motion or application for modification of this Protective Order.

14. **Disposition of Confidential Material After the Case.** Following the final adjudication, or resolution through settlement, of this case, counsel for the parties shall, within thirty (30) days from counsel's receipt of written request, assemble and return to each other all documents, materials, and deposition transcripts for which a confidential designation is maintained hereunder through such date, and all copies of same, or shall certify the destruction thereof; provided, however, that counsel for any party shall be entitled to retain pleadings, memoranda, declarations, motions, exhibits, affidavits or deposition transcripts, which attach, contain or refer to such designated material, but only to the extent necessary to preserve a file with respect to this action. Notwithstanding anything to the contrary contained in this Protective Order, this Protective Order shall not require the return or destruction of anything provided or obtained hereunder if it is obtained or was obtained by a party through other means and/or if the party was otherwise entitled to it by contract or otherwise.

15. **No Waiver of Rights.** This Protective Order shall not be deemed a waiver of:

- a. Any party's right to object to any discovery requests on any ground;
- b. Any party's right to seek an order compelling discovery with respect to any discovery request;
- c. Any party's right at any proceeding herein to object to the admission of any evidence

on any ground;

- d. Any party's right to use its own documents with complete discretion;
- e. Any party's right to move the Court to revoke or amend any portion of this Protective Order;
- f. Any party's right to present a motion to the Court for a protective order; or
- g. Any party's right to use any Confidential Material as an exhibit at any hearing, the trial or any appeal in this litigation.
- h. Notwithstanding anything else herein to the contrary, this Protective Order shall not have any retroactive effect and shall not pertain to materials obtained, received or provided before its entry.**

16. **Use of Material at Trial.** Nothing herein prohibits the use at any hearing trial or appeal of any material designated pursuant to this Protective Order as "Confidential" or "Attorneys Eyes Only," or affects or prohibits the admissibility or use of any Confidential Material as evidence.

17. **Use of Material at Depositions.** Confidential Material shall not lose its protected status simply because the documents are designated as exhibits to a deposition, regardless of whether the deposition or deposition transcript is later designated, in whole or in part, as Confidential Material.

17. 18. Restricting Attendance at Depositions. At the request of any party, attendance at depositions may be restricted to persons qualified to see Confidential Material under Paragraph 6 and the attorney for the deponent during the portion of depositions at which disclosure of Confidential Material is being made. Otherwise, attendance at depositions shall not be limited **in accordance with the Federal Rules of Civil Procedure.**

18. 19. Duration. This Protective Order shall survive the final termination of this action, to the extent that the material contained in “Confidential” or “Attorneys Eyes Only” material is not or does not become known to the public other than in breach of any agreement between the parties or contrary to the terms of this Protective Order, and the Court shall retain jurisdiction to resolve any dispute concerning the use of material disclosed hereunder.

EXHIBIT "A"

**CERTIFICATE OF ACKNOWLEDGMENT OF
PROTECTIVE ORDER
CONCERNING CONFIDENTIAL INFORMATION**

I declare that:

I have been given a copy of and have read the Protective Order Concerning Confidential Information (hereinafter the "Protective Order"), relating to the case, *Ricky B. Perritt, et al. v. Pamela F. Jenkins, et al.*, Civil Action No. 4:11-CV-23, pending in the United States District Court for the Eastern District of Texas, Sherman Division. I agree to abide by the terms of the Protective Order and not to reveal or otherwise communicate to anyone any of the material designated as "Confidential" or "Attorneys Eyes Only" that is disclosed to me except in accordance with the terms of the Protective Order or as may be authorized by the Court. I acknowledge that any violation of the Protective Order may be punishable for contempt of court, and I agree to submit to the jurisdiction of the United States District Court for the Eastern District of Texas, Sherman Division, for all matters relating to such Protective Order.

Dated: _____

Signature of Declarant

Printed Name

Street Address

City/State

Telephone Number