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12 Attorneys for Plaintiff, ANTHONY V. FOX  
13

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
15 **COUNTY OF LOS ANGELES – WEST DISTRICT – CULVER CITY COURT**

16 ANTHONY V. FOX, an Individual,

17 Plaintiff,

18 vs.

19 SAFE IN HEAVEN DEAD PRODUCTIONS,  
INC., a California corporation dba THE VIPER  
20 ROOM; TROUSER TRUMPET, INC., a  
California corporation; JOHN C. DEPP II, an  
21 Individual; OBERMAN, TIVOLI & MILLER,  
LTD. and its successor-in-Interest KAUFMAN,  
22 BERNSTEIN, OBERMAN, TIVOLI &  
MILLER, LLC; LICHTER & GROSSMAN,  
23 INC. and its Successor-in-Interest LICHTER  
GROSSMAN & NICHOLS, INC. and its  
24 Successor-in-Interest LICHTER, GROSSMAN  
NICHOLS & ADLER, INC.; CINDY  
25 SZERLIP, an Individual dba CS BUSINESS  
MANAGEMENT; SALVATORE M. JENCO,  
26 an Individual; and DOES 1 through 25,  
inclusive,

27 Defendants.  
28

CASE NUMBER: SC-062 176

**[PROPOSED] AMENDMENT OF  
COMPLAINT TO CONFORM TO PROOF**

[Complaint Filed: July 3, 2000]

JUDGE: Honorable Allan J. Goodman  
DIVISION: 2

1 Plaintiff, Anthony V. Fox ("Fox"), amends the Complaint herein by adding the following  
2 to the Complaint:

3 **NINTH CAUSE OF ACTION**

4 **[For Rescission against Safe, Trumpet and Depp]**

5 85. Plaintiff incorporates the allegations in paragraphs 1 through 59, 61, 63, 65, 66,  
6 70, 71, and 81 through 84, of the Complaint into this Ninth Cause of Action as set forth in full  
7 hereinbelow.

8 86. Plaintiff, on behalf of Safe, seeks rescission of the purported License Agreement  
9 on the grounds that:

10 (a) Safe was fraudulently induced to enter into the purported License  
11 Agreement based upon the false representation of Trumpet, contained in, *inter*  
12 *alia*, the recitals to the purported License Agreement, that Trumpet was the owner  
13 of the trademark "The Viper Room" and related trademarks and logos  
14 (collectively, the "Mark") at the time when the parties entered into the purported  
15 License Agreement; Trumpet's agent, Peter Nichols ("Nichols"), who also  
16 purported to make the Agreement for Safe, either knew or was reckless in  
17 disregarding the fact that Safe owned the Mark;

18 (b) Safe, in entering into the License Agreement, was operating under a  
19 mistake as to a material fact, i.e., that Trumpet owned the Mark; and Trumpet  
20 knew that Safe was operating under such mistake and/or caused the mistake; and

21 (c) The representative of Safe and Trumpet, Nichols, who purported to  
22 negotiate the License Agreement for both Safe and Trumpet was, in fact,  
23 authorized by neither entity to act on its behalf and, in any event, had a serious but  
24 undisclosed conflict of interest.

25 87. The purported License Agreement between Safe and Trumpet was supposedly  
26 entered into "as of" August 13, 1993. However, the agreement was made, if at all, no earlier  
27 than June 1994. Furthermore, no licensing fees or merchandising royalties were paid by Safe to  
28 Trumpet until sometime in the Spring of 1997. At no time prior to September 15, 1997, was

1 Fox, as Safe's only disinterested director and/or shareholder, given actual or constructive notice  
2 that licensing fees and said merchandising royalty fees had been charged by Trumpet.

3 88. As alleged above, in order to induce Safe to enter into the purported License  
4 Agreement, Trumpet, through its agent, Nichols, represented, in the License Agreement, that  
5 Trumpet owned the Mark. This representation was knowingly or recklessly false. In addition,  
6 Nichols was not authorized to negotiate the purported License Agreement between Safe and  
7 Trumpet, although he purported to do so notwithstanding the lack of any such authority and the  
8 fact that as the attorney for Safe, Trumpet and Depp, he had a serious conflict of interest. The  
9 true facts were that, at all relevant times, Safe was the owner of the Mark, as Safe was the only  
10 entity that had commercially used it in commerce as of the date on which the parties entered into  
11 the purported License Agreement.

12 89. Neither Safe's Board of Directors nor its shareholders, including Fox, as Safe's  
13 only disinterested board member and shareholder, ever approved the purported License  
14 Agreement. In fact, the existence of the purported License Agreement was concealed from Fox,  
15 and was not disclosed to Fox until March 1999.

16 90. Pursuant to the terms of the purported License Agreement, Safe not only paid  
17 licensing fees and merchandising royalties in 1997 and thereafter, but also paid for the  
18 protection and exploitation of the Mark; these expenses were incurred for the benefit of the  
19 Defendants and to direct financial detriment to Safe commencing in 1994.

20 91. Depp, Jenco and Trumpet have received substantial monetary and other benefits  
21 derived from the purported License Agreement; have refused to return those benefits to Safe;  
22 and therefore, have ratified the fraudulent conduct of Nichols, as alleged above.

23 92. Safe is also entitled to rescind the purported License Agreement on the basis of a  
24 material mistake of fact which induced it to enter into the License Agreement. Safe believed  
25 that Trumpet owned the Mark and Trumpet, although its agent, Nichols, knew that Safe was  
26 operating, and had himself caused Safe to operate, under this erroneous belief. In fact, Safe  
27 owned the Mark because it was the first commercial user, having adopted and used the mark in  
28 commerce commencing in not later than June 1993. Trumpet was not yet in existence at that

1 time and, in fact, did no business whatsoever until June 1994, if not later. Even if Depp was the  
2 "creator" of the Mark, he neither had nor acquired any rights as such. Moreover, having given  
3 Safe the unconditional right to use the Mark, any rights which Depp may have had were thereby  
4 lost by him and acquired by Safe. Furthermore, Depp never assigned any such rights to  
5 Trumpet.

6 93. In addition, the parties were operating under the erroneous belief that Nichols was  
7 authorized to act on behalf of both Safe and Trumpet in connection with the purported License  
8 Agreement and, in particular, that Nichols was not required to obtain the authorization or  
9 ratification of Fox, as the only disinterested director and shareholder of Safe.

10 94. Based on the above allegations, Fox seeks rescission of the purported License  
11 Agreement and the imposition of a constructive trust as to all intellectual property rights  
12 concerning "The Viper Room", including any and all related trade dress, trademarks or logos.  
13 In addition, Plaintiff seeks an order requiring Depp, Trumpet and Jenco to account for and  
14 restore to Safe all benefits received by them pursuant to the purported License Agreement,  
15 including all license fees, merchandise royalty fees, merchandise, revenues from the sale of  
16 merchandise, and costs and expenses paid by Safe for the benefit of or to Trumpet.

#### 17 TENTH CAUSE OF ACTION

#### 18 [For Declaratory Relief against Safe, Trumpet and Depp]

19 95. Plaintiff incorporates the allegations in paragraphs 1 through 59, 61, 63, 65, 66,  
20 70, 71, and 81 through 83, of the Complaint into this Tenth Cause of Action as set forth in full  
21 hereinbelow.

22 96. An actual controversy has arisen and now exists between Fox, on behalf of Safe,  
23 and Depp and Trumpet, concerning the ownership rights and duties relating to the work and  
24 other related trademarks, trade dress and logos, Fox contends:

25 (a) Safe, and neither Depp nor Trumpet, owns the Mark and all  
26 trademarks, trade dress and logos related thereto;

27 (b) The purported License Agreement is voidable and subject to  
28 rescission for the reasons set forth in the Ninth Cause of Action;

1 (c) Nichols was not authorized to enter into any agreement  
2 acknowledging that Safe's property, including the Mark, was owned by Trumpet  
3 or binding Safe as a licensee of Trumpet; and

4 (d) The purported License Agreement is unenforceable because it was  
5 never approved by a disinterested director or shareholder and was not in the  
6 interest of Safe, as required by Corporations Code 310 and the bylaws of Safe.  
7

8 97. Fox is informed and believes and thus alleges that Trumpet and Depp dispute  
9 Fox's contentions.

10 98. Fox desires and, on behalf of Safe hereby requests, a judicial determination of the  
11 respective rights of Safe, on the one hand, and Depp and Trumpet, on the other hand,  
12 concerning the Mark and all related trademarks, trade dress and logos, and concerning the  
13 purported License Agreement. In particular, Fox desires and hereby requests a judicial  
14 determination that:

15 (a) The purported License Agreement is voidable and unenforceable;

16 (b) Safe is the owner of the Mark and all other intellectual property  
17 rights used by or in, or concerning, "The Viper Room";

18 (c) The trademark "The Viper Room" was not owned by Depp merely  
19 because he "created" it or for any other reason nor was it, nor is it, owned by  
20 Trumpet;

21 (d) Nichols had no authority into the purported License Agreement on  
22 behalf of Safe; and

23 (e) The purported License Agreement is unenforceable because it was  
24 never approved by a disinterested director or shareholder and was not in the  
25 interest of Safe, as required by Corporations Code 310 and the bylaws of Safe.

26 99. A judicial declaration is necessary and appropriate at this time under the  
27 circumstances in order that Plaintiff may ascertain the respective rights and obligations of Safe,  
28 and Depp and Trumpet.

1        **AMENDED PRAYER FOR THE NINTH AND TENTH CAUSES OF ACTION**

2        WHEREFORE, Plaintiff Fox requests that Judgment be entered against Defendants as  
3 follows:

4        **AS TO THE NINTH CAUSE OF ACTION FOR RESCISSION AGAINST SAFE,**  
5 **TRUMPET AND DEPP:**

6        26. For an order of the court granting rescission of the purported License Agreement;

7        27. For the imposition of a constructive trust upon all intellectual property concerning  
8 "The Viper Room" and any related logos, trade dress and trademarks which are purportedly held  
9 by or through Trumpet;

10       28. For an award of restitution requiring the accounting for and repayment of all  
11 license fees, merchandise royalty fees, merchandise, merchandising revenues received by  
12 Defendants, and requiring the repayment of all costs and expenses paid by Safe for the benefit  
13 of Defendants; and

14       29. For costs of suit, including attorneys' fees;

15       **AS TO THE TENTH CAUSE OF ACTION FOR DECLARATORY RELIEF AGAINST**  
16 **SAFE, TRUMPET AND DEPP:**

17       30. For an judicial declaration of the rights of Safe and, Trumpet and Depp, as  
18 follows:

19       (a) That the purported License Agreement is voidable and otherwise  
20 unenforceable;

21       (b) That Safe is the owner of all intellectual property rights used in or at,  
22 or concerning, "The Viper Room";

23       (c) That the trademark and tradename "The Viper Room" was never  
24 owned by Depp or Trumpet;

25       (d) That the logos and other trademarks utilized at or in "The Viper  
26 Room" are not included within the terms and conditions of the purported License  
27 Agreement and are assets of Safe;  
28

1 (e) That no one was ever authorized by Safe to enter into or approve the  
2 purported License Agreement and, therefore, no rights were created by said  
3 purported License Agreement; and

4 (f) Prior to August 13, 1993, Safe had perfected its rights of ownership,  
5 by commercial use, of the trademark and trade name and, thereafter perfected, by  
6 exclusive commercial use of all related trademarks, trade dress and the logos and  
7 are all the property of Safe; and

8 31. For of costs suit, including attorneys fees.  
9

10 DATED: November 27, 2001

PIRCHER, NICHOLS & MEEKS

11 LAW OFFICES OF BRETT B. CURLEE

12 LAW OFFICES OF JAY R. STEIN  
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15 By: \_\_\_\_\_  
16 I. Bruce Speiser  
Attorneys for Plaintiff ANTHONY V. FOX  
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**VERIFICATION**

I, ANTHONY V. FOX, am the Plaintiff in this proceeding. I have read the foregoing [Proposed] Amendment of Complaint to Conform to Proof and know its contents. The facts stated therein are true and are within my personal knowledge.

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

Executed on November \_\_, 2001 at Culver City, California.

\_\_\_\_\_  
Anthony V. Fox



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**PROOF OF SERVICE**

**STATE OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

} **ss.**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is **PIRCHER, NICHOLS & MEEKS** - 1925 Century Park East, Seventeenth Floor - Los Angeles, California 90067.

On November 27, 2001, I served as described below the document described as

**MOTION FOR AN ORDER AUTHORIZING  
AN AMENDMENT TO THE COMPLAINT TO CONFORM TO PROOF AT TRIAL**

On the interested parties as follows:

**BY MAIL**

I caused a sealed envelope containing a copy of such document and addressed to each such person to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with the practice of Pircher, Nichols & Meeks with respect to the collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, items are deposited in a sealed envelope with the United States Postal Service in the ordinary course of business on that same day with postage thereon fully prepaid. Pursuant to such practice, I caused a sealed envelope containing a copy of such document and addressed to each such person to be placed for collection and processing with the United States Postal Service.

**BY FACSIMILE**

By facsimile transmission from facsimile machine telephone number (310) 201-8922 on November 27, 2001, by transmitting a copy of such document to each such person at the facsimile machine telephone number(s) listed below their address(es).

The document was transmitted by facsimile transmission and such transmission was reported as complete and without error. A copy of the transmission report with respect to each such transmission, properly issued by the transmitting facsimile machine, is attached hereto.

**OVERNIGHT DELIVERY SERVICE**

A sealed envelope or package designated by the carrier with delivery fees prepaid, containing a copy of such document and addressed to such person, was deposited at a station at **PIRCHER, NICHOLS & MEEKS** so that it will be picked up by one of the carrier's couriers or drivers. A true copy of the carrier's delivery form evidencing the transmittal of each overnight delivery service addressee is attached hereto.

1 **☒☒ MESSENGER DELIVERY SERVICE**

2 A sealed envelope containing a copy of such document and addressed to such person, was  
3 delivered to **WORLDWIDE ATTORNEY SERVICE, INC.** whose address is 201 South Figueroa Street, Suite  
4 285 - Los Angeles, California 90012, so that it will be picked up by one of the carrier's couriers or  
5 drivers. A true copy of the carrier's delivery form evidencing the transmittal of each delivery service  
6 addressee is attached hereto.

7 **for Defendants Safe in Heaven Dead Productions, Inc.; Cindy Szerlip dba CS Business**  
8 **Management; and Salvatore M. Jenco:**

9 Eric S. Oto, Esq.  
10 **LAW OFFICES OF ERIC S. OTO**  
11 801 South Flower Street, Fifth Floor  
12 Los Angeles, California 90017  
13 Telephone: (213) 623-8891  
14 Facsimile: (213) 622-7881

15 **☒☒ PERSONAL SERVICE**

16 I delivered an envelope containing a copy of such document by hand to the following  
17 addressee(s).

18 **for Defendant John C. Depp II and Trouser**  
19 **Trumpet, Inc.:**

20 Michael L. Eidel, Esq.  
21 Jeffrey L. Goss, Esq.  
22 **CROSBY HEAFEY ROACH & MAY**  
23 1901 Avenue of the Stars, Seventh Floor  
24 Los Angeles, California 90067  
25 Telephone: (310) 734-5200  
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27 **for Plaintiff Anthony V. Fox:**

28 Brett B. Curlee, Esq.  
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**for Defendants Oberman, Tivoli & Miller,**  
**Ltd., and its successor-in-interest Kaufman,**  
**Bernstein, Oberman, Tivoli & Miller, LLC:**

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**for Plaintiff Anthony V. Fox:**

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29 **☒☒ STATE**

30 I declare under penalty of perjury under the laws of the State of California, that the foregoing  
31 is true and correct, and that this Proof of Service was executed on November 27, 2001 at Los Angeles,  
32 California.

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CASANDRA J. BROOME

# WORLDWIDE ATTORNEY SERVICES, INC.

201 S. FIGUEROA S. STE. 285 • LOS ANGELES, CA 90012 • (213) 625-0200 • FAX: (213) 625-0202  
611 W. CIVIC CENTER DR., STE. 301 • SANTA ANA, CA 92701 • (714) 245-1455 FAX: (714) 245-1450  
Website: WWW.WorldWideattysvcs.Com • E-mail: HotRush@WorldWideattysvcs.Com

<b>Firm Name</b> <b>PIRCHER, NICHOLS &amp; MEEKS</b> 1925 Century Park East Seventeenth Floor Los Angeles, California 90067		<b>Attorney Name:</b> James L. Goldman	<b>CONTROL NO.</b>
<b>Phone #:</b> (310) 201-8981 <b>ACCT. 335</b>		<b>Secy./Paralegal Name:</b> Casandra J. Broome	
<b>DATE:</b> November 27, 2001 <input type="checkbox"/> Hot Rush <input type="checkbox"/> Special <input type="checkbox"/> Rush <input type="checkbox"/> Standard		<b>Ref/Billing #:</b> 4348.2	
		<b>Court:</b> LOS ANGELES COUNTY SUPERIOR COURT = <b>WEST DISTRICT</b>	
		<b>Case Name:</b> <u>Fox, Anthony V. v. Safe In Heaven Dead Productions, Inc., etc. et al.</u>	
		<b>Case #:</b> SC-062 176	

## COURT SERVICE INSTRUCTIONS

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☐ Fees Attached      ☐ Please Advance \$ \_\_\_\_\_      Hearing Date \_\_\_\_\_

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**MOTION FOR AN ORDER AUTHORIZING AN AMENDMENT TO THE COMPLAINT TO CONFORM TO PROOF AT TRIAL**

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Messenger Report:

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Documents To Be Served:

**MOTION FOR AN ORDER AUTHORIZING AN AMENDMENT TO THE COMPLAINT TO CONFORM TO PROOF AT TRIAL**

Instructions:

Person To Be Served:

**Eric S. Oto, Esq.**

Home Address:

Description:

Business Address:

**LAW OFFICES OF ERIC S. OTO**  
801 South Flower Street, Fifth Floor  
Los Angeles, California 90071  
Telephone: (213) 623-8891

## DELIVERY INSTRUCTIONS

<b>Pickup From:</b>	<b>Deliver To:</b>	<b>Special Instructions:</b>
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**RECEIVED BY:** \_\_\_\_\_ **MSGR(1)** \_\_\_\_\_ **MSGR(2)** \_\_\_\_\_

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