

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CULVER FRANCHISING SYSTEM, INC.,)	
)	
Plaintiff,)	16 C 72
)	
vs.)	Judge Gary Feinerman
)	
STEAK N SHAKE INC.,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Culver Franchising System, Inc., brought this suit against Steak n Shake Inc., alleging that Steak n Shake unlawfully copied one of its television commercials in violation of the Copyright Act, 17 U.S.C. § 101 *et seq.* Doc. 1. Steak n Shake has moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that the two commercials are not substantially similar. Doc. 14. The motion is granted, and the complaint is dismissed without prejudice to Culver attempting to replead.

Background

On a Rule 12(b)(6) motion, the court must accept the complaint’s well-pleaded factual allegations, with all reasonable inferences drawn in Culver’s favor, but not its legal conclusions. *See Smoke Shop, LLC v. United States*, 761 F.3d 779, 785 (7th Cir. 2014). The court must also consider “documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice,” along with additional facts set forth in Culver’s brief opposing dismissal, so long as those additional facts “are consistent with the pleadings.” *Phillips v. Prudential Ins. Co. of Am.*, 714 F.3d 1017, 1020 (7th Cir. 2013) (internal quotation marks omitted). The facts are set forth as favorably to Culver as

those materials permit. *See Meade v. Moraine Valley Cmty. Coll.*, 770 F.3d 680, 682 (7th Cir. 2014).

Culver and Steak n Shake are franchisors that license individuals to operate Culver's and Steak n Shake restaurants, respectively, throughout the United States. Doc. 1 at ¶¶ 1-2. In December 2014, Culver began developing its "Butcher-Quality Beef" television commercial, which highlights Culver's "ButterBurger." *Id.* at ¶¶ 6-7. The commercial first aired on April 13, 2015. *Id.* at ¶ 8.

Culver's commercial opens in a butcher shop with its co-founder, Craig Culver, reminiscing with a butcher, Fritz, about "the good old days":



Craig Culver: "The ButterBurger is made of just three cuts of fresh Midwest beef, nothing more, nothing less. It reminds me of the good old days when we first opened Culver's, we would call up the butcher shop and we'd buy our beef from there each and every day."

Fritz: "You can't get any fresher than that."

Craig Culver: "Well today we still get fresh beef into our restaurants."

During this part of the conversation, the commercial intersperses shots of (1) Culver's logo with the words "Butcher-Quality Beef"; (2) a close-up of the ButterBurger; and (3) a mother and her son selecting and purchasing meat from another butcher in the shop.



The camera then focuses on three cuts of beef, as Craig and Fritz discuss how they are incorporated into the ButterBurger:



Craig Culver: “We don’t skimp on the quality of our beef. So we got the sirloin, the chuck and the plate. No fillers, that’s it.”

Fritz: “All prized cuts, all well-marbled for richness and flavor. And when you put them all together, that ends up to be a very high quality burger.”

Craig then cooks two patties, pressing down on them with a spatula and metal cylinder. Craig and Fritz continue discussing the patties’ fresh preparation as Craig assembles a burger:



Craig Culver: “This is where those three wonderful cuts of beef come together.”

Fritz: “You can just tell that blend is working in there.”

Craig Culver: “And we sear them, and that seals in the juices of the burger. That’s where that wonderful steak taste comes from.”

Fritz: “It doesn’t get any better than that.”

Craig Culver: “You know all our burgers are cooked to order. And that’s a little different than most of our competitors. The Culver’s ButterBurger.”

Finally, the commercial transitions to a shot of the completed ButterBurger and then to Culver’s logo; Fritz says, “Craig, that is one great burger,” followed by Craig exclaiming, “Welcome to delicious!”



The commercial runs for one minute and may be viewed at

https://www.youtube.com/watch_popup?feature=player_embedded&v=gFULlxDEQio. *Id.* at

¶ 14.

Seven months after the “Butcher-Quality Beef” commercial debuted, Steak n Shake began running its “The Original Steakburger” commercial. *Id.* at ¶ 12. The ad opens in a butcher shop with a butcher speaking directly to the camera about Steak n Shake’s Steakburger:



Butcher: “In 1934, Steak n Shake decided the world didn’t need another hamburger. It needed a steak burger.”

The butcher then discusses the three cuts of beef used in the Steakburger, as the camera focuses on each cut individually:

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