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

Proceeding	91152145
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**PUBLIC VERSION**  
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

_____ )		
WAL-MART STORES, INC. )	)	
Opposer. )	)	OPPOSITION NO. 91/150,278
v. )	)	OPPOSITION NO. 91/154,632
FRANKLIN LOUFRANI )	)	Trademark:
Applicant. )	)	SMILEY & Design Serial No. 75/302,439
_____ )	)	SMILEY & Design Serial No. 75/977,376
FRANKLIN LOUFRANI )	)	
Opposer. )	)	OPPOSITION NO. 91/152,145
v. )	)	
WAL-MART STORES, INC. )	)	Trademark:
Applicant. )	)	Smiley Design Serial No. 76/320,901
_____ )	)	

**REPLY BRIEF FOR FRANKLIN LOUFRANI AS**  
**PLAINTIFF IN OPPOSITION No. 91/152, 145**

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## I. FACTS AND ARGUMENTS IN REPLY

### A. **Wal-Mart's Happy Face Design Is An Unregistrable Ubiquitous Icon Incapable of Serving As A Mark For Wal-Mart's Retail Store Services**

Wal-Mart's Happy Face Design cannot function as a mark because "a yellow circle with two eyes and a smiling shaped mouth"<sup>1</sup> (the "Icon") is equivalent to a "generic name" for an extraordinary number of goods sold in connection with Wal-Mart's retail store services. The USPTO's treatment of the Icon as a generic symbol is persuasive, and should be applied to Wal-Mart's Happy Face Design for its retail store services.

#### 1. **The USPTO Treated The "Smiley or Happy Face" Icon Like A Generic Symbol**

A "yellow circle with two eyes and a smiling shaped mouth" (the "Icon") is a unique example of a symbol so ubiquitous in American retail culture that it is simply incapable of serving as a source indicator. The USPTO's Examining Attorney alternately referred to the Icon as a "common, universal design", "widely recognized", "universal symbol", "common symbol" and even a "*generic* cultural symbol". (June 12, 200 Office Action)(emphasis added). The registered symbols Wal-Mart references (four leaf clover for automobile parts; horseshoe for gambling; shaded triangle for beer; crescent moon for endorsing dental health plans and a five point star for online retail of sports related merchandise) cannot compare to the nationwide iconic retail status of the Icon. (Wal-Mart Response at 13-14.) The Icon is more akin to other widely used symbols which have been deemed generic because they are incapable of serving as source indicators.

"A generic term cannot be registered as a trademark because such a term cannot function as an indication of source." *Bell South*, 35 U.S.P.Q. at 1557 (citing *In re Merrill Lynch, Pierce,*

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<sup>1</sup> Wal-Mart Application Serial No. 76/320,901 describes the disputed symbol as "a yellow circle with two eyes and a smiling shaped mouth." As set forth in Sec III.A.2. of Loufrani's Brief as Plaintiff filed on August 14, 2006, the Disclaimed Design and the Happy Face Design are indistinguishable versions of the Icon.

*Fenner, and Smith, Inc.*, 828 F.2d 1567, 1569, 4 U.S.P.Q.2d 1141, 1142 (Fed. Cir. 1987)). “To be an unprotectable generic indication, a designation need not necessarily consist of a word. A picture or symbol could well serve as a generic name of a product or service which should be free for all sellers to use.” 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §12:36.50 (4th ed. 2007). Examples of symbols deemed generic as a result of widespread use by numerous third-parties include a “grape leaf” for wine, and the famous “Walking Fingers” logo for classified directories. See, *Kendall-Jackson Winery, Ltd v. E. & J. Gallo Winery*, 150 F.3d 1042, 1048, 47 U.S.P.Q.2d 1332 (9th Cir. 1998) (“Because the grape leaf is widely used in the industry, it has lost the power to differentiate brands.”); *BellSouth Corp v. DataNational Corp.*, 60 F.3d 1565, 35 U.S.P.Q. 1554 (Fed. Cir. 1995) (“through common usage by virtually all classified directory publishers [the “Walking Fingers” logo] can no longer be understood to represent a source of the directories.”).

“[T]he term ‘generic name’ as used in [Lanham Act §14(3)] must be read expansively to encompass anything that has the potential but fails to serve as an indicator of source, such as names, words, symbols, devices or trade dress.” *McCarthy on Trademarks* §12:36.50 at n. 2 (citing *Sunrise Jewelry Mfg. Corp. v. Fred S A.*, 175 F. 3d 1322, 50 U.S.P.Q.2d 1532 (Fed. Cir. 1999)). The USPTO’s treatment of the Icon in the June 12, 2000 Office Action is consistent with a finding that the Icon is the “generic name” for the goods and services set forth in Loufrani’s Application.

Examining Attorney Elissa Garber Kon stated that the “*enclosed evidence shows that the smiley or happy face is a design that has been so widely recognized in our culture that it has become a universal symbol of good will and the desire that anyone who views it should ‘have a nice day.’*” (emphasis supplied). In addition, she referenced widespread adoption of the Icon by multiple companies and institutions “on everything from magazine renewal mail-in cards, to all

manner of party novelties, to keychains, to self-help books.” *Id.* The Examining Attorney concluded that “the attached evidence submitted with the Letter of Protest reinforces the fact that this symbol is so universally used as a purely decorative, informational element on a wide variety of goods and services. . .that no consumer would perceive the applicant as the sole source of goods bearing this proposed mark.” *Id.* This conclusion is analogous to a determination that the Icon has become generic.

**2. The USPTO’s Determination Extends, *At Least*, To Loufrani’s Extensive List of Goods and Services**

The USPTO ultimately concluded that the Icon “does not serve any trademark function under the Trademark Act” for the “wide variety of goods/services, including various cosmetic items, novelties, jewelry and various household items” set forth in Loufrani’s application (June 12, 2000 Office Action.) At first blush, this may not seem like a sweeping declaration, but the decision covers *at least* the extraordinary list of goods and services attached hereto as Ex. A. (“Loufrani’s Goods and Services”). The Office Action also suggests that the Icon’s inability to function as a mark may extend beyond the Loufrani Goods and Services. For example, the Examining Attorney noted that “[a]s such a widely used, decorative symbol, [the Icon] is simply incapable of serving to distinguish the applicant as the sole source of *goods* bearing this design.” (June 12, 2000 Office Action) (emphasis added). In addition, the Examining Attorney stated, “[t]he attached evidence submitted with the Letter of Protest reinforces the fact that this symbol is so universally used as a purely decorative, informational element on a wide variety of *goods* and services. . .that no consumer would perceive the applicant as the sole source of goods bearing this proposed mark.” *Id.* (emphasis added). The use of the term “goods” without any qualifier in these instances is consistent with a conclusion that the Icon cannot serve as a source identifier for *any* goods because it has entered the public domain as a “universal symbol of good



will and the desire that anyone who views it should ‘have a nice day.’” (June 12, 2000 Office Action).

The T.T.A.B has confirmed that similar marks should remain in the public domain, and not appropriated for use in connection with any particular goods or services. In *In re Volvo Cars of North America Inc* , 46 U.S.P.Q.2d 1455, 1460 (T.T.A.B. 1998), the Board stated:

[U]se of the phrase ‘Drive Safely’ as a familiar as ‘Have a nice day’ or ‘Don’t Worry’. It is the type of phrase that is uttered on a daily basis, almost automatically with no thought, to others as they drive off in an automobile. . .our view is that the phrase DRIVE SAFELY should remain in the public domain. . .[T]o grant exclusive rights to applicant in this ordinary and commonly used safety admonition would interfere with the rights of others in the automobile industry to freely use the familiar phrase to promote safe driving and/or that purchasers can drive safely in their make of automobiles.”

Similarly, the USPTO found that the Icon makes the same impression on the purchasing public as the common utterance “Have a nice day.” Wal-Mart concedes that the Examining Attorney’s determination have persuasive authority, and offers no reason why the Icon should be treated differently than similar generic symbols and slogans. (Wal-Mart Br. at 4). Therefore, granting exclusive rights to *any* applicant in the ordinary and common Icon would interfere with the rights of others in *any* industry connected to the Loufrani Goods and Services to freely associate their goods or services with the Icon’s “Have a nice day” impression.

**3. The Icon Cannot Serve As A Mark For Wal-Mart’s Retail Services Because It Does Not Indicate Source For Goods That Are The Subject Of Wal-Mart’s Services**

Wal-Mart’s services and the goods sold in it stores are so intertwined that the USPTO’s findings regarding the Icon’s genericness should be applied with equal force to Wal-Mart’s retail store service. In an effort to avoid application of the USPTO’s June 12, 2000 Office Action to Wal-Mart’s Applications, Wal-Mart repeatedly reminds us that it applied to register the Icon only for *retail store services*. (Wal-Mart Br. at pp.8, 10, n.3). Nevertheless, Wal-Mart cannot

legitimately claim that its retail store services are entirely distinct from the actual goods sold in its stores. The fact remains that the USPTO declared the Icon unregistrable for *at least* approximately 800 goods, nearly all of which Wal-Mart stores' carry in inventory. As a result, the Board should deem the Icon generic as to Wal-Mart's retail store services.

In *In re Lens com Inc* , 83 U.S.P.Q.2d 1444, 1445 (T.T.A.B. 2007), applicant Lens.com, Inc. applied to register the mark LENS for "retail store services featuring contact eyewear products rendered via a global computer network." The examining attorney refused registration under §2(e)(1) of the Trademark Act on the ground that the mark is generic. *Id.* Applicant appealed, and the Board affirmed the examining attorney's decision noting that "because 'lens' is a name for the contact eyewear which comprises the subject matter of applicant's services, the term is likewise a generic name for the retail Internet store services themselves." *Id.* at 1447.

The Board also stated:

The designation LENS is generic and does not and could not function as a service mark to distinguish applicant's services from those of other contact eyewear providers and serve as an indication of origin. The designation sought to be registered should not be subject to exclusive appropriation, but rather should remain free for others in the industry to use in connection with their contact eyewear services.

*Id.* (citations omitted).

Like Lens.com, Wal-Mart applied to register a mark for its retail services which the Examining Attorney deemed generic as to approximately 800 hundred goods in Wal-Mart's inventory. As referenced in Section I.A.2. above, the Examining Attorney found the Icon could not serve as an indicator of source for the approximately 800 Loufrani Goods. Wal-Mart sells the vast majority of those approximately 800 hundred goods in connection with its retail store services. In fact, of the approximately 800 Loufrani Goods for which the USPTO deemed the Icon generic, Wal-Mart can identify fewer than 25 goods which it does *not* sell in connection

with its retail store services.(Wal-Mart’s Supplemental Response to Interrogatory No. 3). Furthermore, Wal-Mart concedes that in connection with its retail store services, it sells the following items actually *bearing* the Icon: t-shirts, coffee mugs, pencils, picture frames, antenna balls, beverage holders, name badge holders, label pins, golf balls, magnets, buttons, “stress balls”, balloons and soccer balls. *Id.* In addition, Loufrani established that others in the retail industry currently use the Icon in connection with identical products sold in connection with their retail services: stress balls (Desai Tr. 18:11-21, Desai Dep. Ex 1 at DEASAI021, 48); balloons (Desai Tr. 19:1-11, Desai Dep. Ex 1 at DESAI049); buttons (Desai Dep. Ex 1 at DESAI004, 042, 071; beverage holders (Desai Dep. Ex 1 at DESAI005); mugs (Desai Dep. Ex 1 at DESAI005, 030); t-shirts (Desai Dep. Ex 1 at DESAI064-5) and writing implements (Desai Dep. Ex 1 at DESAI021, 079). Like the LENS mark, the Icon is a common designation used in the retail industry, and could not function as a mark to distinguish Wal-Mart’s retail services from those of other retailers selling similar merchandise. As a result, the Icon should not be subject to exclusive appropriation, but rather should remain free for others in the retail industry to use in connection with their sale of merchandise. *See, Lens.Com, Inc.* 83 USPQ2d at 1147.

**B. Wal-Mart Cannot Remove The Icon From The Public Domain By Offering Proof Of *De Facto* Secondary Meaning**

Treating the Icon as a “generic name” for certain goods and associated retail services suggests that the Icon has entered the public domain, and cannot be recaptured. Application of the “‘super strength’ version of *de facto* secondary meaning” theory dictates that no amount of consumer recognition can ever transform the Icon into a protectable trademark. Therefore, Wal-Mart’s surveys and other evidence of alleged secondary meaning prove only *de facto* secondary meaning, and should be disregarded.

1. **The Icon Cannot Become Susceptible To Trademark Protection By Proof Of *De Facto* Secondary Meaning**

In light of the USPTO's finding that the Icon is akin to generic for a wide range of goods and services, no amount of consumer recognition can ever transform the Icon into a protectable trademark. Wal-Mart claims that findings of genericness are not applicable to those who "present evidence establishing source-indicating significance in the mind of consumers." (Wal-Mart Br. at 4) (citing *Singer Mfg. Co. v Briley* 207 F.2d 519 (5th Cir. 1953)). However, the "'super strength' version of *de facto* secondary meaning" theory directly contradicts Wal-Mart's position. See, *McCarthy on Trademarks* §12:47. Under that theory, once a mark is deemed generic, it can never be retrieved from the public domain, regardless of customer perception. See, *id*

The leading "super strength *de facto* secondary meaning" case is *Miller Brewing Company v. Falstaff Brewing Corporation et al.*, 655 F.2d 5, 211 U.S.P.Q. 665 (1st Cir. 1981). In *Miller*, the district court entered a preliminary injunction enjoining the defendant from selling or marketing a reduced calorie beer using the symbol or bearing the word "LITE". *Id* at 666. The defendant appealed the injunction arguing (1) that prior findings that "LITE" was a generic term precluded entry of the injunction on collateral estoppel grounds and (2) the trademark "LITE" is a generic term which is incapable of acquiring *de jure* secondary meaning. *Id* The court vacated the district court's injunction, and confirmed that "under no circumstances is a generic term [LITE] susceptible of *de jure* protection under §43(a) of the Lanham Act." *Id* at 667. Affirming the rationale for the rule, the court noted that,

[n]o matter how much money and effort the user of a generic term has poured into promoting the sale of its merchandise and what success it has achieved in securing public identification, it cannot deprive competing manufacturers of the product of the right to call an article by its name.

*Id.* (citing *Abercrombie & Fitch Co v Hunting World, Inc*, 537 F.2d 4, 9, 189 USPQ 759 (2nd Cir. 1976.)) The court distinguished the *Singer* case Wal-Mart relies on noting that “*Singer Mfg Co. v. Briley*, 207 F2d 519 (5th Cir. 1953) (relied upon by the district court) *does not hold* that a term which has currently generic meaning may also have a *de jure* secondary meaning.” *Id.* at n. 2. (emphasis added). Instead, the court explained that

*[b]ecause in 1953 the term Singer had in contemporary usage no generic meaning, Singer had ‘recaptured’ the exclusivity it possessed before the name Singer had acquired a generic meaning. . . . Where a generic association of a word or term has become obsolete and is discoverable only by resort to historical sources or dictionaries compiled on historical principles to preserve from oblivion obsolete words, then, from the viewpoint of trademark and like law, the word or term is no longer a generic word.*

*Id.* (emphasis original). In other words, the court reasoned that in *Singer*, the plaintiff was only able to recapture its mark from the public domain because the generic meaning had become totally obsolete and unknown. In contrast, “the fact that there was some minority usage of “LITE” as a generic name for low cal beer was fatal to Miller’s argument.” *McCarthy on Trademarks* §12:47 at n. 15.

Other courts have also subscribed to the so-called “‘super strength’ *de facto* secondary meaning” theory. For example, considering whether the term “chocolate fudge” as applied to diet soda is generic, the Third Circuit noted that “evidence that a generic term is identified with one producer, indicative of a secondary meaning for a descriptive term, proves only what courts call ‘de facto’ secondary meaning. . . evidence of secondary meaning is not even relevant if the term is arbitrary, suggestive or *generic*.” *A J. Canfield Co v. Honickman, et al*, 808 F2d 291, 1 U.S.P.Q. 2d 1364, 1369 (3rd Cir. 1986)(emphasis added). *See also, In re E. I. Kane, Inc.*, 221 U.S.P.Q. 1203, 1206 (T.T.A.B. 1984) (“[n]o amount of evidence of actual distinctiveness can convert such a highly descriptive term into one that is registrable.”)

Applying the “‘super strength’ *de facto* secondary meaning” theory in this case dictates that the Icon *cannot* acquire *de jure* secondary meaning because the USPTO treated it as a generic symbol for all relevant goods and services. In other words, Wal-Mart’s conclusion that the Icon “has obtained secondary meaning and is therefore registrable on the Principle [sic] Register” is legally impossible. (Wal-Mart Br. at 14.) Any evidence Wal-Mart submits for the purpose of demonstrating that the Icon is identified with Wal-Mart and therefore indicates secondary meaning proves *only de facto* secondary meaning, not *de jure* secondary meaning required for registration on the Principal Register.

**2. The Board Should Disregard Wal-Mart’s Surveys and Other Evidence Purportedly Showing Secondary Meaning**

Because Wal-Mart cannot overcome the inherent problem with its claim of right in the Icon, the Board should disregard as irrelevant Wal-Mart’s survey, testimonial and third-party evidence of the Icon’s alleged acquired secondary meaning. *See, Hunt Masters Inc. v. Landry’s Seafood Restaurant Inc*, 240 F.3d 251, 57 U.S.P.Q. 1884, 1886 (T.T.A.B. 1984) (customer survey irrelevant where term at issue was clearly generic). In *Miller Brewing Co. v. Jos. Schlitz Brewery Co.*, 605 F.2d 990, 203 U.S.P.Q. 642, 645 (7th Cir. 1979), Miller appealed from a grant of summary judgment arising from the application of collateral estoppel on the issue of whether “LITE” is generic for beer. On appeal, Miller argued, among other things, that it was foreclosed from offering crucial survey evidence in connection with the earlier proceeding relied upon by Schlitz in asserting collateral estoppel. *Id.* at 647. Specifically, Miller argued that a subsequent “report survey of 988 beer drinkers taken in March 1978” was not introduced in connection with the preliminary injunction hearing. *Id.* The court noted that one purpose of the new survey evidence was “to prove that consumers have come to associate the word with Miller’s product.” *Id.* The court concluded that the March 1978 survey was not essential evidence of which Miller was deprived in the earlier proceeding because “proof of [the fact that consumer’s have come to

associate LITE with Miller's product] would not advance Miller's trademark claim, because, as Miller acknowledged in [the prior proceeding] if a word is generic it 'can never become a trademark.'" *Id*

In an effort to demonstrate that the Icon has acquired secondary meaning, Wal-Mart relies heavily on the *Perceptions of Smiley* survey report prepared by R.L. Associates (Wal-Mart Br. at 14).<sup>2</sup> According to Wal-Mart, Table II of the survey reflects "overwhelming evidence of establishing public association of [the Icon] with Wal-Mart retail stores. *Id*. However, given that the Icon is akin to "generic" for a wide range of goods and associated retail store services, any alleged evidence of secondary meaning can *only* be evidence of *de facto* secondary meaning. Such evidence is irrelevant in connection with the Icon because if it is generic, it *cannot* acquire *de jure* secondary meaning required for registration on the Principal Register.

Even if the Board determines that Wal-Mart's *Perceptions of Smiley* survey report should not be disregarded, the Board should give little, if any, weight to the survey because it is fatally flawed. Surveys polling only the proponents' own customers are flawed because they create bias in the results. *See, Spraying Systems Co. v. Delavan, Inc*, 762 F.Supp. 772, 783, 19 U.S.P.Q. 2d 1121 (N.D. Ill. 1991). In *Jaret Int'l, Inc. v. Promotion in Motion, Inc*, 826 F. Supp. 69, 73-4, 27 U.S.P.Q. 1913 (E.D. N.Y. 1993), the court found that another trademark survey conducted by Dr. Rappeport of RL Associates was "inadmissible because of its unrepresentative sample and its untrustworthy methodology." The survey was conducted in a mall where only the proponents' goods were sold, "thereby minimizing the probability that a fair sampling of [allegedly competing goods] purchasers was included." *Id* at 73. According to Dr. Rappeport,

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<sup>2</sup> Wal-Mart also relies on Troy David Steiner's testimony regarding Wal-Mart's print media and in-store Icon usage as well as Gary F. Sholtes' testimony regarding Wal-Mart's advertising figures in connection with the Icon. Loufrani maintains that *any* alleged evidence of *de jure* secondary meaning should be disregarded.

Dr. Rappeport's

survey is flawed in that it does not reflect a representative sampling, and is biased in favor of finding that the Icon has acquired secondary meaning. As a result, the Board should give little or no weight to the survey findings.

**C. Wal-Mart's Failure To Police Widespread Third Party Use Of The Happy Face Design Renders It Incapable Of Serving As A Source Indicator**

Contrary to Wal-Mart's assertion, the plain language of the Opposition clearly put Wal-Mart on notice of Loufrani's "failure to police" argument over five years ago. Even if Wal-Mart was not alerted to the issue by the plain language of the Opposition, Wal-Mart's failure to object to Loufrani's testimony regarding the ubiquitous third-party use of the Icon suggests that the issue was knowingly tried on the implicit consent of the parties. As a result, Loufrani's Opposition should be amended to conform with the evidence to include "failure to police" as an additional opposition basis, and Wal-Mart's "failure to police" is sufficient to render the Icon incapable of indicating source.

**1. Wal-Mart Had Fair Notice of Loufrani's "Failure to Police" Ground For The Opposition**



Loufrani's Opposition clearly references rampant third-party use of the Icon as grounds for the Opposition. (Opp. 91/152145 ¶6). Wal-Mart's claim that "by failing to plead [failure to police] as a ground for its opposition of Wal-Mart's Mark, Loufrani waived the argument" is contrary to the evidence in the record. (Wal-Mart Br. at 18.) Reviewing the plain language of the Opposition along with its incorporated exhibits, it appears that Wal-Mart is purposefully sticking its head in the sand.

"[M]odern rules of pleading reject the approach that pleading is a game of skill and cunning. The purpose of pleading is to apprise a party by fair notice of the case it has to meet." *McCarthy on Trademarks* §20:24 (citing *American Novawood Corp. v. U.S. Plywood-Chamption Papers, Inc.*, 426 F.2d 823, 827, 165 U.S.P.Q. 613 (Cust. & Pat. App. 1970) (rejecting argument that opposer failed to plead grounds for opposition)). Paragraph 6 of Loufrani's Opposition states:

Based on the evidence attached at Exhibit B hereto, the U.S. Patent and Trademark Office determined that the Happy Face Design element in opposer's Serial No. 75/977,376 does not serve any trademark function under Trademark Act Sections 1, 2 and 45.

(Opp. 91/152145). As discussed in Sec. I.A.1 above, Ex. B referenced in the Opposition is the Examining Attorney's June 12, 2000 Office Action and accompanying evidence. The accompanying evidence comprises nearly one hundred pages reflecting countless examples of third-party use of the Icon for a variety of goods and services. Furthermore, the Examining Attorney's conclusion that the Icon could not function as a mark was based, in large part, on this evidence which demonstrated that "this symbol is so universally used as a purely decorative, informational element on a wide variety of goods and services." (June 12, 2000 Office Action). Thus, the purpose of Paragraph 6 of Loufrani's Opposition is to alert Wal-Mart that Loufrani relied upon widespread third-party use (and, implicitly, Wal-Mart's decision to acquiesce to such

use) as a ground for the Opposition. This is sufficient to put Wal-Mart on notice of Loufrani's "failure to police" argument. Wal-Mart can hardly feign surprise at this juncture in the proceeding.

**2. The "Failure To Police Argument" Was Knowingly Tried By The Parties and The Pleadings Should Be Amended To Conform To The Evidence**

Even if the Board does not agree that Paragraph 6 of the Opposition put Wal-Mart on notice of Loufrani's "failure to police" argument, the issue has been tried by the implied consent of the parties. Pursuant to TBMP § 3.59 and Fed. R. Civ. P. 15(b), a party may seek to amend the pleadings to conform to the evidence at any time during a Board proceeding. Loufrani hereby requests that the Board amend Loufrani's Opposition to include the "failure to police" basis, consistent with the evidence in the record.

On August 2, 2005, Loufrani took the testimony deposition of Megha Desai. One of the purposes of Ms Desai's deposition was to describe her "research project of looking up as many happy face designs as [she] could possibly find." (Desai Dep. 6:22-3). Loufrani introduced the 86 page bound volume reflecting the results of Ms. Desai's research as an exhibit to Ms. Desai's deposition. *Id.* at 13:8-13, Desai Dep. Ex 1 at DEASAI001-86. Ms. Desai concluded that the Icon "was used in different ways" on different products, and printed out examples of such third party use, compiling it in Ex 1. *Id.* 9:3-8; 10:11-19.

Thus, Loufrani's Opposition and Ms. Desai's testimony put Wal-Mart on notice of Loufrani's interest in the un-checked third-party use of the Icon. Wal-Mart did not raise any objection, or attempt to introduce any evidence of Wal-Mart's efforts to police third-party use of the Icon. Therefore, the "failure to police" issue has been tried by the implied consent of the parties, and Loufrani's Opposition should be deemed amended to include "failure to police" Wal-Mart's Mark as an additional ground for Opposition. *Time Warner Entertainment Co. v.*

*Jones*, 65 U.S.P.Q.2d 1650, 1653 n. 2 (T.T.A.B. 2002) (opposition amended to include claim of ownership of additional registrations where applicant raised no objection to opposer's submission of and reliance upon evidence of unpleaded matters).

### 3. The Un-Checked Third-Party Icon Use Prevents The Icon From Having Significance As A Mark



Wal-Mart has not offered *any* evidence demonstrating that it has taken efforts to enforce its alleged Mark against overwhelming third-party use. Wal-Mart admits that "a number of third-parties use the 'smiley face' design", and the record reflects examples of others' widespread Icon use on similar goods and in connection with similar services. (Wal-Mart Br. at 20; June 12, 2000 Office Action; Desai Dep. Ex 1). Wal-Mart's decision to turn a blind eye to nationwide appropriation of the Icon for retail products and services has taught purchasers to ignore the Icon as a source identification. In short, Wal-Mart has acquiesced to the third-party use, preventing the Icon from acquiring significance as a mark.



Section 45 of the Trademark Act provides that a mark shall be deemed to be 'abandoned' when any course of conduct of the owner causes the mark to lose its significance as a mark. *See* Lanham Act §45.

"Without question, distinctiveness can be lost by failing to take action against infringers. If there are numerous products in the marketplace bearing the alleged mark, purchasers may learn to ignore the 'mark' as a source identification. When that occurs, the conduct of the former owner, by *failing to police* its mark, can be said to have caused the mark to lose its significance as a mark."<sup>3</sup>

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<sup>3</sup> Wal-Mart's suggestion that Apple Corp. and Target are not obliged to police their marks against all third parties using ornamental apple and target images proves more than Wal-Mart intends. (Wal-Mart Br. at 20.) Loufrani

agrees that Apple Corp. and Target certainly are not abandoning their  and  marks by allowing third parties to decorate their merchandise with various public domain depictions of apples and targets. However, if

hundreds of third-party computer and electronic music equipment manufacturers use Apple Corp's identical  mark to adorn their products or if hundreds of retail product manufacturers use Target's identical  mark on their merchandise without *any* objection from Apple Corp or Target, there would be a strong argument that the

*The Wallpaper Manufacturers, Ltd. v. Crown Wallcovering Corp.*, 214 U.S.P.Q. 327, 336 (Cus. & Patent App. 1982) (emphasis added). The parties agree that there are numerous products in the marketplace bearing the Icon, and Wal-Mart has not submitted any evidence that it has taken action against any third-party users. Therefore, to the extent the Icon *ever* served as a source indicator for Wal-Mart's retail services, that significance has certainly been lost.

Wal-Mart's reliance on *University Book Store v. University of Wisconsin Board of Regents*, 33 U.S.P.Q.2d 1385 (T.T.A.B. 1994) is misplaced.<sup>4</sup> Finding that the applicant had not abandoned its Bucky Badger marks by allowing various campus sellers to sell merchandise bearing the marks, the Board concluded that:

[S]ales and advertising by opposers and various third parties for many years. . . simply reflect the fact that applicant, over the years, tolerated sales and advertising of goods, including clothing, bearing the marks it presently seeks to register. Applicant, like numerous other colleges and universities, permitted others to sell imprinted merchandise as expressions of community support and goodwill. . . [R]ather than constituting uncontrolled use by opposers and third parties which resulted in the marks losing all source indicating significance, the reality of the situation which existed for many years may best be characterized as that of a *royalty-free, nonexclusive, implied license to use marks* which, particularly in and around the University's Madison campus, principally signified applicant in the mind of the consuming public and have continued to do so.

*Id.* at 1396 (emphasis added). In other words, the Board viewed third-party use of the Bucky Badger marks as strengthening, rather than diluting, the purchasing public's perception that goods bearing the mark originated with the University.

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marks had been abandoned by acquiescence to universal third-party use. Of course this scenario is unlikely because one *would* expect Apple Corp. or Target to vigorously pursue unauthorized third-party use of their registered marks in this manner

<sup>4</sup> Wal-Mart specifically cites *University Book Store* for the proposition that Wal-Mart is only obliged to enforce its mark against "objectionable" third-party uses. (Wal-Mart Br. at 19) Loufrani is unable to identify any portion of the case which supports this interpretation of Wal-Mart's obligation to police its mark.

The same cannot be said for third-party use of the Icon. Wal-Mart has not suggested, and the record does not support, the notion that rampant third-party use of the Icon is equivalent to implied licenses to use *Wal-Mart's* mark. Certainly the purchasing public does not believe that the ubiquitous nature of the Icon in the United States results from *Wal-Mart's* allowing manufacturers and retailers to use the Icon. In *University Book Store*, the Board noted that use of the Bucky Badger marks for a wide variety of different commercial enterprises was “plainly meant to emphasize or underscore that those firms are based in Madison or otherwise located in the State of Wisconsin.” *Id.* at 1397. No one believes that the hundreds of Icons used in connection with various goods and services compiled in Desai Dep. Ex 1 are meant to indicate any relationship with Wal-Mart. The type of universal third-party use to which Wal-Mart has acquiesced signifies only that purchasers have learned to ignore the Icon as an indicator of source.

## II. CONCLUSION

For the reasons stated herein, Franklin Loufrani requests that the Board grant Opposition No. 91/152,145 and refuse Wal-Mart's application to register the Happy Face Design.

Respectfully submitted,

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Exhibit

A

skin soaps, facial soaps, bath soaps, non-medicated cosmetic preparations for slimming purposes, namely, skin creams, skin lotions, skin pomades, rust removing preparations, sun-tanning preparations for cosmetic purposes, fabric softeners for laundry use, bath gels, bubble baths, shaving soap, cotton sticks for cosmetic purposes, skin whitening creams, laundry bleach, scented wood, floor polish, hair color, hair dyes, hair waving lotions, artificial eyelashes, shoe care products, namely shoe wax, shoe polish and shoe cream, depilatory wax, parquet floor wax, polishing wax for use on furniture and automobiles, leather preservatives, namely, polishing creams and waxes, cosmetic kits comprised of eyelash pencils, eyelid pencils, cosmetics for animals, namely shampoos, fur cleaners, drain openers, general purpose scouring powders, decolorants for cosmetic purposes, namely hair de-colorants, degreasing preparations not used in the manufacturing process for use on floors, make-up removing preparations, dentifrices, depilatory creams, deodorants for personal use, stain removers, paint remover, rust and mineral removing cleaning preparations, laundry detergents, toilet water, anti-static dryer sheets, emery paper, emery cloth, emery boards, polish for furniture and flooring, incense, make-up, perfumes, windscreen cleaning preparations, essential oils for personal use, hair lacquer, hair bleaching preparations, sachets for perfuming linen, hair lotions, body lotions, after-shave lotions, denture polishes, preparations for cleaning dentures, nail care preparations, false nails, cotton balls for cosmetic purposes, abrasive paper for use on the nails, wallpaper cleaning preparations, paint stripper, pumice stones for personal use, shaving preparations, shampoos, varnish-removing preparations, non-medicated mouth washes, hygienic preparations for medicine and personal hygiene, namely, feminine hygiene cleansing towelettes and medicated mouth washes, diet capsules, disinfectants for hygiene purposes, namely, antiseptics, herbicides for agricultural use, herbicides for domestic use, adhesives for dentures, adhesive bandages, air deodorants, air fresheners, dietary food supplements and dietary drink mix for use as a meal replacement, food for babies, herbal tea for use in weight reduction, preparations for destroying vermin, moth balls, flea collars, medicated sun burn ointments, fly paper, medicated bath preparations, namely, medicated bath gels, medicated bath salts, adhesive bandages, feminine hygiene pads, medicated candy for use on sore throat, additives for nutritional purposes, medicated compresses, solutions for contact lenses, cotton for medical purposes, incontinence garments, namely, pants and napkins, tobacco-free cigarettes for medical purposes, dental impression materials, porcelain for dental prostheses, car deodorants, pregnancy test kits for home use, sanitary napkins, insecticides for domestic use, insecticides for agricultural use, animal semen, alloys of precious metals for dental purposes, contact lens cleaning preparations, smelling salts, wound dressings, surgical dressings, medicated skin care preparations, agricultural pesticides, domestic use pesticides, mineral supplements, vitamin supplements non-electric cutlery, namely, non-electric knives, hand operated non-electric choppers, forks and spoons, side arms not including fire arms, namely, hunting arms or swords, whet steels, hand tools, namely, manually operated sharpening wheels, hand tools, namely, reams, beard clippers, spades, instruments for punching tickets, namely, punches, non-electric can openers, engraving needles, nutcrackers, not of precious metal, hand operated

shears, scissors, hand operated vegetable shredders, hand operated vegetable slicers, nail clippers, manual jacks, trowels, tree pruning, namely, pruning scissors, swords electric or non-electric depilatory appliances, hair removing tweezers, hand tools, namely, squares, razor cases, bits for hand drills, sickles, scythes, hand tools, namely, tongs, gimlets, hand operated lawn clippers, ice picks, hand tools, namely, scrapers, electrical hand operated vaporizers and sprayers for use on insects, hand operated choppers for use on meat and vegetables, gardening tools, namely, shovels, spades, hoes, razor blades, hand tools, namely, levers, files, nail files, manicure sets, hand tools, namely, hammers, shaving sets, pedicure sets, pliers, sugar tongs, hand tools, namely, nippers, pickaxes, hand-powered staple guns, hand tools, namely, punches, hand tools, namely, planes and rasps, electric and non-electric razors, rakes, branding irons, sabres, hand tools, namely, saws, carpenters or coopers clamps, fire irons, hand tools, namely, screwdrivers and drills nautical apparatus and instruments namely, sextants, telescopes, directional compasses, weighing apparatus and instruments, namely, scales, automatic vending machines, calculating machines, data processors, computers, electric accumulators, chargers for electric accumulators, anti-intrusion alarms, electronic diaries, warning devices, namely, alarm belts, electric cigarette lighters, for land vehicles, altimeters, sound amplifiers, radio-controlled miniature aerial targets, anti-dazzling glasses, telescopic, gun sights, electric devices for attracting and killing insects, musical juke boxes, automatic distribution machines, namely, foodstuff dispensers, drink dispensers, gas dispensers, burglar alarms except for anti-theft alarms for vehicles, scales, safety equipment, namely, beacon lights, meteorological balloons, blank magnetic computer tapes, blank video tapes and video cassettes, barometers, electric hair curlers, ticket dispensers, computer terminals, electric, neon or luminous road signs, marker buoys, navigational buoys, signaling buoys, push buttons for warning devices, namely, bells and electric doorbells, surveyors' levels, cash registers, photographic cameras, motion picture cameras, video cameras, metered gasoline pumps, magnetic encoded cards, magnetic encoded identity cards, cartridges for video games, protective helmets, life belts, life jackets, motion picture films in the field of sport, nature, environment, historic and geographic documentaries, printed circuits, integrated circuits, computer keyboards, bar code readers, diving suits, control boards, commutators, pre-recorded compact disks featuring music, optical compact discs, thread counters, revolution counters, electrical connectors, contact lenses, speedometers, electrical plugs, electrical sockets, circuit breakers, smoke detectors, photographic slide transparencies, dictation machines, optical discs, blank floppy disks for computers, blank magnetic data carriers, dosimeters, safety equipment, namely, fire escape ladders, projection screens, batteries, telecommunication transmitters, transmitters of electronic signals, teaching apparatus, namely tape recorders, eyeglass cases, contact lens cases, fire extinguishers, electric and flat irons, life nets, exposed camera film, electrical wires, photographic flash-bulb, electrical fuses, gloves for divers, bullet-proof waistcoats, loudspeakers, printers for use with computer, data processors, telephone apparatus, namely, intercoms, computer interface boards, simulators, magnifying peepholes for doors, binoculars, optical character recognition apparatus, digital audio tape players, compact disc players, telescopes, magnifying glasses, sunglasses, video cassette recorders, scuba diving masks, computer memories, slide rules measuring instruments, namely, slide rules, microphones, microprocessors, microscopes, computer monitors, computer peripheral mouse pads, lightning rods, electrical conductors, parking meters, periscopes, letter scales, photocopying machines, photographic camera tripods, signal processors, satellite processors, photographic projectors, movie projectors, radar detectors, life-saving rafts, radios, audio-receivers, video-receivers, graduated rulers, electric light dimmers, semi-conductors, lasers, not for medical purposes, vehicle breakdown warning triangles, luminous or mechanical sirens, sonars, warning devices, namely, bells and electric doorbells, computer mouse, facsimile

machines, telephone transmitters, telephone receivers, telescopes, television sets, thermostats, electronic apparatus for translating words from and into foreign languages, mechanical or electric egg timers precious metals and their alloys sold in bulk, precious gem stones, clocks and chronometers, silver plated plates and dishes, works of art of precious metal, namely, statues, statuettes, figurines of precious metal, jewelry, boxes, earrings, buckles of precious metal, candlesticks of precious metal, bracelets, cuff links, brooches, sundials, ashtrays of precious metal for smokers, jewelry chains, hat ornaments of precious metal, chronographs for use as watches, necklaces, tie clips, tie pins, hat pins, household and kitchen containers of precious metal, change purses of precious metal, clutch purses of precious metal, watches, watch bands, wrist watches, shoe ornaments of precious metal, towel holders of precious metal, alarm clocks, serving platters of precious metal, urns of precious metal, trunks for traveling, traveling bags, umbrellas, parasols and walking sticks, whips and saddlery, dog collars, cat collars, leashes for animals, hat boxes for travel, purses, school bags, business card cases, school satchels, document cases, key cases, vanity cases sold empty, briefcases, mesh bags for shopping, horse blankets, dog coats, cat coats, attache cases, suitcases, pocket wallets, infants carriers worn on the body, backpacks, rucksacks, handbags, beach bags, leather envelopes and pouches bags for merchandise packaging, garment bags for travel, traveling leather sets consisting of traveling bags, combs, toilet brushes, water troughs, thermal insulated containers for food, cat litter pans, lawn sprinklers, works of art, of porcelain, terra-cotta or glass, namely, statuettes, figurines, table plates not of precious metal, non-electric pressure cookers, brooms, shaving brushes, cocktail picks, portable baby baths tubs, drinking flasks for travelers, drinking vessels, beer mugs, glass jars for jams and jellies, bread boxes, soap boxes, tea balls not of precious metal, boxes for dispensing paper towels, boxes of glass, bowls, candy boxes sold empty, corkscrews, non-electric kettles, bottles sold empty, bottle openers, pitchers not of precious metal, electric toothbrushes, non-electric toothbrushes, perfume burners, coffee services, not of precious metal, non-electric coffee pots, not of precious metal, decanters, glass pans for cooking stew, metal cooking pans for stew, polishing leather, shoe horns, shoe stretchers of wood, egg cups, not of precious metal, baskets of wicker, straw and wood for domestic use, dish covers, pot lids, beverage glassware, jugs, cooking pot sets, cookery molds, non-electric cooking utensils, namely, saucepans, toothpicks, cutting boards for the kitchen, trivets, toilet paper holders, decorative crystal prisms, soap dispensers, sponges for household purposes, cleaning rags, dusting cloths, scouring sponges for toilets, earthenware basins, household utensils, namely strainers, flower pots, gloves for household purposes, gloves for gardening, ice buckets, portable non-electric ice boxes for food and beverages, ice cube molds for refrigerators, goblets, not of precious metal, mugs, not of precious metal, bottle-gourds, not of precious metal, insect traps, crumb trays, fitted picnic baskets including dishes, soap holders, sponge holders, perfume sprayers sold empty, perfume atomizers sold empty, ironing boards, pepper shakers, earthenware mugs, knife rests for the table, garbage cans, trash cans, napkin rings, not of precious metal, thermal insulated tote bags for food or beverages, tableware services not of precious metal, namely, table plates, napkin holders, not of precious metal, non metal piggy banks, urns, not of precious metal, drinking glasses, lingerie fabric, upholstery fabrics, bath linen, canvas for tapestry or embroidery, oilcloth to be used as tablecloths, cloth flags, cloth labels, bed linen, household linen, table linen, table napkins of textile, unfitted fabric furniture covers, mosquito nets, wall hangings of textile, curtains of textile or plastic, table mats, not of paper, agricultural grains for planting, unprocessed seeds for agricultural purposes for flowers, trees, live animals, fresh fruits and vegetables, live plants and flowers, animal feed additives for non nutritional purposes for use as flavoring, ingredient or filler, edible chews for animals, flower bulbs, fresh garden herbs, animal litter, beers, mineral and aerated waters, non-alcoholic drinks, namely, fruit juices, lemonades, tomato juice



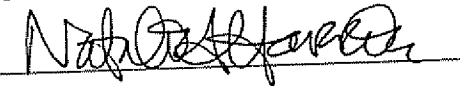
beverages, syrups for making soft drinks, isotonic beverages, vegetable juices, beverages, namely, vegetable juices, fruit juices and soft drinks alcoholic beverages, namely, wines, sparkling wines, whiskey, gin, rum, vodka, apertifs with a distilled alcoholic liquor base, prepared alcoholic cocktails, cherry brandy, liqueurs, distilled spirits of rice, corn, barley tobacco, matches, match boxes, not of precious metal, cigar and cigarette cases, not of precious metal, cigarette lighters, not of precious metal, ashtrays, not of precious metal, cigars, cigar cutters, cigarettes, cigarette holders, not of precious metal, tobacco pouches advertising and marketing cooperative, administration of cultural and education exchange programs, arranging of subscriptions for the publications of others, business management and consultation, outdoor advertising by means of electronic billboard advertising, import and export agencies, commercial information agencies, publicity agents, dissemination of advertising matter, office machines and equipment rental, employment agencies, accounting services, personnel management consultation, shop window display arrangement services, product demonstrations, direct mail advertising, document reproduction, auctioneering, conducting marketing studies, efficiency experts, organizing trade shows and exhibitions for the garment industry, the foodstuff manufacturing industry, the toy manufacturing industry, the stationery industry, the computerized mean industry, computerized data base management, rental of advertising space, opinion polling for business or advertising purposes, personnel placement or recruitment, economic forecasting and analysis, advertising agencies, namely, promoting the services of computers, fashion, toys, foodstuffs, public relations, business relocation, secretarial and clerical services, providing statistical information, business investigations guarantee assurance underwriting, financial services in the nature of an investment security debt collection agencies, real estate agencies, art appraisal, charitable fund raising, mutual investment funds, fund investment consultation, credit card services, monetary exchange, travellers's check issuance, saving bank services, appraisals for insurance claims of others' property, real estate management, financial management telecommunication services, namely, personal communication services, paging services radio communication, telephone communication, communication by telegram, electronic transmission of documents and data via a computer terminal, rental of telecommunication equipment, electronic mail services, television broadcasting, radio broadcasting, cellular telephone services transportation services by ferry, boat, rail, land, air, packaging articles for transportation, warehouse storage, arranging travel tours as a bonus program for credit card customers, arranging travel tours, arranging of cruises, tourist agency services, vehicle towing, pleasure boat cruises, chauffeur services, message delivery, public utility services in the nature of electricity distribution, delivery of goods by truck, boat, rail and air, car rental, rental of parking spaces, underwater salvage, taxi transport, conducting sightseeing tours for others, guarded transportation of valuables and money by truck.

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, hereby certifies that I caused this **REPLY BRIEF FOR FRANKLIN LOUFRANI AS PLAINTIFF IN OPPOSITION No. 91/152,145** to be served on:

Mr. Gary J. Rinkerman  
Baker & Hostetler LLP  
Washington Square  
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via first-class mail, postage prepaid before hour of 5 p.m. on September 26, 2007

  
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