

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

In re: Trademark Application Serial No. 75/302,439
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Attorney Ref.: 21188-174021

03 JAN -6 PM 11:27
TM TRIAL BOARD

Wal-Mart Stores, Inc.

vs.

Franklin Loufrani

Opposition No. _____

Honorable Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-35313

Box: TTAB FEE

06 JAN -7 PM 5:00
TM TRIAL BOARD

NOTICE OF OPPOSITION

Sir or Madam:

Wal-Mart Stores, Inc. ("Opposer"), a Delaware corporation having its principal place of business at 702 Southwest 8th Street, Bentonville, Arkansas, 72616-8095, by and through its attorneys, hereby submits a Notice of Opposition to the above-referenced application. Opposer submits that this Notice is timely filed.

Applicant, Franklin Loufrani, has applied to register the mark SMILEY and design on an intent-to-use basis for a broad range of products and services in International Classes 16, 25, 28, 29, 30, 41, and 42. Applicant's filing date is June 3, 1997, and Applicant has not yet amended his application to state a date of first use.

Applicant has likewise filed an application to register the identical mark SMILEY and design on an intent to use basis for a broad range of products and services in International Classes 3, 5, 8, 9, 14, 18, 21, 24, 31, 32, 33, 34, 35, 36, 38, and 39 under Serial No. 75/977,376. Opposer has filed an opposition to that applicant which is being pursued under No. 150,278. Opposer respectfully submits that this proceeding should be suspended pending the outcome of No. 150,278.

Opposer believes that the Applicant's proposed mark is incapable of distinguishing the goods of the Applicant's from the goods of others and, therefore, cannot function as a trademark and an indicator of source. The "smiley face" design is a ubiquitous icon, tracing its origins back to the early 1960s in the United States. At the very least, Applicant should be required to demonstrate that Applicant's mark has become distinctive of the Applicant's goods in commerce pursuant to Section 2(f) of the Lanham Act of 1946, as amended.

Opposer further maintains that to the extent that the "smiley face" design is capable of functioning as a trademark, the rights to the same belong to Opposer. Opposer first began use of the design it refers to as "Mr. Smiley" at least as early as January 26, 1996, and has continuously used the design in commerce and in interstate commerce since that date. Opposer has spent substantial sums in advertising and marketing using the Mr. Smiley design in association with its retail department store services in International Class 35 since 1996 and to the present.

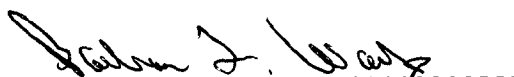
Therefore, Opposer maintains that it would be damaged by the registration of Applicant's proposed mark. The appearances are similar. Applicant has applied for the same kinds of services as those with which Opposer uses Mr. Smiley and for the same kinds of goods as those sold by Opposer in its capacity as a retailer. If the Board were to determine that Applicant's

proposed mark is capable of functioning as a trademark and/or has become distinctive, then Opposer submits there would be a likelihood of confusion between Opposer's mark and Applicant's mark.

Please deduct the requisite fees of \$700.00 from our Deposit Account No. 22-0261.

Pursuant to 37 C.F.R. § 2.102(d), this document is being submitted in triplicate.

Respectfully submitted,



Barbara L. (Pixie) Waite
Venable, Baetjer, Howard & Civiletti, L.L.P.
1201 New York Avenue, N.W., Suite 1000
Washington, DC 20005
(202) 962-4800

Attorneys for Opposer

January 6, 2003

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