

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
Atlanta Division

|                        |   |                  |
|------------------------|---|------------------|
| CHARLES SMITH,         | ) |                  |
|                        | ) |                  |
| Plaintiff,             | ) |                  |
|                        | ) |                  |
| v.                     | ) | Civil Action No. |
|                        | ) |                  |
| WAL-MART STORES, INC., | ) |                  |
|                        | ) |                  |
| Defendant.             | ) |                  |

**COMPLAINT FOR DECLARATORY RELIEF**

1. This is an action for a declaratory judgment protecting against a misuse of the trademark laws to censor criticism of Wal-Mart Stores. Plaintiff created designs that express his objections to Wal-Mart's destructive effect on local communities, arranged with a printer to affix those designs to clothing and other items and to sell the imprinted items to members of the public who share his sentiments, and reserved the domain name walocaust.com, on which those wares could be displayed. By threatening plaintiff and the printing company with trademark litigation, Wal-Mart has prevented plaintiff from expressing his views effectively. Accordingly, plaintiff asks the Court to declare that the creation and sale of his designs, and the display of the designs on the Internet, do not violate the trademark laws, and that the First Amendment forbids the application of the trademark laws to bar his designs.

**PARTIES, JURISDICTION and VENUE**

2. Plaintiff Charles Smith is a resident of Conyers, Georgia, and is the creator of the designs that Wal-Mart has suppressed through its trademark claims.

3. Defendant Wal-Mart Stores, Inc., is an international discount retailer that is incorporated in Delaware and headquartered in Arkansas. Wal-Mart operates numerous stores in Georgia,

including at least twenty in the Atlanta area. It inflicted injury on Smith in Georgia by sending its first cease-and-desist letter there as well as by sending other cease-and-desist letters that were intended to and did affect him there.

4. The Court has subject-matter jurisdiction of this case under 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1337, and 1338.

## **FACTS**

5. Plaintiff believes that because Wal-Mart is the largest company in the world, it has a special responsibility to set standards for other companies. Instead, Wal-Mart has made poor wages standard, so any company that wants to be competitive will have to follow Wal-Mart's lead. It has also "outsourced" jobs to lower wage countries, not to speak of buying products made in lower wage countries. Thus, Wal-Mart is lowering the standard of living for workers. Although Wal-Mart claims that its prices are low due to innovations in distribution and inventory control, plaintiff believes that its main innovations are suppressing wages and bullying workers, vendors, and communities, and thus that Wal-Mart is destroying communities wherever it goes. He believes that its greatest innovation may be figuring out how to get away with its destructive conduct. Moreover, Wal-Mart is moving from one industry to the next: from general merchandise to groceries, healthcare, business services, and beyond. Plaintiff believes that Wal-Mart is megalomaniacal and won't be happy until it controls everything. Wal-Mart also proclaims the importance of family values while destroying the communities where families live, not to speak of selling destructive products such as alcohol, tobacco, and firearms. Plaintiff believes that citizens have a responsibility to object to these untoward trends.

6. To express his strong views about Wal-Mart, plaintiff created several designs that merged

Wal-Mart's name with the word "holocaust," creating the parodic portmanteau term "Wal★ocaust." The three letters "Wal" are drawn from Wal-Mart's name, and the five-pointed star invokes the symbol with which Wal-Mart sometimes replaces the hyphen in displaying its name. The purpose of the portmanteau is to call to mind the name "Wal-Mart" while at the same time expressing strong opposition to what Wal-Mart represents.

7. Plaintiff incorporated "Wal★ocaust" into

(a) a design that included the words and symbols "I ♥Wal★ocaust: they have family values and their alcohol, tobacco and firearms are 20% off";

(b) a design that included the words "Wal★ocaust: Come for the low prices stay for the knife fights"; and

(c) a design that included the word "Wal★ocaust" and a stylized bird symbol over a "smiley face," in a form reminiscent of a Nazi eagle. Wal-Mart commonly uses the smiley face, a design that had been in common circulation for many years before Wal-Mart first used it, in its displays and advertising.

Copies of these designs are attached to this complaint as Exhibit A.

8. Plaintiff also registered the domain name "walocaust.com" for use in connection with his images and with his expression of opposition to Wal-Mart.

9. Plaintiff arranged with CafePress.com, a California company that imprints images provided by its customers on physical products and sells them online, to have his images printed on articles of clothing such as T-shirts and hats, on bumperstickers, and on other items, and to sell those items online. Plaintiff redirected traffic from his walocaust.com domain name to servers maintained by CafePress.com so that people wishing to express their own opinions about Wal-Mart by

purchasing and donning these items could easily do so.

10. On December 28, 2005, defendant Wal-Mart, through an attorney, sent a letter and email to plaintiff Smith, asserting ownership of trademarks in the name Wal-Mart, in the star coupled with Wal-Mart's name, and in the "smiley face," threatening to sue him for infringing and diluting its trademarks. It specifically demanded that he stop selling paraphernalia imprinted with his anti-Wal-Mart designs, and that he sign an acknowledgment that he had ceased all sales. Wal-Mart further threatened that, if he did not do exactly as demanded, it would sue him for an injunction, damages, disgorgement of profits, and attorney fees.

11. On information and belief, Wal-Mart made a similar threat against CafePress.com. The threat was immediately effective, because on December 28, 2005, CafePress.com notified plaintiff that Wal-Mart had asserted that its intellectual property rights were being violated by the sale of merchandise with plaintiff's designs, and that CafePress would no longer allow his Wal-Mart related designs to be displayed on CafePress.com's servers, and would no longer imprint his designs on paraphernalia nor sell such paraphernalia to interested customers.

12. On information and belief, CafePress.com will continue to refrain from displaying plaintiff's Wal-Mart related designs, from imprinting those designs, and from selling material imprinted with such designs, unless and until this Court declares that the designs and their sale do not violate Wal-Mart's trademark rights and/or are protected by the First Amendment.

13. Lawrence Lessig, a law professor and attorney, offered to help Smith discuss his rights with counsel for defendant Wal-Mart. On February 1, 2006, defendant Wal-Mart through newly-retained counsel wrote to Professor Lessig to threaten further litigation against Smith because, although CafePress had complied with Wal-Mart's demands, Smith had not yet agreed to cease and

desist from selling such merchandise or any other merchandise to which Wal-Mart might object. The new demand letter also objected to Smith's registration and use of the domain name walocaust.com, asserted that the domain name diluted and tarnished its trademark, and constituted cybersquatting in violation of the Anti-cybersquatting Consumer Protection Act ("ACPA"). Wal-Mart threatened to sue Smith for an injunction, damages, statutory damages, and attorney fees unless he stopped using the walocaust.com domain name and transferred it to Wal-Mart, stopped selling any merchandise bearing his anti-Wal-Mart designs or any other designs to which Wal-Mart might object, agreed not to do so in the future, and provided an accounting of his merchandising activities using the anti-Wal-Mart designs as well as any other merchandise sold through the walocaust.com web site.

14. Plaintiff is unwilling to sell more merchandise containing anti-Wal-Mart messages and therefore incur further claims for damages, unless the Court declares that he is entitled to do so.

15. Although plaintiff has received \$5.10 from the sale of Walocaust paraphernalia, he did not enter into this activity for the purpose of making a profit, but solely to express his views and to make it possible for others who share his views to express themselves by wearing or displaying his designs. The \$5.10 that he received is less than the costs incurred to create and display his Walocaust expression, not to speak of the cost of the impending litigation. If the court declares that he is entitled to publish his designs as he seeks to do, and he is therefore able to resume the printing and sale of his designs, he will devote any income from the sales to his Walocaust expression and to the costs of this litigation, and anything left after that will be donated to assist others who are suffering oppression by Wal-Mart or working to oppose its misdeeds.

16. Currently, however, the web site at walocaust.com displays images and text that

expresses plaintiff's views about Wal-Mart, and contains hyperlinks that refer viewers to other web sites where they can learn about Wal-Mart's misdeeds.

### **CLAIMS FOR RELIEF**

17. Plaintiff maintains that his current and prior uses of his domain name and his designs were at all times legal. Defendant maintains that plaintiff's actions were illegal.

18. Defendant's actions have given rise to an actual and justiciable controversy pursuant to 28 U.S.C. § 2201 *et seq.*

19. Although plaintiff has sold merchandise bearing his anti-Wal-Mart designs, the designs themselves are non-commercial speech.

20. There is no likelihood of confusion about whether plaintiff's anti-Wal-Mart designs, or merchandise or web sites displaying them, are sponsored or affiliated with Wal-Mart.

21. There is no likelihood of confusion about whether plaintiff's domain name walocaust.com, or the web site displayed at that Internet address, are sponsored by or affiliated with Wal-Mart.

22. Plaintiff's designs, paraphernalia imprinted with those designs, and his domain name and web site neither infringe, nor dilute, nor tarnish Wal-Mart's trademarks.

23. Plaintiff's designs, paraphernalia imprinted with those designs, and his domain name and web site constitute a fair use of Wal-Mart's trademarks.

24. Plaintiff's designs, paraphernalia imprinted with those designs, and his domain name and web site constitute a non-commercial use of Wal-Mart's trademarks.

25. Plaintiff's domain name is neither confusingly similar nor dilutive of Wal-Mart's trademarks, and plaintiff does not have a bad faith intent to profit.

26. Plaintiff therefore seeks a declaratory judgment that he has neither infringed, nor diluted, nor cybersquatted on Wal-Mart's trademarks, and that he is not in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114, nor of section 43 of the Lanham Act, 15 U.S.C. §§ 1125(a), (c), or (d), nor of any similar state law, or any law whose violation defendant may assert through counterclaims.

27. Plaintiff seeks a declaratory judgment that any claims that he may have violated federal or state trademark laws are barred by the First Amendment to the United States Constitution, and by principles of fair use, including nominative fair use and parody.

### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff asks the Court to enter a judgment in favor of plaintiff, Charles Smith, and against defendant Wal-Mart Stores, as follows:

A. Declaring that plaintiff's designs, paraphernalia bearing those designs, domain name and web site do not violate defendant's rights under the Lanham Act or other trademark law;

B. Declaring that plaintiff's designs, paraphernalia bearing those designs, domain name and web site are fair use and protected by the First Amendment;

C. Declaring that plaintiff has a right to sell the paraphernalia bearing plaintiff's designs, and to arrange with others to print and sell such paraphernalia, without infringing or diluting defendant's trademarks or other rights;

D. Declaring that defendants are not entitled to an injunction or any other form of relief against plaintiff's designs, paraphernalia bearing those designs, domain name and web site;

E. Awarding plaintiff his costs and attorney fees in this matter; and

F. Awarding such other relief as may be just and proper.

Respectfully submitted,

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March 6, 2006

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Exhibit A

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