

**Appellate Nos. 10-57020, 57019, 57022  
Case No. CV10-8884 RGK (RZx)**

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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GIBSON GUITAR CORP, a Delaware corporation,  
*Appellee,*  
vs.  
WowWee USA, Inc., a Delaware corporation, et al.  
*Appellants.*

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On Appeal from the United States District Court  
for the Central District of California  
(Hon. R. Gary Klausner, Presiding)

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**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3  
OF DEFENDANT-APPELLANT WAL-MART STORES, INC.  
FOR STAY OF PRELIMINARY INJUNCTION PENDING APPEAL;**

**DECLARATION OF CLINT BLAND  
CORPORATE DISCLOSURE STATEMENT  
CIRCUIT RULE 27-3 CERTIFICATE**

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## CIRCUIT RULE 27-3 CERTIFICATE

The facts showing the existence and nature of the emergency are set forth below. The telephone numbers, email addresses and office addresses of the attorneys for the parties are set forth in the following table. They will be notified and served by email and Federal Express overnight delivery on December 23, 2011:

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## EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION

Appellant Wal-Mart Stores, Inc. (“Walmart”) hereby respectfully moves for urgent, emergency relief to stay the preliminary injunction order filed on December 21, 2010 and entered by the district court (Klausner, J.) on December 22, 2010.<sup>2</sup> pursuant to Fed. R. App. P. 8 and 27(a). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(a)(1). Urgent relief from the order is required before Christmas.

### I. INTRODUCTION

Walmart joins in the arguments set forth in the Motion of Defendant-Appellant WowWee USA, Inc. (“WowWee”) for Stay of Preliminary Injunction Pending Appeal: The District Court’s Preliminary Injunction should be stayed as to all appellants, including Walmart.

### II. ARGUMENT

Of all of the compelling reasons to stay the preliminary injunction order as set forth by WowWee, one deserves particular consideration. The order violates Fed. R. Civ. P. 65(c) because it does not require security in an amount “proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” The bond of \$50,000 that the district court required is woefully inadequate to provide compensation to Walmart for enjoining a popular toy three shopping days before Christmas. **Walmart will lose in excess of eleven million dollars if an adequate bond is not posted.**

The requirement that adequate security be issued is mandatory. Plaintiff-appellee Gibson Guitar Corp. (“Gibson”) contended, without any legal authority, that the requirements of Fed. R. Civ. P. 65(c) could be evaded by alleging a likelihood of success on the merits. For the reasons explained in WowWee’s motion, success on the merits is not likely and the motion for preliminary injunction should have been denied. Moreover, there appears to be no legal authority for the proposition that a likelihood of success on the merits can

eliminate the requirements of adequate security set forth in Fed. R. Civ. P. 65(c) .

Federal Rule of Civil Procedure 65(c) states that the court may issue a preliminary injunction or a temporary restraining order “only if” the moving party provides gives security sufficient to “pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” It is mandatory. There are no exceptions. The un rebutted evidence submitted by WowWee was that the potential harm from a wrongfully issued injunction was in the tens of millions, not the tens of thousands.

If the preliminary injunction is not stayed, Walmart’s supplier, WowWee, will become insolvent. [Supplemental Declaration of Leon Garfinkle at paragraphs 11 – 14; District Court Docket Entry No. 31]. This will result in Walmart sustaining losses far exceeding \$50,000. As Mr. Garfinkle stated in his declaration, WowWee’s best estimate based on current available information of the total financial harm in the form of lost revenue of accused toy guitar product line would be twenty million dollars (\$20,000,000). Of all of the retailer defendants, Walmart is the largest. WowWee estimated that total costs (with respect to all retailers) to return the product alone (i.e. shipping and related costs) were estimated to be two hundred and fifty thousand dollars (\$250,000), which is five times the amount of the bond required by the district court. [Id.]. **With regard to Walmart, as of today, December 23, 2010, Walmart has 608,800 units of accused toy guitars in inventory, for which Walmart paid in excess of eleven million dollars.** [Declaration of Clint Bland, filed herewith]. The retail value of these products exceeds the amount Walmart paid for the product. [Id.].

The preliminary injunction should be vacated immediately. Any reinstatement should be permitted only on the condition that Gibson secure it with an adequate bond of at least \$40 million, a request that was un rebutted by Gibson in the proceedings below. A stay is necessary because otherwise the monetary harm to Walmart alone, without consideration to any other defendant-appellants,

will vastly exceed what is recoverable on the bond. This sole factor constitutes the required showing of irreparable harm that mandates a stay of the order granting a preliminary injunction.

Plaintiff waited months before seeking any injunctive relief. Its delay was cited by the district court in denying plaintiff's application for temporary restraining order. [District Court Docket Entry No. 20]. Failing to stay the injunction will bankrupt WowWee and result in significant monetary losses that are not secured, in violation of Federal Rule of Civil Procedure 65(c). In order to prevent irreparable harm, the District Court's preliminary injunction should be immediately stayed pending this Court's full review on appeal.

### **III. CONCLUSION**

In order to prevent irreparable harm, Walmart respectfully requests that the District Court's preliminary injunction be stayed immediately pending this Court's full review on appeal.

### **DECLARATION OF CLINT BLAND**

I am the Merchandise Manager for toys at Wal-Mart Stores, Inc. ("Walmart"). My job duties and responsibilities include managing the toy category, including the accused toy guitars at issue in this case that were supplied by WowWee USA, Inc.

I am familiar with the books and records of the company and have personal knowledge of Walmart's inventory and costs of toys. As of today, December 23, 2010, Walmart has 608,800 units of accused toy guitars in inventory, for which Walmart paid in excess of eleven million dollars. The retail value of these products exceeds the amount Walmart paid for the product.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on December 23, 2010 at Bentonville, Arkansas.

By: /s/ CLINT BLAND

**CORPORATE DISCLOSURE STATEMENT**

**(Fed. R. App. P. 26.1)**

Walmart is a corporation. No publicly held corporation owns 10% or more of the stock of Walmart.

DATE: December 23, 2010

Respectfully submitted,

FOLEY & LARDNER LLP  
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By: /s/ LAURA L. CHAPMAN  
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