

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

JAY FRANCO & SONS, Inc.,)	
)	
Plaintiff,)	Civil Action No. 1:08-cv-01313
)	Consolidated with No. 1:08-cv-0058
v.)	
)	Judge Dow
CLEMENS FRANEK,)	
)	JURY DEMAND
Defendant.)	

DEFENDANT, CLEMENS FRANEK’S, MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF

Now comes the Plaintiff, Clemens E. Franek, through the undersigned attorney, Mark Roth, and pursuant to local rule 7.1(d)(6) request that this Court grant him leave to file a Sur-Reply Brief relating to the issues raised in Jay Franco & Sons Reply to Franek’s Response to Franco’s Motion for Partial Summary Judgment. In support of the Motion, the Defendant states as follows:

Plaintiff, Jay Franco & Sons, Inc., (“Franco”) filed a 15-page memorandum in support of its Motion for Partial Summary Judgment. Defendant, Franek, then filed a 15-page response brief.

Franco’s reply brief was due per court order on August 4, 2008. Franco’s counsel requested an extension until August 14, 2008, and Franek’s attorneys agreed to that extension.

Franco then sought leave to file a reply brief in excess of 15-pages. Judge Costillo heard Franco’s motion on August 14, 2008. Franek’s attorney objected to a reply brief

being almost double that of Franek's response brief. Franek's attorney explained the great pains that were undertaken to have Franek's response comply with the local court rules regarding the page limitation for briefs. Judge Costillo granted the motion for leave to file a 24-page reply brief, while at that same time inviting Franek's counsel to move to file a sur-reply.

Franek's now moves this court to allow Franek to file a sur-reply brief.

Franco's reply brief contains new arguments relating to the burden of proof and proving invalidity of the trademark. Further, Franco's reply brief now cites new cases and treatises which were never before cited in any brief to support its arguments that the patents raised by Franco invalidate Franek's trademark. Further, Franco's reply brief faces new substantive arguments relating to invalidity of the mark at issue.

Franek's counsel seeks leave to file a sur-reply within 14-days from the date of the hearing on this motion.

Wherefore, the Defendant, Clemens Franek, request that this Court grant him the leave to file a sur-reply brief related to Francos Motion for Partial Summary Judgment. Franek requests that this Court grant him leave to file that sur-reply brief within 14-days from the date of the order granting this motion. Franek's counsel also requests such other relief as this Court deems just.

Respectfully submitted,

By: /s/ Mark D. Roth
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