

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____)	
The Kind Group LLC,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:12cv01487 (BSJ)
)	ECF Case
Added Extras LLC,)	
)	
Defendants.)	
_____)	

COMPLAINT

Plaintiff The Kind Group LLC (hereinafter “Kind Group”) brings this action for patent infringement, trade dress infringement, false designation of origin, and unfair trade practices against Defendant Added Extras LLC (hereinafter “Added Extras”). For its Complaint, Plaintiff Kind Group hereby alleges:

Parties

1. Plaintiff Kind Group is a limited liability company organized under the laws of the State of New York, and has its principal place of business at 307 Fifth Avenue, 5th Floor, New York, New York 10016.

2. Upon information and belief, Defendant Added Extras is a limited liability company organized under the laws of the State of New York, and has its principal place of business at 1400 Broadway, 27th Floor, New York, New York 10018.

Jurisdiction and Venue

3. Jurisdiction of this Court with respect to the claims set forth herein arises under the patent laws of the United States, as set forth in Title 35, United States Code, and the Trademark Act of 1946, as amended, 15 U.S.C. § 1051 *et seq.* Jurisdiction is also founded upon 28 U.S.C. §§ 1331 and 1338(a), (b). The Court also has supplemental jurisdiction over the state law claims in this action pursuant to 28 U.S.C. § 1367.

4. Venue in this District is appropriate pursuant to 28 U.S.C. §§ 1391 (b), (c) and 1400(b) because Defendants conduct regular business in this District, have committed acts of infringement in this District, and have sold and/or offered for sale infringing products in this District.

Facts

5. On September 13, 2011, U.S. Design Patent No. D644,939, entitled “Spherically-Shaped Lip Balm” (hereinafter “the ‘939 patent”), was duly and legally issued to Plaintiff Kind Group by the United States Patent and Trademark Office, on an application filed by Jonathan Teller on December 3, 2009. A true and correct copy of the ‘939 patent is attached hereto as Exhibit A.

6. Plaintiff Kind Group is the owner by assignment of the ‘939 patent from the inventor, Jonathan Teller.

7. Plaintiff Kind Group designs, manufactures, sells, markets and distributes, *inter alia*, cosmetics and other personal care products, including products sold and marketed under the “eosTM” and “eos evolution of smoothTM” brands.

8. Kind Group's products are marketed throughout the United States and internationally, and sold in retail and online stores, including Kind Group's website, *store.evolutionofsmooth.com*.

9. Kind Group has expended substantial resources in designing, promoting, manufacturing, and selling its products, brands and packaging, and has built a valuable business based on demand for its distinctively-styled, quality cosmetics and other personal care products.

10. The "eosTM" and "eos evolution of smoothTM" brands have become known in the market, and particularly, in the mind of the relevant consumer group as identifying the source of distinctively-styled, quality cosmetics and other personal care products and packaging.

11. In 2009, Kind Group introduced a new line of lip balm, known as the SMOOTH SPHERETM Lip Balm Collection.

12. Kind Group actively advertises, markets, and otherwise promotes its SMOOTH SPHERETM Lip Balm Collection, and has received valuable publicity and acclaim in well-known magazines and other publications.

13. Kind Group's SMOOTH SPHERETM Lip Balm Collection embodies a protectible trade dress in the perception of purchasers and potential purchasers of cosmetics and other personal care products (hereinafter "the SMOOTH SPHERETM Trade Dress"). The SMOOTH SPHERETM Trade Dress is as shown in Exhibit B attached hereto and includes the overall appearance reflected in the designs of the SMOOTH SPHERETM Lip Balm Collection.

14. Kind Group's SMOOTH SPHERETM Trade Dress is nonfunctional and is widely recognized by the trade and the public, and has built up extensive goodwill and acquired secondary meaning among the relevant trade and public as a symbol identifying Kind Group as the source of origin of the SMOOTH SPHERETM Lip Balm Collection.

15. Upon information and belief, the SMOOTH SPHERETM Trade Dress serves primarily as a designator of origin of lip balms emanating from or sponsored or licensed by Kind Group.

16. Kind Group's promotional materials and website are organized and designed to enhance and encompass its trade dress rights. Kind Group's advertising of the SMOOTH SPHERETM Lip Balm Collection draws attention to the SMOOTH SPHERETM Trade Dress and encourages customers to associate the design features of the SMOOTH SPHERETM Lip Balm Collection with Kind Group and the "eosTM," and "eos evolution of smoothTM" brands.

17. Upon information and belief, Defendant Added Extras designs, markets, sources and distributes a variety of branded products, including ladies, teen and children's cosmetics, and personal care products, through a worldwide network of retail partnerships, at all levels of retail, including Wal-Mart, Target, K-Mart, CVS, Walgreen's and Kroger.

18. Upon information and belief, Defendant Added Extras designs, sources and distributes private label products for specialty-based retailers, such as Claire's, Limited Too, Charming Shops, and Hot Topic.

19. Upon information and belief, Defendant Added Extras has offered for sale, sold, and otherwise distributed in the United States, spherical lip balm products that embody the design claimed by the '939 patent, including but not limited to the AquafinaTM Hydrating Lip Balm Rollerball sold and marketed in association with Aquafina Skincare; Hello Kitty[®] spherical lip balm products sold and marketed under license from Sanrio Co., Ltd.; Lisa Frank[®] Rollerball Flavored Lip Balm products sold and marketed under license from Lisa Frank, Inc., and various spherical lip balms products bearing images of animals, dinosaurs, monsters, letters and icons, representative images of which are provided in Exhibit C.

20. Upon information and belief, Defendant is aware of the '939 patent.

21. Upon information and belief, Defendant is aware of lip balm designs created, sold and marketed by Plaintiff Kind Group that embody the designs protected and claimed by the '939 patent, including Kind Group's SMOOTH SPHERE™ Lip Balm Collection.

22. Kind Group has not licensed to Defendant, or otherwise authorized Defendant any rights, to use or practice the '939 patent.

23. Upon information and belief, Defendant Added Extras has offered for sale, sold and otherwise distributed in the United States, spherical lip balm products that embody Kind Group's SMOOTH SPHERE™ Trade Dress, including but not limited to the representative spherical lip balm products provided in Exhibit C.

24. Upon information and belief, Defendant is aware of the SMOOTH SPHERE™ Lip Balm Collection and the SMOOTH SPHERE™ Trade Dress embodied thereby, and introduced its spherical lip balm products after the SMOOTH SPHERE™ Lip Balm Collection was launched.

25. Upon information and belief, Defendant is aware of the commercial success and industry acclaim for Kind Group's SMOOTH SPHERE™ Lip Balm Collection. Upon further information and belief, Defendant intended to reap the benefit of such success and acclaim by offering its spherical lip balm products.

26. Kind Group has not licensed to Defendant, or otherwise authorized Defendant any rights, to use, offer for sale, sell, advertise, or promote the SMOOTH SPHERE™ Trade Dress, or to make any other use of such trade dress in the United States or elsewhere.

27. Defendant Added Extras' infringing spherical lip balm sphere product, and any promotional materials related thereto, have caused, and are likely to continue to cause,

confusion, mistake and/or deception as to the source of origin of the infringing spherical lip balm products in that the public, the trade and others are likely to believe that the infringing spherical lip balm products are provided by, sponsored by, approved by, licensed by, affiliated with or in some other way legitimately connected to Kind Group.

28. Defendant Added Extras' spherical lip balm products are advertised, promoted, and sold in the same channels of trade and are directed to some of the same customers as Kind Group's SMOOTH SPHERE™ Lip Balm Collection.

29. Kind Group has no control over the nature, quality or pricing of Added Extras' infringing spherical lip balm products and promotion thereof, or any other aspect of Defendant's business conduct with respect thereto, thereby creating a potential adverse effect on the goodwill created in the SMOOTH SPHERE™ Trade Dress.

30. Defendant is violating Kind Group's distinctive trade dress in its lip balm products and is diminishing the value of such products. Defendant's unauthorized use of the SMOOTH SPHERE™ Trade Dress is likely to erode the distinctiveness of the SMOOTH SPHERE™ Trade Dress.

31. Upon information and belief, Defendant willfully and intentionally violated the SMOOTH SPHERE™ Trade Dress with the deliberate intention of trading on the valuable goodwill and reputation established in the SMOOTH SPHERE™ Trade Dress.

32. Upon information and belief, unless restrained by this Court, Defendant will continue to willfully and intentionally use, without authority from Kind Group, the SMOOTH SPHERE™ Trade Dress in connection with its infringing spherical lip balm product designs.

**COUNT I
PATENT INFRINGEMENT**

33. Plaintiff Kind Group realleges and restates each and every allegation set forth in Paragraphs 1-32 inclusive, and incorporates them herein by reference.

34. Without the consent of Plaintiff Kind Group, Defendant has infringed the '939 patent by making, using, selling, offering for sale or importing into the United States certain infringing products covered by the claim of the '939 patent in this District and elsewhere in the United States, and will continue to do so unless enjoined by the Court.

35. Defendant's infringement of the '939 patent has irreparably damaged Plaintiff Kind Group in an amount that is unknown and cannot at the present time be ascertained, and will cause added injury and loss unless Defendant is enjoined by this Court.

36. Defendant's infringement of the '939 patent is knowing and willful.

**COUNT II
TRADE DRESS INFRINGEMENT AND FALSE DESIGNATION OF ORIGIN**

37. Plaintiff Kind Group realleges and restates each and every allegation set forth in Paragraphs 1-36 inclusive, and incorporates them herein by reference.

38. Defendant's unauthorized use of a trade dress for its infringing spherical lip balm products that is confusingly similar to Kind Group's SMOOTH SPHERETM Trade Dress constitutes trade dress infringement, false designation of origin, false representation and false description, all in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), to the substantial and irreparable injury of the public and of Plaintiff Kind Group, including its business reputation and goodwill.

39. Upon information and belief, by such wrongful acts, Defendant has caused, and unless restrained by the Court, will continue to cause serious irreparable injury and damage to

Plaintiff Kind Group, and to the goodwill associated with the distinctive SMOOTH SPHERE™ Trade Dress, including diversion of customers, lost sales, and lost profits.

40. Plaintiff Kind Group has no adequate remedy at law.

**COUNT III
UNFAIR COMPETITION AND UNLAWFUL FALSE ADVERTISING**

41. Plaintiff Kind Group realleges and restates each and every allegation set forth in Paragraphs 1-40 inclusive, and incorporates them herein by reference.

42. Defendant's aforementioned acts were, and continue to be, engaged in by Defendant in the conduct of trade and/or commerce.

43. Defendant's aforementioned acts were, and continue to be, unfair, unconscionable, and/or deceptive.

44. Defendant's aforementioned acts constitute unfair competition, false advertising, and unfair or deceptive acts or practices in violation of the New York Consumer Protection Act, N.Y. C.L.S. Gen. Bus. § 349 et seq.

45. Plaintiff Kind Group has been damaged by Defendant's aforementioned acts.

**COUNT IV
COMMON LAW UNFAIR COMPETITION**

46. Plaintiff Kind Group realleges and restates each and every allegation set forth in Paragraphs 1-45 inclusive, and incorporates them herein by reference.

47. Defendant's aforementioned acts constitute unfair competition under the common law.

48. Plaintiff has been damaged by Defendant's aforementioned acts.

Prayer for Relief

WHEREFORE, Plaintiff Kind Group demands judgment as follows:

1. That the Court declare that the '939 patent is valid and infringed by Defendant Added Extras.
2. That the Court preliminarily and permanently enjoin Defendant Added Extras, and anyone acting in concert with it, from infringing the '939 patent as provided in 35 U.S.C. § 283, and specifically barring Defendant, and anyone acting in concert with it, from making, using, selling, offering for sale or importing into the United States products that infringe the '939 patent.
3. That the Court award Plaintiff Kind Group damages, as provided in 35 U.S.C. §§ 284 and 289, in an amount to be proven at trial, resulting from the infringement of the '939 patent by Defendant Added Extras.
4. That the Court award Plaintiff Kind Group treble damages as provided in 35 U.S.C. § 284.
5. That the Court award Plaintiff Kind Group its costs in this action, together with reasonable attorneys' fees as provided in 35 U.S.C. § 285.
6. That the Court preliminarily and permanently enjoin and restrain Defendant Added Extras, and anyone acting in concert with them, pursuant to 15 U.S.C. §§ 1116 and 1125; and N.Y. C.L.S. Gen. Bus. §§ 349(h), 350-e(3) from:
 - (a) infringing Plaintiff Kind Group's SMOOTH SPHERE™ Trade Dress; and
 - (b) unfairly competing with Plaintiff Kind Group.
7. That Defendant Added Extras be ordered to account for and pay to Plaintiff Kind Group the actual damages suffered by Kind Group, including any profits derived from

Defendants' willful acts of infringement, false designation of origin, and unfair competition, together with interest.

8. That the Court order Defendant to deliver up and destroy all infringing products in its possession that contain Plaintiff Kind Group's SMOOTH SPHERE™ Trade Dress.

9. That the Court order Defendant to request that all retailers selling Defendant's infringing products containing Plaintiff Kind Group's SMOOTH SPHERE™ Trade Dress return those products to Defendant at Defendant's expense and requiring Defendant to destroy those products.

10. That the Court award Plaintiff Kind Group treble damages and prejudgment interest pursuant to 15 U.S.C. §§ 1117 and 1125.

11. That the Court award Plaintiff Kind Group its costs in this action, together with reasonable attorneys' fees, as provided in 15 U.S.C. § 1117(a), N.Y. C.L.S. Gen. Bus. §§ 349(h), 350-e(3) and/or any other applicable provision.

12. That Defendant be required to account for and deliver up to Plaintiff Kind Group, for impoundment during pendency of this action and for destruction thereafter, all spherical lip balm products infringing upon the SMOOTH SPHERE™ Trade Dress, pursuant to 15 U.S.C. §§ 1118 and 1125.

13. That Plaintiff Kind Group be awarded such other and further relief, general and special, at law or in equity, which this Court, in its discretion, may deem just and proper.

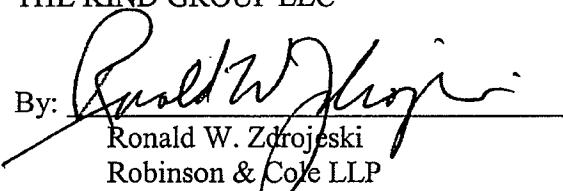
Jury Demand

Plaintiff Kind Group hereby demands a jury trial

Respectfully submitted,

THE KIND GROUP LLC

By:


Ronald W. Zdrojeski
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103
Telephone: (860) 275-8200
Facsimile: (860) 275-8299

Attorney for Plaintiff

Of counsel:
Tucker Griffith, Esq.
McCormick, Paulding & Huber LLP
185 Asylum Street
CityPlace II
Hartford, CT 06103
Telephone: (860) 549-5290
Facsimile: (860) 527-0464

Exhibit A



US00D644939S

(12) **United States Design Patent** (10) Patent No.: **US D644,939 S**
 Teller (45) Date of Patent: **** *Sep. 13, 2011**

(54) **SPHERICALLY-SHAPED LIP BALM**
 (75) Inventor: **Jonathan Teller, New York, NY (US)**
 (73) Assignee: **The Kind Group, New York, NY (US)**
 (**) Term: **14 Years**
 (21) Appl. No.: **29/351,278**
 (22) Filed: **Dec. 3, 2009**
 (51) **LOC (9) Cl.** 09-01
 (52) **U.S. Cl.** D9/726
 (58) **Field of Classification Search** D9/500,
 D9/502-504, 519, 529, 549, 557, 558, 682,
 D9/686-691, 694, 723-729, 900; 220/660-662,
 220/669, 675, 4.24, 4.25; 206/219, 220,
 206/221, 216, 217, 223; 215/379-383; D28/76,
 D28/78, 91, 91.1; D24/222-224
 See application file for complete search history.

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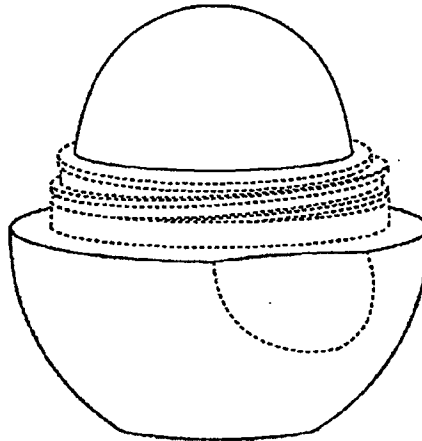
Primary Examiner — Thomas Johannes
 (74) Attorney, Agent, or Firm — McCormick, Paulding & Huber LLP

(57) **CLAIM**
 I claim the ornamental design for the spherically-shaped lip balm, as shown and described.

DESCRIPTION

FIG. 1 is a top perspective view of a spherically-shaped lip balm showing my new design;
 FIG. 2 is a top plan view thereof;
 FIG. 3 is a front elevation view thereof;
 FIG. 4 is a rear elevation view thereof; and,
 FIG. 5 is a side elevation view thereof.
 The broken line portion of the figure drawings is included to show unclaimed subject matter only and forms no part of the claimed design.

1 Claim, 3 Drawing Sheets



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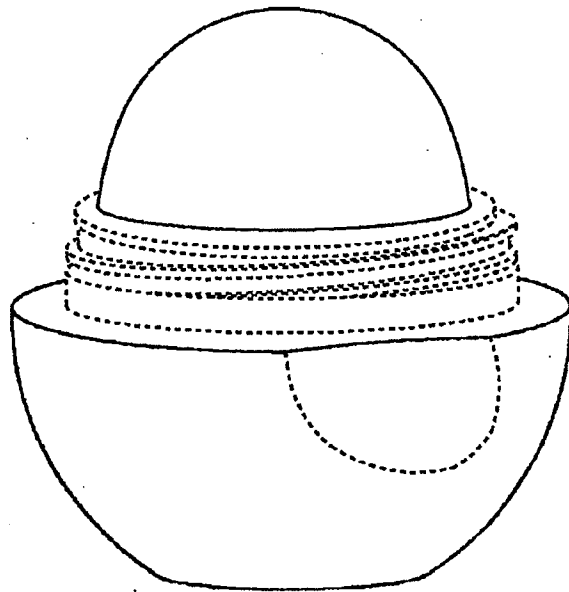


FIG. 1

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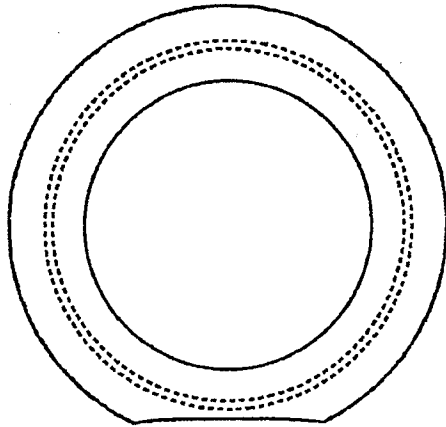


FIG. 2

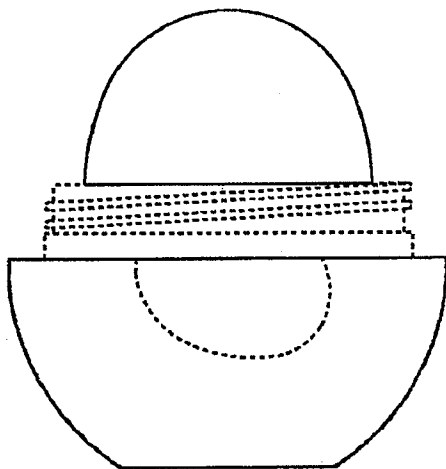


FIG. 3

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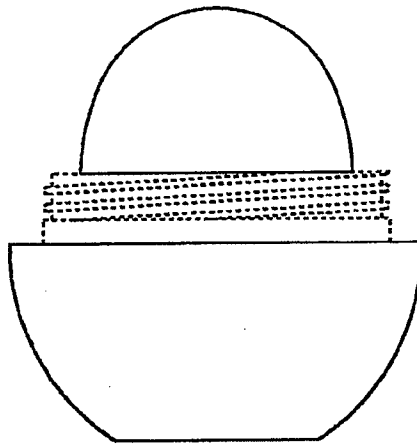


FIG. 4

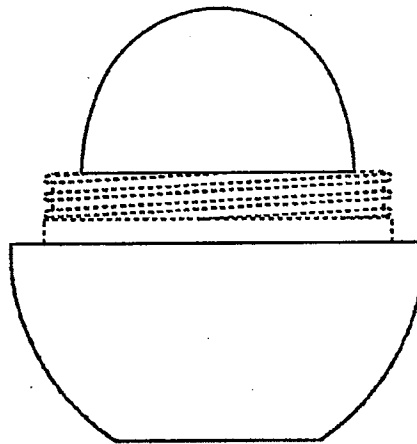


FIG. 5

Exhibit B

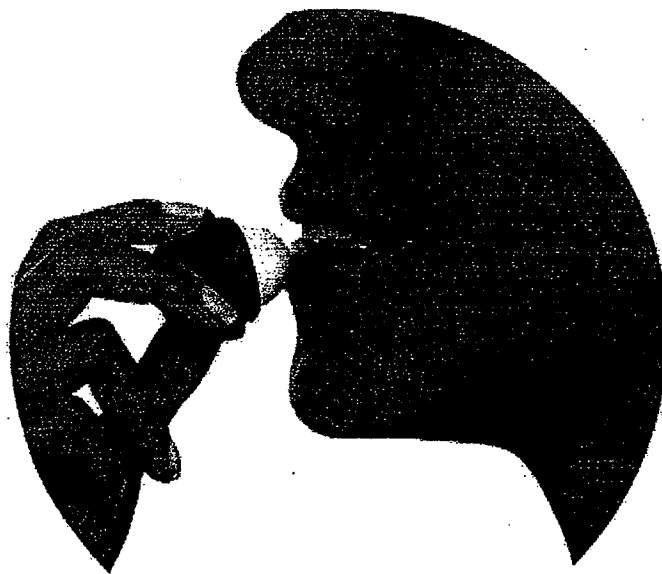
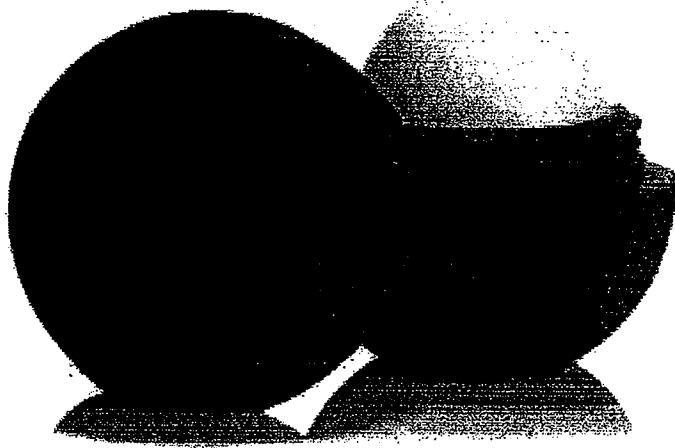
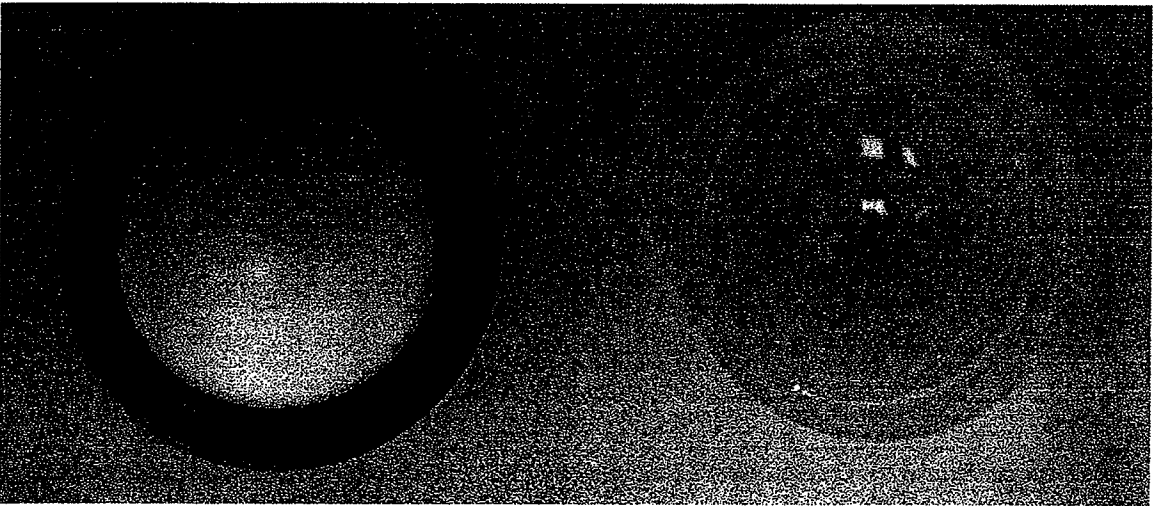
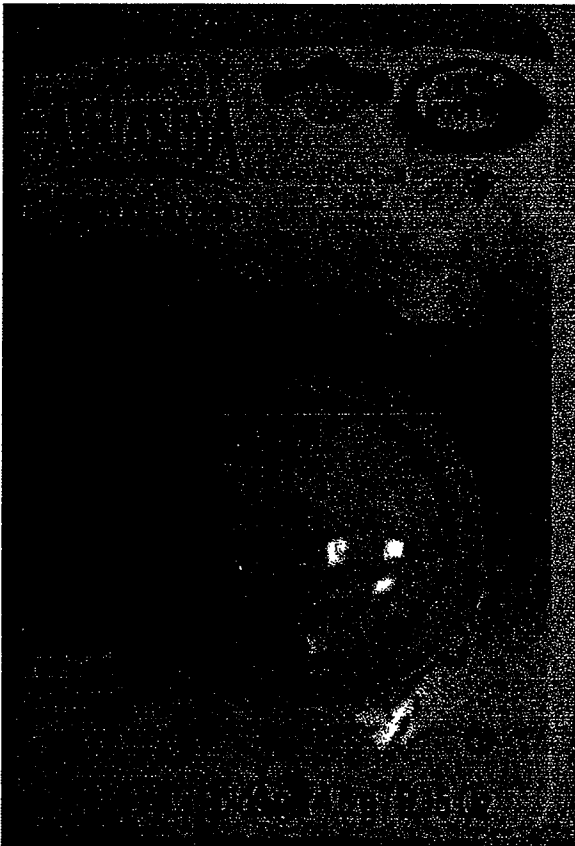
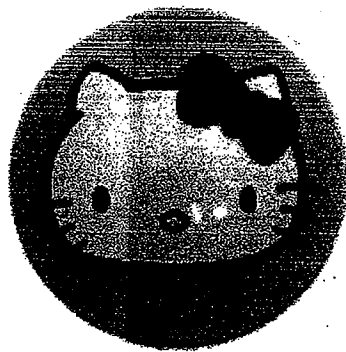
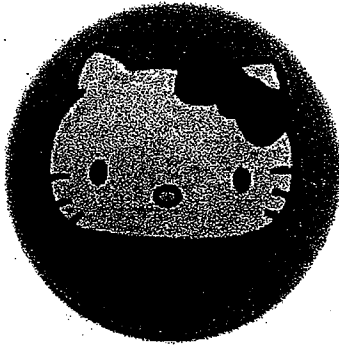
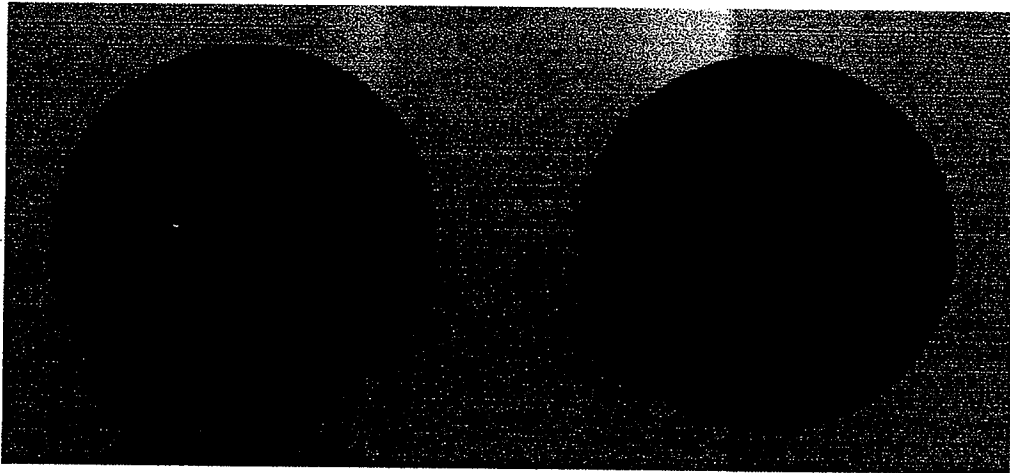
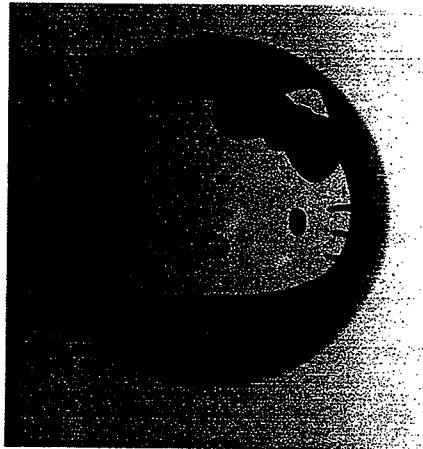
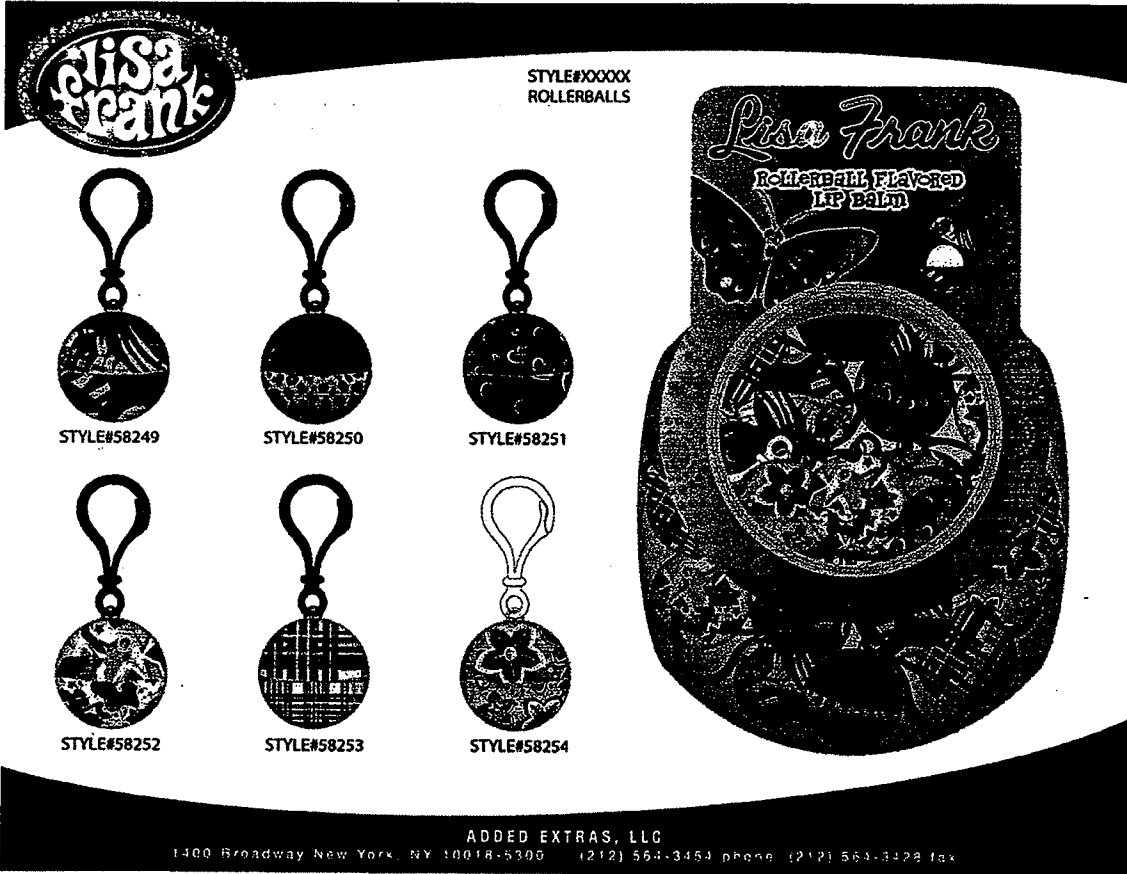


Exhibit C







Lisa Frank

STYLE#X000X
ROLLERBALLS

STYLE#58249

STYLE#58250

STYLE#58251

STYLE#58252

STYLE#58253

STYLE#58254

Lisa Frank
Rollerball Flavored
LIP BALM

ADDED EXTRAS, LLC
1400 Broadway New York, NY 10018-3300 (212) 564-3454 phone (212) 564-3428 fax

The advertisement features a collection of Lisa Frank rollerballs. On the left, six individual rollerballs are displayed in two rows of three. Each rollerball has a unique, colorful design: the top row includes a landscape with a sun and mountains, a solid dark color with a light pattern, and a dark color with a light pattern; the bottom row includes a landscape with a sun and mountains, a grid pattern, and a floral design. To the right of these is a large, detailed image of a rollerball in its packaging. The packaging is dark with a light-colored rollerball visible through a circular window. The text 'Lisa Frank' is written in a cursive font at the top, and 'Rollerball Flavored LIP BALM' is written below it. The background of the advertisement is white with a black border at the top and bottom.

