

ESTTA Tracking number: **ESTTA530901**

Filing date: **04/07/2013**

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

Proceeding	92048777
Party	Defendant Michael Calmese
Correspondence Address	MICHAEL CALMESE 3046 N 32ND STREET, UNIT 321 PHOENIX, AZ 85018-6842 UNITED STATES proveit@excite.com, usaproveit.com, usaproveit@yahoo.com
Submission	Opposition/Response to Motion
Filer's Name	s/Michael Calmese/s
Filer's e-mail	usaproveit@yahoo.com
Signature	s/Michael Calmese/s
Date	04/07/2013
Attachments	adidas Response TTAB Motion to Lift Suspension 1.pdf (5 pages)(270931 bytes)

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

adidas America, Inc., a Delaware Corporation,) Cancellation No.: 92048777
Petitioner,) Registration No.: 2,202,454
-against-) Registration Date: 11/10/98
Michael D. Calmese, a Resident of Arizona) Mark: PROVE IT!
Registrant.)
_____)

**REGISTRANT’S RESPONSE TO PETITIONER’S MOTION TO LIFT THE
SUSPENSION IN PETITIONER’S NOTICE OF STATUS**

Pursuant to the Board’s July 2, 2008 Order, August 21, 2009 Order, September 22, 2010 Order, February 4, 2011 Order, March 1, 2012 Order and Trademark Rule § 2.117, Registrant Michael Calmese (“Calmese”) respectfully files his response to Petitioner adidas America Inc’s., (“adidas”), motion to lift the suspension embedded in adidas America Inc., (“adidas”) Notice Of Status filed on April 4, 2013, and requests that the Board maintain the suspension of this cancellation proceeding. As grounds for this request, Calmese states as follows:

First, as this Board has already clearly stated, “Inasmuch as the civil action which occasioned the original suspension of this proceeding is still pending, on

appeal, consideration of the outstanding motions (i.e., to strike, for default, for sanctions, and for summary judgment based on the district court determination) is suspended. The Board further stated, “Accordingly, proceedings herein remain suspended pending final determination (including all appeals on all issues) of the civil action. See Trademark Rule 2.117(a).” Secondly, on November 28, 2012, Registrant Calmese filed a Petition for Panel Rehearing or Rehearing En banc and Judicial Disqualification Under 28 U.S.C. § 455. Accordingly, Mr. Calmese respectfully requests that the Board maintain the suspension of this cancellation proceeding pending disposition of the appellate proceedings, on the basis that the civil action which occasioned the suspension of this proceeding is still pending and has not come to a final determination. Also see *Softbelly’s, Inc. v. Ty, Inc.*, 2002 TTAB LEXIS 529, *6 (TTAB Aug. 13, 2002)(“Clearly in this case, post-trial motions are pending and opposer has indicated its intention to appeal and unfavorable ruling to the U.S. Court of Appeals for the Seventh Circuit. Therefore, for Board purposes, the district litigation has not finally determined the merits of the case ... Proceedings herein remain suspended pending final determination of the parties’ civil action”).

As the Board can see in this case, Calmese’s appeal is still pending with some major issues that may have an enormous effect on the outcome of these proceedings if the Panel Rehearing or Rehearing En Banc is granted and favors

Calnese. Furthermore, as an attorney pro se litigant, it is my understanding that the case cited by adidas to lift this suspension, *Martin beverage Co., Inc, v. Colita Beverage Corp.*, is not relevant to this matter because the suspension for this matter has already been granted unlike the above case adidas refers to. In any event, the Board has already suspended this proceeding accordingly. With all due respect, Calnese contends that while his appeal is still pending with outstanding issues, adidas' motion to lift the suspension should be denied in accordance with the Board's repeated and consistent Orders to suspend this matter pending the outcome of all appeals on all issues.

Again, as stated earlier by this Honorable Board, the proceedings herein should remain suspended pending final determination (including all appeals on all issues) of the civil action. Mr. Calnese contends all appeals on all issues should include Registrant Calnese's actual appeal and issues also. Again, see Trademark Rule 2.117(a).

In closing, because adidas' Petition to Cancel clearly stated in paragraph 12, and I quote, "Upon information and belief, Registrant has committed fraud in procuring Registration No. 2,202,454 for PROVE IT!, **thus** making Registrant's registration of PROVE IT! *void ab initio*." Therefore, it is my belief as an attorney pro se litigant that there technically cannot be any *void ab initio* because fraud was not proven by adidas at trial and adidas lost their appeal without the

contention of fraud, **thus** making Petitioner's argument, as it was stated in adidas' initial Petition To Cancel for cancellation, moot. Now that adidas has lost the district court trial to cancel Mr. Calmese's trademark and the subsequent appeal that followed, the only appeal with issues left on the table surrounds Calmese's appeal, warranting that the suspension not be lifted as disingenuously requested by adidas' legal counsel. As Mr. Calmese has simply restated almost exactly what adidas basically stated in their January 12, 2011 filing with the Board entitled Petitioner's Response To Registrant's Notice Of Disposition Of The Civil Action that ironically motioned this same Board to UPHOLD the suspension. Likewise, as previously stated by adidas and now by Calmese, the suspension should not be lifted and the Board, with all due respect, should maintain the suspension of this cancellation proceeding. Calmese further contends, adidas should be sanctioned for filing this frivolous and bothersome motion, as Calmese's pending litigation and pending allegations charge adidas with crimes and violations that subsequently carry a heavy penalty. Again, see 9th Circuit Appeal Case No. 11-35053 currently pending before the Honorable 9th Circuit Court of Appeals.

Dated April 7, 2013

Respectfully submitted,

s/Michael Calmese
3046 N. 32nd Street APT 321
Phoenix, Arizona 85018
(602) 954-9518

CERTIFICATE O SERVICE

I HEREBY CERTIFY that the foregoing RESPONSE to Petitioner's NOTICE OF STATUS was served upon FRIEDLAND AND VINING P.A. by delivering a true and correct copy of the same via U.S. Mail on April 8,2013 as follows:

FRIEDLAND AND VINING P.A.

1500 San Remo Ave., Ste. 200,

Coral Gables, FL 33146