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

Proceeding	92048777
Party	Defendant Michael Calmese, and Laura Ann Fisher
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Submission	Other Motions/Papers
Filer's Name	Laura Fisher
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Signature	s/Laura Fisher/s
Date	06/22/2013
Attachments	MOTION to dismiss and FOR SANCTIONS DUE TO ADIDAS 12.pdf(208534 bytes )

**IN THE UNITED STATES PATENT AND 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 & Laura Ann Fisher,	) Mark: PROVE IT!
Residents of Arizona,	)
<u>Respondents'</u>	)

**MOTION TO DISMISS LAURA FISHER AS A PARTY DEFENDANT  
PURSUANT TO THE MAY 3, 2013 ASSIGNMENT AND MOTION FOR  
SANCTIONS**

Now comes Michael Calmese and Laura Fisher (“Respondents’ ”), who respectfully submits their motion to dismiss Laura Ann Fisher (“Ms. Fisher”) as a party defendant and a motion for sanctions.

**I. MOTION TO DISMISS MS. LAURA ANN FISHER AS A  
PARTY DEFENDANT**

**LOCAL RULE 7.1 CERTIFICATION**

Pursuant to LR 7.1(a)(1) and Fed. R. Civ. P. 37(a)(1), Respondents’ certify that in good faith Respondents’ have attempted to confer with petitioner adidas America

Inc., in an effort to resolve the issues raised by this motion, but that the parties have been unable to do so.

## **ARGUMENT**

### **A. Laura Fisher Is No Longer A Owner Of The PROVE IT! Registration**

In view of Laura Fisher's May 3, 2013 Assignment, Reel/Frame 5020/0905 and Michael Calmese's statement in (Doc. 43), the Respondents' collectively and respectfully request the Board to dismiss Ms. Fisher as a party defendant to this Cancellation Proceeding immediately based on the record before this Board, accordingly. See (Doc. 43) of these proceedings.

### **B. Adidas Should Be Ordered Not To Send Ms. Fisher Anymore Correspondence Concerning This Matter**

Furthermore, with all due respect, Michael Calmese and Laura Fisher respectfully request that this Court issue an order compelling adidas to cease and desist from sending anymore legal documents to individuals, investors, potential retailers or anyone of the such, including Ms. Fisher, who may want to do business with Michael Calmese ("Mr. Calmese"), and who are not named in this suspended cancellation proceeding or the pending civil litigation that occasioned this dubious proceeding.

## **II. MOTION FOR SANCTIONS**

### **LOCAL RULE 7.1 CERTIFICATION**

Again, pursuant to LR 7.1(a)(1) and Fed. R. Civ. P. 37(a)(1), Respondents' Michael D. Calmese and Laura Fisher certify that on May 9, 2013 and May 20, 2013 Respondents' have attempted in good faith to confer with petitioner adidas America Inc., ("adidas") in an effort to resolve the issues raised by this motion, but that the parties have been unable to do so.

### **INTRODUCTION**

This case involves allegations that Petitioner adidas America Inc., ("adidas"), engaged in unfair competition or business tactics designed to injure Respondent Mr. Calmese's business. Adidas crossed the line between legitimate activity and tortious conduct. On April 6, 2013, adidas intentionally interfered with Laura Fisher and Mr. Calmese's contractual business relationship. As a result of adidas' interference, adidas successfully broke up the relationship between Mr. Calmese and Laura Fisher ("Ms. Fisher"), causing financial loss to Mr. Calmese in the amount of \$9,106.50. *Id.* The April 6, 2013 letter illustrates the purpose of tortious interference laws. It appears that adidas' primary purpose in initiating such actions is to attempt to harass and or intimidate Mr. Calmese and his investors after adidas

lost the November 2, 2010 trial and the Ninth Circuit appeal that followed on November 21, 2012. Based on adidas' losing history in this matter and adidas' threat of future litigation, adidas is likely to continue their abuse of the legal process unless protective measures are taken by sanctioning adidas and declaring adidas guilty of tortious interference. As the Board should note, adidas only prevailed in the civil litigation where Mr. Calmese as the defendant, was unknowingly being represented by adidas' own former employee. *Id.* The Board should further note, that on June 20, 2013, Mr. Calmese filed a malpractice lawsuit against adidas' former employee Anthony McNamer (aka) Anthony Davis. Mr. Calmese will file an official copy of his malpractice complaint as soon as the Oregon District Court makes one available. As Mr. Calmese's malpractice lawsuit may further warrant that this cancellation proceeding stay suspended pending a final ruling on all of the issues surrounding the adidas America Inc., v. Michael D. Calmese civil litigation.

### **RELEVANT FACTS**

On April 6, 2013, adidas sent Laura Fisher legal documents concerning this suspended cancellation proceeding. *Id.* Prior to April 6, 2013, Laura Fisher was not named in this cancellation proceeding. On April 29, 2013, the Board ordered that Laura Fisher be joined to this suspended cancellation proceeding. On May 3, 2013, Laura Fisher, voided her contract with Mr. Calmese as a direct result of

adidas' harassing and intimidating April 6, 2013 legal letter. It is clear that adidas had NO legal authority or business sending Mr. Calmese's investor legal paper work concerning this matter on April 6, 2012, because on April 6, 2013 Mr. Calmese was knowingly the only party named in this suspended cancellation proceeding. Subsequently, the Board has on record all of the assignments between Ms. Fisher and Mr. Calmese and the April 6, 2013 envelope proving adidas sent legal mail to a person not named in this cancellation proceeding . See Cancellation Proceeding No. 92048777, (Docs. 40, 41 and 43) and USPTO Assignments #4 Reel / Frame 5000/0969 filed April 8, 2013 and Assignment #5 Reel / Frame 5020 / 0905 filed May 3, 2013. Calmese also relies on the May 8, 2013 Communication on record before the Board. See (Doc. #43).

## **ARGUMENT**

### **A. Legal Standard**

A viable claim for tortious interference with contract or prospective economic advantage generally requires a showing of (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. While

the interferor's knowledge of the business relationship and his intent to disturb it are requisite elements, malice is not.

When the claim is for interference with prospective contractual relations it will be necessary to prove the conduct was for an "improper purpose" or that "improper methods" were employed in the course of the interference. Bribery, fraud, misrepresentation, deceit, and duress are all examples of improper methods upon which a tortious interference claim may be based. Likewise, the misrepresentation made by adidas that Laura Fisher was named in this law suit on April 6, 2013 was deceitful and stressful and out of order damaging both Ms. Fisher and Mr. Calmese.

### **B. Undisputed Facts**

1. On April 6, 2013 Laura Fisher was not named in this suspended cancellation proceeding.
2. On April 6, 2013, adidas sent Laura Fisher legal documents regarding this suspended cancellation proceeding.
3. On April 6, 2013, adidas had full knowledge of Laura Fisher's assignment / contract with the USPTO regarding Mr. Calmese's trademark.
4. On April 6, 201 adidas had full knowledge that Laura Fisher was not named in this suspended cancellation proceeding.

5. On April 6, 2013, this cancellation proceeding was suspended and has been suspended for more than 2 years.
6. On April 6, 2013, adidas violated Mr. Calmese's rights by causing Laura Fisher to forfeit her ownership in Mr. Calmese's business.
7. On April 8, 2013, Laura Fisher expressed that she was stressed and in fear of being attacked by adidas as a direct result of the adidas April 6, 2013 letter.
8. On May 3, 2013, Laura Fisher assigned her 50% ownership in PROVE IT!® back to Mr. Calmese as a direct result of unrightfully being attacked and called a fraud by adidas.
9. On May 3, 2013, Calmese was damaged financially by adidas' April 6, 2013 actions in the amount of \$9,106.50.
10. On April 6, 2013, adidas violated Mr. Calmese's rights by sending a copy of legal paper work concerning this suspended cancellation proceeding to a third party not named in these proceedings.
11. Prior to violating Calmese's rights, adidas lost the November 2, 2010 trial to cancel Mr. Calmese's trademark were Laura Fisher was not named as a party.
12. On November 21, 2012, adidas even lost the appeal in the Ninth Circuit Court of Appeals that followed the 2010 trial. And again, Laura Fisher was not named as a party in the civil litigation.

13. Adidas is liable for the lost revenue Laura Fisher was going to invest into Mr. Calmese's business.
14. Laura Fisher wanted to invest into Mr. Calmese's business to make money above and beyond the monies already invested into Calmese's business. 0
15. Adidas has ruined a great opportunity for Mr. Calmese to get his business back on track.
16. Adidas is guilty of tortious interference as a direct result of the April 6, 2013 letter mailed to Laura Fisher.
17. Adidas' April 6, 2013 conduct used improper methods.
18. Indeed, the misrepresentation that Laura Fisher was named in this law suit on April 6, 2013 was deceitful and stressful and was out of order to Ms. Fisher and Mr. Calmese.
19. We do not know how many potential investors and or retailers' adidas has poisoned with their unethical and illegal tactics displayed on April 6, 2013.

**C. Sanctions Would Be Adequate to Protect Mr. Calmese, The Board and The U.S. Supreme Court**

As indicated above, adidas lost the trial in the civil litigation and the appeal that followed and have been mandated. Aside from the relief Mr. Calmese is seeking from adidas' tortious acts warranting adidas be sanctioned in the amount of

\$9,106.50, there may only be one other measure that might be employed to protect Mr. Calmese and the Board from rehearing this case that was already heard in the Oregon District Court and the Ninth Circuit Court of Appeals. *Id.* Additionally, Calmese contends the Board should issue the ultimate sanction and order adidas to not only pay Mr. Calmese back the lost May 3, 2013 revenue from Laura Fisher, but that the Board also issue an order preventing adidas from collecting any attorney fees or cost as a direct result of this tortious interference and that adidas be liable for any outstanding attorney fees or cost that are connected to or rely on this civil litigation involving adidas and Mr. Calmese. Also see Case No. 12-15915. The Board should note, Mr. Calmese file a motion to consolidate Case No. 12-15915 with this matter but Mr. Calmese's motion to consolidate was denied while this matter Case No. 35053 and Case No. 12-15915 were still both assigned to the same panel in the Ninth Circuit Court of Appeals. And both cases will be pending before the United States Supreme Court, but not filed as of yet.

### **CONCLUSION.**

For the reasons set forth above, the Board should grant Ms. Fisher's and Mr. Calmese's motion to dismiss Fisher as a party defendant and the parties motion for sanctions in the amount of \$9,106.50 and that the amount be trebled. Furthermore, Mr. Calmese and Ms. Fisher respectfully request an order declaring that on April 6, 2013 adidas committed tortious interference warranting this Board to impose the

ultimate sanction and order adidas to not only pay Mr. Calmese back the lost May 3, 2013 revenue from Laura Fisher, but that the Board order should prevent adidas from collecting any attorney fees or cost in the civil litigation that occasioned this matter. In addition, as a direct result of adidas' tortious interference, Mr. Calmese respectfully request that adidas be liable for any outstanding attorney fees against Mr. Calmese that are connected to or rely on this civil litigation involving adidas and Mr. Calmese. Also see Case No. 12-15915.

### **VERIFICATION**

I, Michael Calmese, Respondent in the above entitled action, hereby verify under penalty of perjury, under the laws of the **United States of America and the State of Oregon**, that the above statements in this motion are true and correct, according to the best of my current information, knowledge, and belief, so help me God.

I, Laura Fisher, Respondent in the above entitled action, hereby verify under penalty of perjury, under the laws of the **United States of America and the State of Oregon**, that the above statements in this motion are true and correct, according to the best of my current information, knowledge, and belief, so help me God.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup>, day of June 2013.

**s/Michael Calmese/s**

**and**

**s/Laura Fisher/s**

Michael Calmese & Laura Fisher Respondents'

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**CERTIFICATE O SERVICE**

**I HEREBY CERTIFY** that the foregoing MOTION TO DISMISS LAURA FISHER AS A PARTY AND MOTION FOR SANCTIONS was served upon FRIEDLAND AND VINING P.A and PERKINS COIE by delivering a true and correct copy of the same via U.S. Mail on June 22, 2013 2013 as follows:

FRIEDLAND AND VINING P.A.

David K. Friedland

1500 San Remo Ave., Ste. 200,

Coral Gables, FL 33146

And

PERKINS COIE

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