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Filing date: **04/03/2008**

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

Proceeding	92048777
Party	Plaintiff adidas America, Inc.
Correspondence Address	David K. Friedland Lott & Friedland, P.A. 355 Alhambra Circle, Suite 1100 Coral Gables, FL 33134 UNITED STATES dkfriedland@lfiplaw.com, jrich@lfiplaw.com
Submission	Motion for Default Judgment
Filer's Name	Jaime S. Rich
Filer's e-mail	jrich@lfiplaw.com, kruiz@lfiplaw.com, dkfriedland@lfiplaw.com
Signature	/Jaime S. Rich/
Date	04/03/2008
Attachments	Petitioner's Motion for Entry of Default Judgment.pdf (4 pages)(807420 bytes) Exhibit A-C.pdf (7 pages)(1195251 bytes) Exhibit D-G.pdf (11 pages)(1868579 bytes)

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

adidas America, Inc., a Delaware
corporation,
Petitioner,

v.

Michael D. Calmese, a resident of
Arizona,
Registrant

Cancellation No.: 92048777
Registration No.: 2,202,454
Registration Date: November 10, 1998
Mark: **PROVE IT!**

**PETITIONER'S MOTION FOR ENTRY OF DEFAULT JUDGMENT, OR
ALTERNATIVELY, FOR ORDER TO SHOW CAUSE**

Pursuant to Fed. R. Civ. P. 37(b)(2) and 37 C.F.R. §2.120 (g), Petitioner, adidas America, Inc. ("Petitioner"), respectfully moves the Board for entry of a default judgment against Registrant, Michael D. Calmese ("Registrant"), or in the alternative, an order requiring Registrant to appear and show cause why he should not be sanctioned for failure to participate in good faith in the required discovery conference.

As grounds for this Motion, Petitioner alleges as follows:

1. On January 23, 2008, the Board set the deadline for the parties to participate in the discovery conference as April 2, 2008.
2. On March 7, 2008, Registrant sent undersigned counsel an email indicating that he had spoken to and retained Attorney Jacqueline Tadros in connection with this proceeding. A true and correct copy of Registrant's email dated March 7, 2008 is attached hereto as Exhibit A. However, when undersigned counsel spoke with Ms. Tadros on March 7, 2008, Ms. Tadros confirmed that Registrant had not retained her as legal counsel.

3. On March 9, 2008, Registrant sent undersigned counsel an email directing undersigned counsel to “*not contact [him] with anything else other than settlement issues.*” A true and correct copy of Registrant’s email dated March 9, 2008 is attached hereto as Exhibit B.

4. On March 18, 2008, despite Registrant’s March 9 instructions, undersigned counsel sent Registrant an email to arrange the required discovery conference. A true and correct copy of undersigned counsel’s email dated March 18, 2008 is attached hereto as Exhibit C. Registrant did not respond with any request made in the email.

5. On March 20, 2008, undersigned counsel attempted to reach Registrant by telephone and left a message requesting Registrant to contact Petitioner’s counsel regarding the discovery conference. Registrant did not respond or contact undersigned counsel.

6. On March 26, 2008, undersigned counsel sent Registrant a second email to arrange the required discovery conference. A true and correct copy of undersigned counsel’s email dated March 26, 2008 is attached hereto as Exhibit D.

7. On March 27, 2008, Registrant responded to undersigned counsel’s March 26, 2008 email, indicating that Registrant had retained legal counsel and his attorney would contact undersigned counsel. A true and correct copy of Registrant’s email dated March 27, 2008 is attached hereto as Exhibit E.

8. Subsequent to Registrant’s March 27, 2008, undersigned counsel requested Registrant provide the identity and contact information for his attorney. A true

and correct copy of undersigned counsel's email dated March 27, 2008 is attached hereto as Exhibit F.

9. Registrant later identified Attorney William Mansker, who spoke with undersigned counsel on April 1, 2008 and confirmed that he did not represent Registrant in connection with this pending matter.

10. On April 2, 2008, undersigned counsel sent Registrant a third email to arrange the required discovery conference. A true and correct copy of undersigned counsel's email dated April 2, 2008 is attached hereto as Exhibit G. Registrant responded by requesting that undersigned counsel contact him by telephone.

11. Immediately upon receiving Registrant's April 2 email, undersigned counsel attempted to reach Registrant by telephone and left Registrant a voicemail regarding the required discovery conference. Registrant did not respond or contact undersigned counsel.

12. As of the date of this filing, Registrant has refused to participate in the required discovery conference by not taking or returning undersigned counsel's telephone calls and directing undersigned counsel to at least two (2) attorneys who have advised they do not represent Registrant.

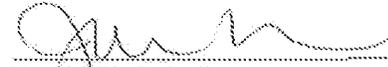
13. Consequently, Registrant has failed to comply with the Board's Order of January 23, 2008. As a result, Petitioner respectfully moves the Board for entry of a default judgment against Registrant as the disobedient party, as provided under Rule 37(b)(2). Alternatively, Petitioner respectfully moves the Board to order Registrant to

appear and show cause why he should not be sanctioned for failure to participate in good faith in the required discovery conference.

Date: April 3, 2008

Respectfully submitted,

LOTT & FRIEDLAND, P.A.



David K. Friedland
Jaime S. Rich
355 Alhambra Circle
Suite 1100 (zip code: 33134)
Post Office Drawer 141098
Coral Gables, Florida 33114-1098
(305) 448-7089 telephone
(305) 446-6191 facsimile
dkfriedland@lfiplaw.com
jrich@lfiplaw.com

Attorneys for Petitioner adidas America, Inc.

Our File 01153-1-8820

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing **PETITIONER'S MOTION FOR ENTRY OF DEFAULT JUDGMENT, OR ALTERNATIVELY, FOR ORDER TO SHOW CAUSE** was served upon the Registrant by delivering true and correct copies of same to Registrant via Federal Express on April 3, 2008 as follows:

Michael D. Calmese
14666 N. 90th Lane
Peoria, AZ 85381

EXHIBIT A

Jaime Rich

From: David Friedland
Sent: Saturday, March 08, 2008 6:32 AM
To: 'proveit@excite.com'; David Friedland
Cc: 'Feldman, Stephen (Perkins Coie)'; 'Jacqueline Tadros'
Subject: RE: Adidas v. Michael Calmese

Rule 408, Fed.R.E., Communication

Mr. Calmese -

The only frivolous element of this dispute is your claim that my client should pay you a cent. Nothing you have suggested or threatened since December, when you re-raised your claims after 7 months of dead silence in response to our letter sent to your then-attorney in June, has changed my client's position on this matter. When you are ready to drop your claims, once and for all, our client may similarly be persuaded to withdraw its challenge to your invalid and fraudulent trademark registration.

We have indeed been in contact with the Kenyon & Kenyon firm regarding your dispute with its client. As I previously mentioned to you, the attorneys are curious to learn how the terms of your confidential settlement with their client were made public, including testimony from a third party that you bragged of receiving a \$75,000 payment from them. Noting that all reference to the Eastbay matter has suddenly disappeared from your web site, I assume that they have been in touch with you or that my prior reference to their concerns helped you realize what you had done.

Is Ms. Tadros now your counsel? I have copied her on this correspondence so that you or she may advise me if she is representing you, in which case all communications should be strictly between the attorneys. I previously informed you, when you mentioned you were hiring an attorney to defend you in the Oregon action, that if you have counsel, I am required to communicate with you through your counsel unless instructed otherwise by your counsel. Thus, if Ms. Tadros is representing you, I would ask that you not email Mr. Feldman or me directly but instead have Ms. Tadros do so.

Regards,

David K. Friedland, Esq.
Lott & Friedland, P.A.
355 Alhambra Circle, Suite 1100
Coral Gables, Florida 33134
(305) 448-7089 office
(786) 258-4619 cellular
(305) 446-6191 telecopier
dkfriedland@lfiplaw.com

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-----Original Message-----

From: PROVE IT [mailto:proveit@excite.com]
Sent: Friday, March 07, 2008 11:05 AM
To: David Friedland
Subject: RE: Adidas v. Michael Calmese

Mr. Friedland:

I have confirmed you have my formal answers to your petition and declaratory suit. I am preparing to file a second answer and motion to your declaratory suit in Oregon, but before I take time away from what I should be doing, to address your frivolous suit which includes having the venue changed, I would again like to perhaps talk about settling this matter before I take certain steps that will not allow me to deal with you again on this level.

I have added some important material and information on my website in hopes you will review it prior to adding it to your claimed archived versions of my internet business and/or catalogs.

(www.trueologofan.com and/or www.proveitsportswear.com)

Perhaps you should consult with the other huge IP firm I dealt with concerning their IDENTICAL declaratory suit filed against me in a New York District Court. KENYON & KENYON in New York and STEPHEN FELMAN PERKINS COIE in Oregon are some of the largest if not the largest firms in the country that deal with these types of matters. I get the feeling that Stephen Feldman has retained you in this matter because of your aggressive approach and background. After speaking with Ms. Jacqueline Tadros, Esq., who has dealt with you in the past, I now have some insight as to who you are and how you operate. I am sure Stephen Feldman will be alot like Kenyon & Kenyon. I would like to forgo all of THAT for a simple and reasonable settlement.

Currently, I am interested in talking settlement. If settlement is something you are also interested in then by all means please give me a call and let's put this matter to rest! If not, then again, so be it...

Regards,
Michael Calmese
proveit@excite.com

EXHIBIT B

March 9, 2008

ADIDAS v. PROVE IT!®

David Friedland:

I have carefully considered all the points you make and I remain satisfied ADIDAS has infringed my rights in PROVE IT! As far as the claimed ample evidence you claim to have that supports your claims, I am confident it is not any better than the ample evidence the well-respected KENYON & KENYON New York firm claimed to have had back in 2005. And I must point out that in the EASTBAY INC. v. MICHAEL CALMESE Declaratory Case, it was settled in my favor and they did not even put my trademark on clothing, hang tags or receipts as Adidas and Dick's Sporting Goods have done. NOW somehow you believe you have a better chance in an identical situation. Have you ever heard of reverse-confusion?

Even though I am not an attorney I recognize that your claim is "bogus" and/or "frivolous". I have concluded further communication between us is not likely to prove productive unless you are willing to forward me the assessment of the offending product supported by a warranted statement that was promised to me by ADIDAS back in April and May of 2007. *Therefore, do not contact me with anything else other than settlement issues.* Notwithstanding, the long awaited March, April, May and June 2007 requested assessment and warranted statement, I would certainly entertain the possibility of settlement just as I did in the identical EASTBAY INC., v. MICHAEL CALMESE case. I request you not take any failure on my part to respond to further communication from you, not required by law, as any change in my position. As you are probably aware I am preparing a motion to move the venue from Oregon to Arizona's District Court even though I have already filed my Answer.

If you are not interested in settlement talks then I await receipt of your formal answer to my Counterclaim and Third Party Defendant Dick's Sporting Goods answer. I am sure you will be up to speed on all of these issues by the end of next week!

It's Sunday, Suns vs. Spurs time to PROVE IT! In Cleveland they wear NIKE t-shirts emblazed with "WITNESS" and in Phoenix we have been wearing my t-shirts emblazed with "PROVE IT!®" for the past 13 years....This could have been a very good start for us if your client had done the proper legal research prior to utilizing my trademark to sale clothing and then filing suit on me. (SEE attached Phoenix Suns Team Shop Invoice)

Sincerely,
Michael D. Calmese
Proveit@excite.com
Truelogofan.com
Proveitsportswear.com
(602)348-0964

CC:
Stephen M. Feldman
Dick's Sporting Goods

EXHIBIT C

Jaime Rich

From: Jaime Rich
Sent: Tuesday, March 18, 2008 2:23 PM
To: proveit@excite.com
Cc: David Friedland, Feldman, Stephen (Perkins Coie)
Subject: PROVE IT! / Our File No. 01153-1-5815

Tracking: Recipient	Read
proveit@excite.com	
David Friedland Feldman, Stephen (Perkins Coie)	Read: 3/18/2008 2:24 PM

Dear Mr. Calmese:

Pursuant to the Court's Discovery and Pretrial Scheduling Order, we write to arrange our Initial Conference for Discovery Planning. Please advise whether you are available this Thursday, March 20, 2008 at 12 PM (Mountain Standard Time). Also, please provide us with a phone number to best reach you.

Very truly yours,

Jaime Rich

Lott & Friedland, P.A.
355 Alhambra Circle
Suite 1100
Coral Gables, Florida 33134
Telephone: 305.448.7089 ext. 210
Facsimile: 305.446.6191
jrich@lfiplaw.com

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EXHIBIT D

Jaime Rich

From: Jaime Rich
Sent: Wednesday, March 26, 2008 5:17 PM
To: proveit@excite.com
Cc: David Friedland; Feldman, Stephen (Perkins Coie)
Subject: Re: PROVE IT! / Our File No. 01153-1-5815

Tracking:	Recipient	Read
	proveit@excite.com	
	David Friedland	Read: 3/26/2008 5:24 PM
	Feldman, Stephen (Perkins Coie)	

Dear Mr. Calmese:

We write further to our email of March 18, 2008, which appears below, and our telephone message of March 20, 2008 regarding our Initial Conference for Discovery Planning. You have been unresponsive to our attempts to arrange this conference, as required by the Court's Discovery and Pretrial Scheduling Order dated January 18, 2008 and Fed. R. Civ. P. 26(f). Accordingly, we will contact the Court regarding your failure to participate in the conference and to make arrangements for a Rule 16(b) Court Conference for Scheduling and Planning. In addition, we intend to seek an enlargement of the current pretrial and discovery deadlines of six (6) months, extending the deadlines through November 19, 2008.

Lastly, we have a deadline of Wednesday, April 2, 2008 to meet and confer regarding the cancellation proceeding before the TTAB. Please advise whether you are available this Friday, March 28, 2008 at 12 PM (Mountain Standard Time).

Very truly yours,

Jaime Rich

Lott & Friedland, P.A.
 355 Alhambra Circle
 Suite 1100
 Coral Gables, Florida 33134
 Telephone: 305.448.7089 ext. 210
 Facsimile: 305.446.6191
jrich@lfiplaw.com

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From: Jaime Rich
Sent: Tuesday, March 18, 2008 2:23 PM
To: proveit@excite.com
Cc: David Friedland; Feldman, Stephen (Perkins Coie)
Subject: PROVE IT! / Our File No. 01153-1-5815

Dear Mr. Calmese:

4/3/2008

Pursuant to the Court's Discovery and Pretrial Scheduling Order, we write to arrange our Initial Conference for Discovery Planning. Please advise whether you are available this Thursday, March 20, 2008 at 12 PM (Mountain Standard Time). Also, please provide us with a phone number to best reach you.

Very truly yours,

Jaime Rich

Lott & Friedland, P.A.

355 Alhambra Circle

Suite 1100

Coral Gables, Florida 33134

Telephone: 305.448.7089 ext. 210

Facsimile: 305.446.6191

jrich@lfiplaw.com

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EXHIBIT E

Jaime Rich

From: Jaime Rich
Sent: Thursday, March 27, 2008 11:40 AM
To: proveit@excite.com
Cc: David Friedland
Subject: RE: PROVE IT! / Our File No. 01153-1-5815

Dear Mr. Calmese:

Please provide us with your counsel's contact information immediately, as the deadline to meet and confer has passed and we are about to contact the Court regarding your failure to participate in the process.

Very truly yours,

Jaime Rich
Lott & Friedland, P.A.
355 Alhambra Circle
Suite 1100
Coral Gables, Florida 33134
Telephone: 305.448.7089 ext. 210
Facsimile: 305.446.6191
jrich@lfiplaw.com

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-----Original Message-----

From: PROVE IT [mailto:proveit@excite.com]
Sent: Thursday, March 27, 2008 11:19 AM
To: Jaime Rich
Subject: Re: PROVE IT! / Our File No. 01153-1-5815

Jaime Rich:

Thank you for your e-mail. My attorney will contact you in regards to this matter.

Good day,
Michael Calmese

--- On Wed 03/26, Jaime Rich <jrich@lfiplaw.com> wrote:
From: Jaime Rich [mailto:jrich@lfiplaw.com]
To: proveit@excite.com
Cc: dkfriedland@lfiplaw.com, SFeldman@perkinscoie.com
Date: Wed, 26 Mar 2008 17:17:02 -0400
Subject: Re: PROVE IT! / Our File No. 01153-1-5815

<html xmlns:v="urn:schemas-microsoft-com:vml" xmlns:o="urn:schemas-microsoft-com:office:office" xmlns:w="urn:schemas-microsoft-com:office:word" xmlns:st1="urn:schemas-microsoft-com:office:smarttags" xmlns="http://www.w3.org/TR/REC-html40">

EXHIBIT F

Jaime Rich

From: Jaime Rich
Sent: Thursday, March 27, 2008 1:59 PM
To: proveit@excite.com
Subject: RE: PROVE IT! / Our File No. 01153-1-5815

Dear Mr. Calmese:

Please identify your counsel or confirm that you have not retained counsel in this matter. We have already made attempts to call you on Thursday, March 20, 2008, at the arranged time in our email of March 18, 2008, and left a message on your voicemail, which you did not return. Thus, you have failed to respond and participate in the initial conference for discovery planning.

We are done playing these games with you. Please provide us with your counsel's contact information for both the federal lawsuit and the TTAB proceeding by no later than the close of business today or we will proceed accordingly.

Very truly yours,

Jaime Rich
Lott & Friedland, P.A.
355 Alhambra Circle
Suite 1100
Coral Gables, Florida 33134
Telephone: 305.448.7089 ext. 210
Facsimile: 305.446.6191
jrich@lfiplaw.com

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-----Original Message-----

From: PROVE IT [mailto:proveit@excite.com]
Sent: Thursday, March 27, 2008 12:56 PM
To: Jaime Rich
Subject: RE: PROVE IT! / Our File No. 01153-1-5815

Jaime Rich:

This is the biggest case of my life and I assure you there have been no failures on my behalf to participate!

Again, you can call me anytime..

Sincerely,
Michael Calmese
proveit@excite.com
(602)348-0964

EXHIBIT G

Jaime Rich

From: Jaime Rich
Sent: Wednesday, April 02, 2008 9:56 AM
To: proveit@excite.com
Cc: David Friedland; Feldman, Stephen (Perkins Cole)
Subject: RE: PROVE IT! / Our File No. 01153-1-5815

Dear Mr. Calmese:

We write further to our numerous emails below regarding our initial discovery conference in both the Oregon district court and TTAB proceedings. We spoke with Mr. Mansker yesterday afternoon and he confirmed that he does not currently represent you in connection with these matters. Therefore, we write to remind you that the deadline to conduct the discovery conference regarding the TTAB cancellation proceeding is today, Wednesday, April 2, 2008. If you chose not to participate in this initial conference, we will advise the Board accordingly.

Very truly yours,

Jaime Rich
Lott & Friedland, P.A.
355 Alhambra Circle
Suite 1100
Coral Gables, Florida 33134
Telephone: 305.448.7089 ext. 210
Facsimile: 305.446.6191
jrich@lfiplaw.com

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-----Original Message-----

From: PROVE IT [mailto:proveit@excite.com]
Sent: Thursday, March 27, 2008 4:43 PM
To: Jaime Rich
Subject: RE: PROVE IT! / Our File No. 01153-1-5815

Dear Jaime Rich:

Per your request I have attached the following contact information. For the record, this is not a game and I am taking this case very, very, very, seriously. The 12 years of success I have had with my registered trademark PROVE IT! is under fire by you and your client and I assure you I am not taking this lightly...

William H. Mansker -
Attorney At Law - (623) 935-2660 Fax: (623) 478-2805

Sincerely,
Michael Calmese

cc: William H. Mansker

Jaime Rich

From: Jaime Rich
Sent: Wednesday, April 02, 2008 11:57 AM
To: proveit@excite.com
Cc: David Friedland
Subject: RE: adidas/PROVE IT!

Dear Mr. Calmese:

Further to the telephone message I left this morning on your answering machine, please call us today regarding the discovery conference. Our office telephone number is listed below.

Very truly yours,

Jaime Rich
Lott & Friedland, P.A.
355 Alhambra Circle
Suite 1100
Coral Gables, Florida 33134
Telephone: 305.448.7089 ext. 210
Facsimile: 305.446.6191
jrich@lfiplaw.com

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-----Original Message-----

From: PROVE IT [mailto:proveit@excite.com]
Sent: Wednesday, April 02, 2008 10:42 AM
To: Jaime Rich
Subject: RE: PROVE IT! / Our File No. 01153-1-5815

Jaime Rich:

Please give me a call today.

Sincerely,
Michael Calmese

--- On Wed 04/02, Jaime Rich <jrich@lfiplaw.com> wrote:
From: Jaime Rich [mailto:jrich@lfiplaw.com]
To: proveit@excite.com
Cc: dkfriedland@lfiplaw.com, SFeldman@perkinscoie.com
Date: Wed, 2 Apr 2008 09:56:08 -0400
Subject: RE: PROVE IT! / Our File No. 01153-1-5815

Dear Mr. Calmese:

We write further to our numerous emails below regarding our initial discovery conference in both the Oregon district court and TTAB proceedings. We spoke with Mr. Mansker yesterday afternoon and he confirmed that he does not currently

Jaime Rich

From: Jaime Rich
Sent: Thursday, April 03, 2008 9:00 AM
To: proveit@excite.com
Cc: David Friedland
Subject: RE: adidas/PROVE IT!

Mr. Calmese:

Yesterday was the deadline to comply with the TTAB requirements that we speak about scheduling, discovery, settlement, and other issues. For over a month, you have given us the runaround regarding a conference to discuss both the Oregon lawsuit and the Trademark Office proceeding. You have not taken our calls, you have not returned our calls, and you have directed us to at least two attorneys who tell us they are not representing you. I am available for you to call me at 11:00 AM Eastern time this morning to discuss the requisite issues. If you do not call me, our papers regarding your refusal to participate in these ministerial matters will be filed tomorrow.

Regards,

Jaime Rich
Lott & Friedland, P.A.
355 Alhambra Circle
Suite 1100
Coral Gables, Florida 33134
Telephone: 305.448.7089 ext. 210
Facsimile: 305.446.6191
jrich@lfiplaw.com

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-----Original Message-----

From: PROVE IT [mailto:proveit@excite.com]
Sent: Thursday, April 03, 2008 8:44 AM
To: Jaime Rich
Subject: RE: adidas/PROVE IT!

Jaime Rich:

Further to my attempt to reach you yesterday, please note I will again attempt to call you later today regarding the discovery conference. It appears you and your client are trying to run me by filing these two actions in two separate districts. Before I let that happen I will represent myself although I am currently seeking legal representation. I look forward to speaking with you later today. My number again is (602)348-0964....

Sincerely,
Michael Calmese
Prove It!®