

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN CAFIERO,)	
)	
Plaintiff,)	
)	Civil Action No. 08-202
v.)	
)	
DOUG CUSTER a/k/a)	
DOUG EVIL,)	
)	
Defendant.)	

RESPONSE TO MOTION FOR LEAVE FILED BY PLAINTIFF

To the Clerk of the United States District Court for the Western District of Pennsylvania:

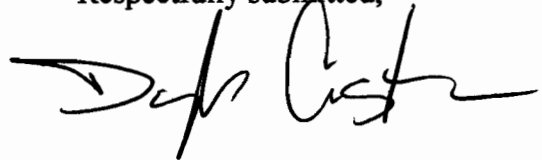
Council for Plaintiff John Cafiero filed a Motion for Leave to File First Amended Complaint (Motion) on May 28, 2009. This complaint was received by myself, Doug Custer, who is proceeding as a pro se litigant, on May 29, 2009.

The Amended Complaint requests to add Jerry Caiafa, a/k/a Jerry Only, as an additional Plaintiff to the claim, among other allegedly "new" accusations.

I have read this Motion and hereby request the Court to dismiss the Plaintiff's request for a Motion for Leave to File First Amended Complaint in consideration of the arguments I present within this response.

In accordance with Local Rule 7.1, a proposed order of court is attached.

Respectfully submitted,



Doug Custer
P.O. Box 137
Cairnbrook, PA 15924

Dated: June 3, 2009

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

JOHN CAFIERO,)	
)	
Plaintiff,)	
)	Civil Action No. 08-202
v.)	
)	
DOUG CUSTER a/k/a DOUG EVIL,)	
)	
Defendant.)	

L. INTRODUCTION

Plaintiff John Cafiero’s Motion for Leave to File First Amended Complaint seeks to add Jerry Caiafa, a/k/a Jerry Only, of the musical outfit, The Misfits, as an additional Plaintiff. The Plaintiff specifically intends to prove that the uploading of my intellectual property as it is contained in the animated piece “Misfits Re-Animated” infringed on certain trademarks held by Mr. Caiafa through his company “Cyclopien Music, Inc.”

Additionally, Mr. Cafiero’s amended complaint contains alarming inaccuracies, particularly in Section #69 and Section #70, whereas the Plaintiff is under the impression that certain postings on the website Myspace.com were made by myself, which they were not.

The Plaintiff has amended his claim to include what appear to be recent acts on my behalf. I submit to the court through this document and under the penalty of perjury that I have not engaged in any new public on-line activities whereas I made any reference to Mr. Cafiero, Mr. Caiafa or the animated vignette “Misfits Re-Animated” since being served with this Civil Action in August, 2008.

II ARGUMENT

A.) Mr. Cafiero's request to enter an Amended Claim conflicts with the best interests of the ADR Process

On June 1, 2009 during the Pre-Trial Conference, Mr. Krasik, one of the Plaintiff's attorney's who represented him at the conference, expressed the desire of Mr. Cafiero to reach a resolution to this matter in the ADR Process.

Mr. Cafiero filed this immediate claim in August 2009, following what he believed to be the illegal uploading of a specific piece of animation and certain factual comments I posted in conjunction with the animation and a separate video clip on Youtube.com in July, 2008.

Mr. Cafiero apparently had the time and resources to file what he believes to be a legitimate claim against myself in regards to the aforementioned video material. He would also have had the opportunity to communicate to Mr. Caiafa the apparent seriousness of my uploading of this material before filing the initial claim.

As the record of this case illustrates, Mr. Cafiero has not shown an interest in resolving this matter without litigation. Following the initial filing of this claim I retained an attorney who specializes in Intellectual Property to explain to Mr. Cafiero's lawyers the discrepancies contained within the "Cheesy Release Form", to which the Plaintiff conceded ownership of the piece. The Plaintiff's council explained that Mr. Cafiero was not interested in acquiring outright ownership of the potentially lucrative commodity "Misfits Re-Animated" and his attorneys proposed to draft an order of settlement.

However, to date I am still contending with Mr. Cafiero's continuous litigation and apparent memory lapse of the conversations held between our attorneys in September of 2008. The current Motion to Amend the Claim contains no substantial revelations, new evidence or additional arguments that differ from the original claim.

Additionally, as stated numerous times, the status of the animated piece "Misfits Re-Animated" at the time of it's removal from Youtube.com was a mere 300 views. The claim against me remarks on apparent "file sharing" of the cartoon via a file sharing website MegaUpload.com and that I expressed an interest with sharing the file with others.

Mr. Cafiero has succeeded at removing the cartoon from YouTube.com. He also immediately removed links to the file on MegaUpload.com and I have never shared the cartoon file with anyone as no one has requested it. I have not done anything with the video material since being served with a lawsuit in August, 2008.

Mr. Cafiero only intends to escalate the severity of litigation by adding a second

Plaintiff when this matter can and should be resolved in the ADR Process between the current parties involved.

B.) Mr. Cafiero's proposed additional Plaintiff assigned specific trademark properties to the Defendant in 1994/Discrepancies regarding the MISFITS trademark used in "Misfits Re-Animated"

The Plaintiff's amended complaint contends that I infringed on apparent "Misfits trademarks" such as "likenesses" as well as the trademarked "Misfits" logo.

Attached at Exhibit 1 is a document assigning a one-half interest between myself and Jerry Caiafa in regards to the likenesses of Jerry Only and Doyle, members of the musical outfit The Misfits, in cartoon form as designed by myself. By assigning an equal copyright interest between myself and Mr. Caiafa, this agreement permits the display of my property as it pertains to The Misfits' likenesses and any related trademark issues. This document was signed November 22, 1994 by myself and Mr. Caiafa, respectively.

Mr. Cafiero's new complaint alleges an overt infringement on Mr. Caiafa's trademark "Misfits" logo (section 30 of the amended complaint). The Plaintiff contends that my uploading of the animated piece "Misfits Re-Animated" displayed the trademarked property of Mr. Caiafa in the title sequence of the cartoon. It did not. Mr. Cafiero simply typed the word "Misfits" in the same font that he used for all other text in the animated piece. The entire 1 minute vignette does not contain the actual "Misfits" logo as Mr. Cafiero's amended claim leads one to believe and as such cannot be labeled an infringement on a specific trademark.

Additionally, the musical piece "Mars Attacks" was permitted to be used in the cartoon by virtue of the same release form I signed in 1996. In doing so, Mr. Caiafa has, in essence, licensed the use of this particular version of the song to be used in the animation I created and retain ownership of.

III CONCLUSION

For all the forgoing reasons, I motion to deny Mr. Cafiero his request to Motion for Leave to File First Amended Complaint (Motion). I hereby request this case to proceed as it was originally filed in August, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Doug Custer", with a long horizontal flourish extending to the right.

Doug Custer
P.O. Box 137
Cairnbrook, PA 15924

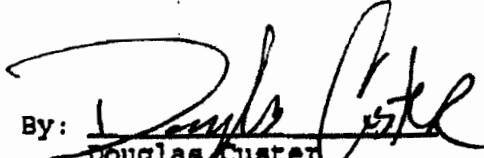
Dated: June 3, 2009

EXHIBIT 1

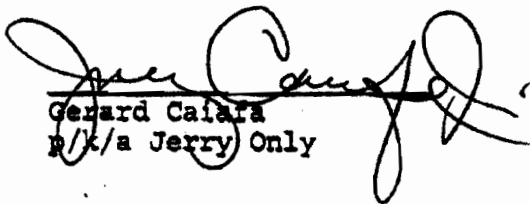
ASSIGNMENT

The undersigned, Douglas Custer, p/k/a Doug Evil, for good and valuable consideration, receipt of which is hereby acknowledged, does hereby assign to Gerard Caiafa p/k/a Jerry Only, an undivided one-half interest in copyrights and all other right, title and interest throughout the world, in perpetuity, in and to the existing and any future drawings of Jerry Only, Doyle, Glen Danzig and Robc, created by the undersigned.

THIS ASSIGNMENT shall be deemed effective as of the 22 day of NOVEMBER 1994.

By: 
Douglas Custer
p/k/a Doug Evil

AGREED TO AND ACCEPTED:


Gerard Caiafa
p/k/a Jerry Only

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DOUG EVIL,)	
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(PROPOSED) ORDER

AND NOW, this _____ day of _____, 2009, upon consideration of Defendant Doug Custer's request to deny Mr. Cafiero's Motion for Leave to File First Amended Complaint (Motion)and arguments in support thereof, it is hereby ORDERED that the Plaintiff's Motion for Leave to File First Amended Complaint be dismissed. Civil Action No. 08-202 will proceed as it was originally filed in August, 2008.

The Honorable Kim R. Gibson
United States District Judge



JOHNSTOWN PA 158
JUN 2009 PM 11

DOUG CUSTER
P.O. BOX 137
CAIRNBROOK, PA
15924

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
KIM A. JOHNSON
U.S. DISTRICT JUDGE
319 WASHINGTON ST.
JOHNSTOWN, PA 15901



15901-1626