

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 11-24110-CIV-O'SULLIVAN  
[CONSENT]

**MPS ENTERTAINMENT, LLC and  
MICHAEL P. SORRENTINO,**

Plaintiffs,

v.

**ABERCROMBIE & FITCH STORES,  
INC. and ABERCROMBIE & FITCH  
CO.,**

Defendants.

/

**ORDER**

**THIS CAUSE** is before the Court on the Defendants' Motion for Summary Judgment ("Motion," DE# 93, 11/1/12), which contains the defendants' Statement of Undisputed Facts ("SUMF"). The plaintiffs filed their response ("Response," DE# 100, 11/20/12), to which the defendants filed their reply (DE# 109, 11/20/12). Additionally, the plaintiffs filed Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts (DE# 99, 11/20/13). Having reviewed the Motion, Response, Reply, the SUMF and the plaintiffs' response thereto, and the record, the Court grants the Defendants' Motion for Summary Judgment ("Motion," DE# 93, 11/1/12) as more fully discussed below.

## I. Background<sup>1</sup>

This case involves trademark infringement and related claims by a public figure alleging that a clothing company used his nickname and trademark on a t-shirt and in an advertisement to sell its products. The plaintiff, Michael Sorrentino, regularly appeared on the television show “Jersey Shore,” which first aired on MTV Networks<sup>2</sup> on December 3, 2009. Sorrentino and his brother Marc Sorrentino own the plaintiff MPS Entertainment, LLC, which is a limited liability company engaged in the business of developing, marketing, and distributing goods and services. The defendant, Abercrombie & Fitch Co., is the parent company of Defendant Abercrombie & Fitch Stores, Inc. (collectively, “A&F”), and A&F produces, markets, distributes, and sells clothing at retail stores. Plaintiffs’ claims relate to a t-shirt created and sold by A&F that had the phrase “The Fitchuation” on the front of the shirt and to a press release issued by A&F, which the plaintiffs contend constituted an advertisement for A&F’s products.

### A. “The Fitchuation” T-shirt

The plaintiff Michael Sorrentino uses the nicknames “The Situation” and “Mike The Situation.” Sorrentino gave himself the nickname “The Situation” based on an association with his abdominal muscles.

On January 28, 2010, A&F placed an order for a t-shirt bearing the phrase “The

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<sup>1</sup> The facts contained in this section are taken from the Statements of Undisputed Material Facts (“SUMF”), which Defendants filed as part of their Motion (see Motion, D.E. 93, at CM/ECF pp. 28-38) and Plaintiffs filed separately from their Response (see D.E. 99, at 1-11), and are undisputed unless otherwise noted. Defendants also filed a summary chart of the statements of undisputed facts. (See D.E. 110, at 1-30.)

<sup>2</sup> MTV Networks, a division of Viacom, Inc., co-produces and broadcasts Jersey Shore.

Fitchuation” on the front of the shirt. A&F explains that “‘The Fitchuation’ was a play on words or parody of Mr. Sorrentino’s nickname ‘The Situation.’ A&F was making fun of Mr. Sorrentino giving his abs the nickname ‘The Situation,’ and used wordplay to create a fanciful word using A&F’s brand name.”<sup>3</sup> (Statement of Undisputed Facts, D.E. 93, ¶ 4.)

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<sup>3</sup> Plaintiffs assert that they dispute A&F’s explanation of the meaning of “The Fitchuation.” Plaintiffs state:

Mr. Wilson’s ‘spin’ on the exact wording of the Abercrombie t-shirt (that merely says ‘The Fitchuation’) and whether or not it is a parody is a question for the jury to decide. The affirmative defense of fair use/parody is a mixed question of law and fact as to which the proponent carries the burden of proof.

(Response to Statement of Undisputed Facts, D.E. 99, ¶ 4 (citing cases).)

Without providing any details of the content contained therein, the plaintiffs also refer the Court to the “Deposition of Marc Sorrentino attached hereto as Exhibit ‘A’ 114:17-115:3, 116:13-19; 118:4-19.” (*Id.*) However, the plaintiffs did not attach any exhibits to its Response to the Statement of Undisputed Facts. The plaintiffs originally filed six exhibits as a separate filing attached to a declaration of Richard Wolfe (D.E. 101). However, the plaintiffs filed a Notice of Striking that filing on November 26, 2012 (D.E. 103), and these exhibits do not contain the cited pages of Marc Sorrentino’s deposition. The plaintiffs filed additional exhibits as a separate filing on November 26, 2012 (D.E. 106-1, 106-2). The Court has reviewed the plaintiffs’ exhibits and has not found the cited pages of Marc Sorrentino’s deposition. Exhibit A consists of excerpts from a deposition of Michael Kagan, and the excerpts do not contain pages 114, 115, 116, or 118. (*See* D.E. 106-1, at CM/ECF p. 4.) Exhibit G is a two-page excerpt from the deposition of Marc Sorrentino; however, the exhibit consists only of the cover page of the deposition transcript, lines 22 through 25 of page 295, and lines 1 through 25 of page 296. (*See id.* at CM/ECF p. 86-87.) The Court has also reviewed the defendants’ exhibits and has not found the cited pages of Marc Sorrentino’s deposition. The defendants filed excerpts of Marc Sorrentino’s deposition in support of their Motion for Summary Judgment as Exhibit 1, but these excerpts do not contain pages 114, 115, 116, or 118. (*See* Motion Ex. 1, D.E. 93-2, at CM/ECF p. 2-37.) Finally, the Court has reviewed the exhibits attached to the Plaintiffs’ Second Amended Complaint, which also does not contain the cited pages of Marc Sorrentino’s deposition. (*See* D.E. 68.)

Under Rule 56(e)(2) of the Federal Rules of Civil Procedure, “If a party . . . fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may: . . . consider the fact undisputed for purposes of the motion.” Here, the Court considers as undisputed the fact that the plaintiff Sorrentino gave his abdominal muscles the nickname “The Situation” and that the phrase “The Fitchuation” was created using part of A&F’s brand name with part of the plaintiff Sorrentino’s nickname. The Court also notes that in their Response to the Statement of Undisputed Facts, the plaintiffs discuss the origin of the nickname, stating “While ‘The Situation’ may have originated based on an association with his abs, it is also

A&F began selling the t-shirt in February 2010 exclusively through its Abercrombie & Fitch branded stores and website. A&F does not engage in any conventional advertising, and it did not advertise “The Fitchuation” t-shirt. All but four of the shirt sales were made by December 2010, and the remaining four shirt sales were made by June 2011.

On October 19, 2010, the plaintiffs filed an application to register “The Situation” as a trademark covering entertainment services. The plaintiff MPS currently sells t-shirts on its website, <http://www.officialsituation.com>. One t-shirt sold by the plaintiff MPS is called the “Official Situation Logo T-shirt,” which contains the words “The Situation” and “Official Situation Nation.” (See Motion Ex. 42, D.E. 93-6, at CM/ECF p. 21.) The plaintiffs have never used the phrase “The Fitchuation.”

#### **B. Press Release / Advertisement**

On the episode of Jersey Shore airing on August 11, 2011, Sorrentino wore at least one pair of A&F-branded sweatpants.<sup>4</sup> Four days later, on August 15, 2011,<sup>5</sup> A&F sent a letter via overnight Federal Express to MTV Networks, in which A&F stated that it would

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Sorrentino’s trademark and he is specially known as the Situation.” (Response to Statement of Undisputed Facts, D.E. 99, ¶ 57.) In support of this statement, the plaintiffs again cite to exhibits that do not correspond to exhibits they filed in support of their response. (See *id.*)

<sup>4</sup> The parties dispute the number of pairs of A&F-branded sweatpants worn by Sorrentino in the episode. The plaintiffs claim that Sorrentino wore only one pair of A&F-branded sweatpants during the episode, whereas the defendants claim that Sorrentino wore three pairs of A&F-branded sweatpants. (See Statement of Undisputed Facts, D.E. 93, ¶ 15; Response to Statement of Undisputed Facts, D.E. 99, ¶ 15.)

<sup>5</sup> The Statement of Undisputed Facts contains a typographical error on the date A&F sent the letter, stating the date of the letter as August 15, 2012. (See Statement of Undisputed Facts, D.E. 92, ¶ 16.) The Court’s review of the record, including the exhibits attached to the declaration of Reid Wilson that Defendants cited in their Statement of Undisputed Facts, shows that the date of the letter is August 15, 2011. (See Reid Wilson Decl., Ex. A, D.E. 93-8, at CM/ECF p. 12.)

be willing to pay MTV, Sorrentino, or other characters on the show up to \$10,000 not to wear any clothing bearing trademarks owned by A&F. The body of the letter stated, in relevant part, as follows:

I am reaching out to you on behalf of Abercrombie & Fitch Co. ("A&F") to address a matter with respect to one of the shows aired by MTV Networks, namely "Jersey Shore." We have been disturbed to see that one of the characters on the show, Michael Sorrentino (better known as "The Situation"), has been prominently wearing A&F clothing on a number of episodes aired to date this season.

A&F obviously has not sought product placement on the show, and we believe that, since the character portrayed by Mr. Sorrentino is not brand appropriate, his display of A&F clothing could be misconstrued as an endorsement by him of our clothing or – worse – an endorsement by A&F of his wearing our clothing.

We have no interest at this point in pursuing any sort of legal action against MTV or the producers of "Jersey Shore." In fact, we would be willing to pay MTV or Mr. Sorrentino or other characters up to \$10,000 NOT to wear any clothing bearing the "ABERCROMBIE & FITCH," "A&F," "FITCH," "MOOSE" or related trademarks. For additional episodes aired this season, we would appreciate it if you would ensure that our brands are pixilated or otherwise appropriately masked.

(Reid Wilson Decl., Ex. A, DE # 93-8, at CM/ECF p. 12.) MTV Networks received the letter the next morning, on August 16, 2011, at 9:01 a.m.<sup>6</sup>

Later that same day, on August 16, 2011 at 6:13 p.m., A&F issued a press release referring to Sorrentino.<sup>7</sup> The press release stated as follows:

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<sup>6</sup> The Statement of Undisputed Facts contains a typographical error on the date MTV Networks received A&F's letter, stating the date of the receipt as August 16, 2012. (See Statement of Undisputed Facts, D.E. 92, ¶ 16.) The Court's review of the record, including the exhibits attached to the declaration of Reid Wilson that the defendants cited in their Statement of Undisputed Facts, shows that the date of receipt is August 16, 2011. (See Reid Wilson Decl., Ex. B, DE# 93-8, at CM/ECF p. 14.)

<sup>7</sup> The plaintiffs dispute this fact and state that "[o]n its face, the Press Release is dated August 12, 2011. (Response to Statement of Undisputed Facts, D.E. 99, ¶ 18.) Upon review of the record, the Court finds that there is no genuine dispute of fact as to the date A&F issued its press release.

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