Case 3

TCOs F & G.   Laura Etheridge and Rita O’Donnell, the CEO and Creative Director of ***Clean Clothes*** (a Texas based lesbian women’s clothing line) brainstormed together  and came up with a tagline for their new slacks line:  “Masculine Attitude, Feminine Fit.”  They market the product on YouTube, Twitter, and Face Book showcasing their “Funky Femme”  slacks collection, made from a material which resembles alpaca wool, but is actually organic cotton.  To further the advertising impact, the team uses an Ellen DeGeneres look-alike in the YouTube video, where the model does the “Ellen dance” – and mouths “love the pants” as she points to her legs and then walks off leading an Alpaca by a halter.  Within months, the slacks are a huge hit in the lesbian community.  Clean Clothes sends a letter to their attorney asking him to trademark their tagline, and move forward without another thought about it.

Meanwhile, Men2Wimmin, a  French company with a branch in New York,  has established a huge following in the gay and cross-dressing community.  It has used the tagline “Feminine Attitude, Masculine Fit” for many years to advertise their drag queen dress collection for men on billboards, the internet and television.

Ellen DeGeneres learns that her likeness is being used to advertise for  Clean Clothes.  She watches the ad and is incensed.  She spends the next week on her show bashing the Clean Clothes company, and states that  she would never endorse the use of Alpaca wool for clothing, as she feels shearing them is cruel. (She doesn’t catch that the pants are really made from cotton.) Further, she says she feels that lesbian women should not need to shop at special stores, although she admits she often shops in the men’s department at Joseph A. Bank (JOSB).  Her comments cause a precipitous drop in sales at both Joseph A. Bank (JOSB) and Clean Clothes. Using the above fact pattern, analyze fully, the following questions:

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| 1. TCO F. Ellen DeGeneres sues Clean Clothes for Misappropriation and Right of Publicity for the use of a look-alike model for the slacks advertisement. Clean Clothes countersues for product disparagement.  Joseph A. Bank (JOSB) sues Ellen for impacting their men’s clothing sales with her unsolicited comment. Analyze the case for all three parties – who will win and why; what elements will they need to prove, and what defenses can they show?
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