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

Proceeding	92066153
Party	Defendant LeYeF, LLC
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Date	03/02/2020
Attachments	WEVOTE Respondent Brief.pdf(393604 bytes )

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

WE VOTE )  
Petitioner, ) Cancellation No.: 92066153  
 )  
v. )  
LEYEF, LLC ) Respondent's Trial Brief  
 )  
Registrant )

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**EXECUTIVE SUMMARY**

Petitioner We Vote has filed a frivolous cancellation action against Respondent LeYeF, LLC's WEVOTE registration on the false basis of priority rights and non-use abandonment. This frivolous action has irreparably harmed Respondent's ability to conduct business until resolved. Simply put, Petitioner's rights from 2004 third-party mark fail on numerous grounds: laches, hearsay, non-continuous use, abandonment, purpose/services, and class. Petitioner's claim of rights dated back to 2004 are based upon inadmissible hearsay and a cartoonish image from a Russian language website that does not reflect the offering or rendering of any services whatsoever, let alone the services identified in Petitioner's trademark application.

Furthermore, Respondent, LeYeF, LLC has superior rights from filing the federal trademark first and has never abandoned, has continuously used of the mark, and has the intent to continue such use. In addition, upon notice, Respondent has immediately defended the infringement of the WEVOTE mark multiple times against Petitioner and other non-related third parties by cease and desist letters and other means. Petitioner's claim of abandonment is based upon faulty evidence that purports to show that

Respondent's website was down for seven and a half months. In addition to being false, this evidence falls miles short of demonstrating statutory abandonment of trademark rights. Petitioner's claim of prior common law rights is based upon isolated one-off events that do not rise to the level of trademark use. Even assuming that Petitioner's evidence constitutes trademark use, Petitioner itself has introduced evidence that demonstrates Respondent's prior use of its WeVote trademark. Thus, Respondent respectfully requests Petitioner's frivolous registration be denied and unjust cancellation request rejected.

### **STATEMENT OF FACTS**

Respondent LeYeF, LLC DBA WeVote is a for profit limited liability company in Lincoln, Nebraska. WeVote also has a non-profit corporation. LeYeF started in the summer of 2009 with four guys. It morphed into WeVote after multiple advisors suggested LeYeF was too broad and we should focus solely on the government portion of LeYeF and was first marketed as WeVote January 2012 and has been in continuous use ever since. WeVote applied for a federal trademark in December 2014. Respondent WeVote provides voting and political information, goods, and services for the following.

IC 035. US 100 101 102. G & S: Internet advertising services; Providing an internet website featuring news and information in the field of national and international politics. FIRST USE: 20120101. FIRST USE IN COMMERCE: 20120101

IC 041. US 100 101 107. G & S: Providing an Internet website portal featuring entertainment news and information specifically in the field of Politics; Providing biographical information of individuals via the Internet for educational purposes; Providing news in the nature of current event reporting relating to Politics via the Internet; Research in the field of education via the internet. FIRST USE: 20120101. FIRST USE IN COMMERCE: 20120101

IC 045. US 100 101. G & S: Identification verification services, namely, providing authentication of personal identification information via secure storage and transmitting such information via the Internet. FIRST USE: 20120101. FIRST USE IN COMMERCE: 20120101

Respondent has long been active throughout the United States and, as of the time it filed its evidence in this matter, its members have personally invested over \$50,000 on marketing alone and well

over \$200,000 total. Respondent has been present and has marketed its organization at many conferences and events in 18 different states. Respondent has an online presence on: Facebook, Twitter, YouTube, Sunlight Foundation, Silicon Prairie News, Mass Innovation Nights, American Thinker, 10/11 News, Angel.co, etc. Respondent members and various volunteers have spent over 10,000 hours on the product and brand. Respondent's "coming soon" in regards to various states like New York, etc. was strictly limited to a single "bill tracking" feature within the WeVote website but did NOT as Petitioner claims limit the Respondent's WeVote brand, services, or other features to a single U.S. State. In contrast, Respondent has had users from the U.S. states and multiple countries.

In summary, respondent has rights to the WEVOTE mark back to January of 2012, currently holds the Federal Trademark, and has built a robust for profit and non-profit organization devoted to voter and political issues associated with the mark.

## ARGUMENTS

### A. PETITIONER DOES NOT HAVE PRIORITY RIGHTS TO THE WE VOTE TRADEMARK DATING BACK TO NOVEMBER 1, 2004.

Generally speaking, common law trademark ownership is acquired by actual use or marketing in a given market. Common law trademarks can only be protected in the geographic area where goods or services (collectively referred to in this article as "goods") are sold or have acquired customer goodwill. Additionally, actual and continuous *use* of a trademark is required to retain a protectable interest in a trademark. *Tally-Ho Inc. v. Coast Community College District*, 889 F.2d 1018, 1023-24 (11th Cir.1989).

Moreover, generally speaking common law trademarks rights are limited to the geographic market that the common law trademark has been used, is known by consumers or where the common law trademark may naturally expand. Federal registration of a trademark by another user after a senior user has begun to *use* the same trademark has the practical effect of freezing the senior user's enforceable

common law trademark rights thereby terminating any right to future expansion beyond the common law trademark's existing territory. *Tana v. Dantanna's*, 611 F.3d 767, 780-81 (11th Cir. 2010).

Petitioner We Vote does not have priority rights to the WEVOTE Trademark for the following reasons:

First, Petitioner's claim of common law rights dating back to November 1, 2004 is based upon its acquisition of the domain name wevote.us and purported trademark rights associated therewith.

Petitioner's Trial Brief, pp. 13-14. The obvious flaw in this claim is that the website at issue was at all times prior to such acquisition a Russian language website, and Petitioner's claim of trademark rights is based upon inadmissible hearsay and a single cartoonish image from the Russian language website that does not reflect the offering or rendering of any services whatsoever, let alone the services identified in Petitioner's brief or trademark application.

Specifically, the Declaration of Dale John McGrew alleges that the signatory to the assignment, William Sweeney, provided him with information regarding the services purportedly offered via the wevote.us website beginning in November 2004.<sup>1</sup> Mr. McGrew's testimony as set forth in paragraph 3 of his Declaration constitutes inadmissible hearsay. Respondent hereby objects to the introduction of paragraph 3 of Mr. McGrew's Declaration on the grounds that it constitutes hearsay, and moves that it be stricken from the record and disregarded by the Board.

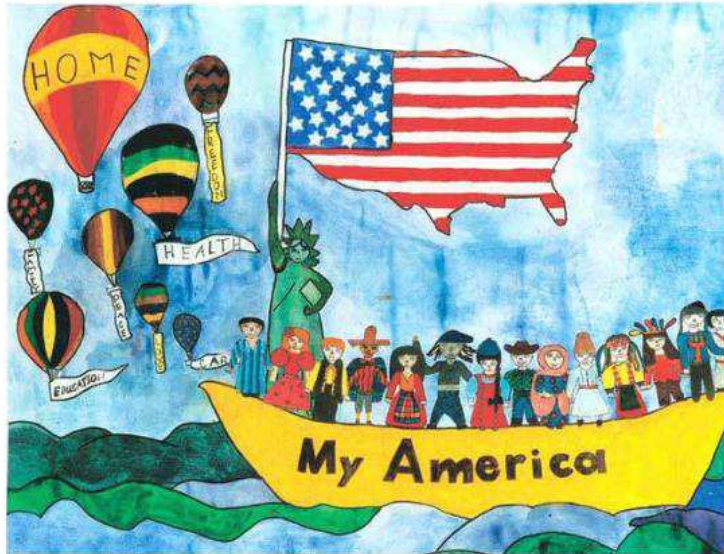
Second, Petitioner has also submitted ten copies of a single image, purportedly captured from the website wevote.us by the web archival service Wayback Machine.<sup>2</sup> The image depicts the cartoonish image of a boat sailing past the Statue of Liberty with seemingly Russian wording above the image and the words "We Vote!" in English below the image:

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<sup>1</sup> *Petitioner's Notice of Reliance No. 1, Dale McGrew Declaration, Paragraphs 3 – 4.*

<sup>2</sup> *Petitioner's Notice of Reliance No. 2, Paul McClean Declaration, Paragraph 5, Exhibit D.*

СОВМЕСТНЫЙ ПРОЕКТ HIAS/LOREO  
И АМЕРИКАНСКОГО ОТДЕЛЕНИЯ WSPU



**We Vote!**

The image makes no reference to any services purportedly available on the website, does not show any such services actually being rendered, and does not demonstrate use of “We Vote!” as a trademark. The words “We Vote!” are instead being used in a merely decorative or ornamental manner and are not functioning as a trademark as depicted in Petitioner’s evidentiary submission. As such, Petitioner has failed to demonstrate that its predecessor in interest used “We Vote!” as a trademark to promote any services at all, let alone the various services referenced in Petitioner’s Trial Brief or its pending trademark application. Insofar as Petitioner’s predecessor in interest was not using the “We Vote!” mark to promote or render any particular services, Petitioner merely acquired the domain name wevote.us without any associated trademark rights. As such, Petitioner has failed to provide any admissible evidence to support its claim of trademark rights dating back to 2004.

Third, the Petitioner’s assigned website when owned and operated by HIAS from 2004 until assigned, was primarily in the Russian language and meant for Russian refugees. HIAS never showed

any interest in expanding to serve the English speaking market in the US or anywhere. HIAS clearly did not qualify for the trademarks classes Petitioner is seeking. *Tana v. Dantanna's*, 611 F.3d 767, 780-81 (11th Cir.2010.) Furthermore, even if Petitioner has some common law rights from HIAS, (which Respondent disputes and Petitioner has failed to prove), the Federal registration of the WEVOTE trademark by Respondent after a senior user has begun to *use* the same trademark has the practical effect of FREEZING the senior user's enforceable common law trademark rights thereby terminating ANY right to future expansion beyond the common law trademark's existing territory or services. *Tana v. Dantanna's*, 611 F.3d 767, 780-81 (11th Cir.2010.) Therefore, Petitioner can not expand into Respondent's territory, service, or class anyway.

Fourth, even if Petitioner has any trademark rights, (which Respondent disputes and Petitioner has failed to prove), Respondent has the defense of laches. Laches is an equitable time limitation on a party's right to bring suit, resting on the maxim that one who seeks the help of a court of equity must not sleep on his rights." *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir.2002) (internal citations and quotation marks omitted). Laches is a defense to both Lanham Act claims (including trademark infringement and unfair competition) as well as to California state law claims. *Id.*; *Saul Zaentz Co. v. Wozniak Travel, Inc.*, 627 F.Supp.2d 1096, 1109 (N.D.Cal. 2008); *see also* *Bridgestone/Firestone Research, Inc. v. Auto. Club De L'Ouest De La France*, 245 F.3d 1359, 1362, 1364 (Fed. Cir.2001) (holding that a petition for cancellation of registered trademark was barred by laches). A claim is only barred by laches if the defendant can show "(1) unreasonable delay by plaintiff in bringing suit, and (2) prejudice. . . ." *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 997 (9th Cir.2006) Petitioner and assignor failed to take any action against Respondent in a reasonable amount of time. Doing so now unreasonably prejudices LeYeF, LLC as it has spent a great deal of money and time building an award winning brand with substantial media coverage and user base. *Pinkette Cothing, Inc. v. Cosmetic Warriors Limited*, No. 17-55325 (9th Cir. 2018), *Fitbug v. Fitbit*, No. 13-1418, 2015 U.S. Dist. LEXIS 8775 (N.D. Cal. Jan. 26, 2015) *Eat Right Foods, Ltd v. Whole Foods Mkt., Inc.*, No. C13-2174, 2015 U.S. Dist. LEXIS 63578 (W.D. Wash. May 14, 2015).

## B. RESPONDENT NEVER ABANDONED THE TRADEMARK

According to 15 USC 1127, a trademark is considered abandoned if “its use has been discontinued with intent not to resume such use.” The intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment. ‘Use’ of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.”

A petition to cancel a registration on the grounds of abandonment is brought under Section 14 of the Lanham Act [15 USC 1064]. Petitioner must prove both Respondent’s: 1. nonuse and 2. intent not to resume. Petitioner is unable to show either element, and thus, Petitioner’s Cancellation of Respondent’s Trademark must be denied.

Petitioner’s claim of abandonment hinges upon evidence from the Internet archival service Wayback Machine which purports to show that Respondent’s wevoteproject.org website was inactive between October 30, 2016 and June 14, 2017.<sup>3</sup> As an initial point, Respondent denies this allegation, and specifically notes that the Wayback Machine is not designed to evidence periods of inactivity. Instead, the service merely crawls the Internet and makes periodic screen captures of websites at irregular intervals. Petitioner’s own evidence contains the following disclaimer:

### Note

This calendar view maps the number of times wevoteproject.org was crawled by the Wayback Machine, *not* how many times the site was actually updated. More info in the [FAQ](#).

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Even assuming for the sake of argument that Respondent’s political website took a brief hiatus following the 2016 elections (which Respondent disputes), a seven and a half month period of inactivity falls woefully short of the statutory definition of abandonment, falling 28 and a half months short of the presumption created by three continuous years of non-use.

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<sup>3</sup> Petitioner’s Notice of Reliance No. 2, Paul McClean Declaration, Paragraph 4, Exhibit C.

<sup>4</sup> Petitioner’s Notice of Reliance No. 2, Paul McClean Declaration, Paragraph 4, Exhibit C, page 1.



Furthermore, there is nothing in Petitioner’s submission to support the critical element of “intent not to resume such use.” Quite to the contrary, even assuming a seven and a half month period of inactivity following a presidential election (which, again Respondent denies), Respondent’s intent to resume use was clearly demonstrated by (a) the fact that Respondent did, in fact, resume use and (b) the fact that Respondent sought to enforce its trademark rights by sending cease and desist demands to Petitioner in April of 2017, in the midst of its purported non-use.<sup>5</sup> Clearly, Respondent would not be seeking to enforce its trademark rights against Petitioner if it had discontinued use without intent to resume use.

In short, Petitioner has failed to demonstrate both the requisite non-use and the state of mind necessary to demonstrate Respondent’s purported abandonment of its WeVote trademark.

#### C. RESPONDENT’S USE OF ITS WEVOTE TRADEMARK PREDATES ALL OTHER COMMON LAW RIGHTS ALLEGED BY PETITIONER

Having failed to demonstrate any enforceable trademark rights arising from its acquisition of the wevote.us domain name, Petitioner is left to cobble together isolated non-trademark uses of the words “we vote” in a misguided effort to demonstrate use of its mark in 2014, prior to Respondent’s December 26, 2014 filing date. Even assuming for the sake of argument that Petitioner can demonstrate use in 2014 that predates Respondent’s filing date, Petitioner has failed to demonstrate use that predates Respondent’s first use of its WeVote mark. To that end, Respondent notes the Affidavit testimony of its owner, Luke Alexander, who testified that the WeVote mark “has been in continuous use since as early as January 1, 2012.”<sup>6</sup>

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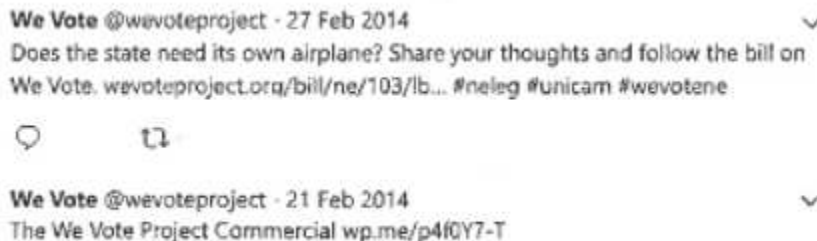
<sup>5</sup> *Petitioner’s Notice of Reliance No. 3, Dale McGrew Declaration, Paragraph 11; Respondent’s Notice of Reliance, Luke Alexander Declaration, Paragraph 14, Exhibit B.*

<sup>6</sup> Respondent’s Notice of Reliance, Luke Alexander Declaration, paragraphs 1-5.

It must be stated that Respondent's prior counsel, who apparently surrendered his license to practice before the TTAB and USPTO, and suddenly withdrew as Respondent's counsel,<sup>7</sup> did Respondent no favors by his neglect of this case and his haphazard presentation of evidence in Petitioner's Notice of Reliance. Fortunately, however, Petitioner itself has provided the Board with ample evidence of Respondent's prior trademark use.

First, it must be noted that Petitioner has again misplaced its reliance upon evidence generated by the Wayback Machine. In particular, Petitioner has alleged that Respondent's website was launched on October 11, 2014, citing the first instance that the website was discovered and crawled by the Wayback Machine. Again, however, the Wayback Machine does not seek to confirm every single day that a website is up and running nor should its failure to crawl a website over a period of months – especially a new website – be deemed evidence that the website does not exist.

Second, Petitioner has provided screen captures of Respondent's twitter account, reflecting Twitter posts back to January 8, 2014.<sup>8</sup> The Twitter account itself makes prominent use of Respondent's WeVote trademark and at the very least demonstrates use of certain class 35 services identified in Respondent's registration, namely, (class 35) "providing news in the nature of current event reporting relating to Politics via the Internet". Respondent's Twitter posts further demonstrate that its website was active no later than February 27, 2014, when Respondent's Twitter post invited the public to visit its wevoteproject.org website to share their thoughts and follow a bill on the wevoteproject.org website:



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<sup>7</sup> Docket 27, Motion to Withdraw as Counsel.

<sup>8</sup> Petitioner's Notice of Reliance No. 1, Dale McGrew Declaration, Exhibit C.

<sup>9</sup> Petitioner's Notice of Reliance No. 1, Dale McGrew Declaration, Exhibit C, page 71.

Petitioner has also sought to diminish Respondent's trademark use by falsely stating that until February 21, 2015, Respondent's "services were only available in Nebraska". Petitioner's Trial Brief, page 4. Petitioner's argument on this point is disingenuous at best. Although Respondent's website may have launched with information relating to Nebraska politics, the news, information, education and advertising services provided by the website (as well as its Twitter account) have always been available to anyone, anywhere in the United States interested in the subject matter of the website. There is nothing in the evidence submitted by Petitioner to support its proposition that the content of Petitioner's website – freely accessible to anyone throughout the entire United States and World – was "only available in Nebraska".

#### CONCLUSION

Thus, as set forth above, Respondent has shown Petitioner does not have priority of use rights to the WEVOTE mark through the 2004 assignment of the mark originally owned by HIAS. Furthermore, Respondent currently owns the Federal Trademark which has been in continuous use since 2012 and has enforced its trademark rights against Petitioner's infringement. Respondent has never abandoned the trademark and intends to continue to use the mark in the future.

For the foregoing reasons, Respondent respectfully requests that Petitioner's WEVOTE Cancellation and new Registration of the mark be dismissed.

By: *Luke Alexander*

Luke Alexander