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

Proceeding	92074759
Party	Defendant Talimali Band Of The Apalachee Indians Of Louisiana
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of U.S. Service Mark Registration No. 5,915,019

Registration date: November 19, 2019

For the mark: TALIMALI BAND THE APALACHEE INDIANS OF LOUISIANA

TROY KERRY,

Petitioner,

v.

**TALIMALI BAND OF THE
APALACHEE INDIANS OF
LOUISIANA,**

Registrant.

CANCELLATION NO. 92074759

**REGISTRANT TALIMALI BAND OF THE APALACHEE INDIANS
OF LOUISIANA’S OPPOSITION TO PETITIONER TROY KERRY’S
MOTIONS FOR LEAVE AND TO AMEND PLEADINGS**

Pursuant to FED. R. CIV. P. 12(b)(6) and T.B.M.P. § 503 *et seq.*, Registrant **TALIMALI BAND OF THE APALACHEE INDIANS OF LOUISIANA** (“Registrant”) respectfully submits this Opposition to the motion for leave and motion to amend pleadings¹ (the “Motions”) of Petitioner **TROY KERRY** (“Petitioner”) in regard to his petition for cancellation² (the “Petition”) to cancel Service Mark Registration No. 5,915,019 (the “Registration”) of Registrant.

As demonstrated below, Petitioner has again failed to state any claim for which relief may be granted. All of Petitioner’s claims in these proceedings are fatally defective as a matter of law; they rely on alleged facts not germane to the issues in these proceedings and contain unsupported legal conclusions that rest on a misunderstanding of trademark law, which in fact bars Petitioner’s claims.

¹ Paper Nos. 7-8.

² Paper No. 1.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner filed the Petition on July 19, 2020. In the Petition, Petitioner averred as follows as bases for cancellation:

- (1) The name Apalachee Talimali Band is a historical name that describes the entire tribe as a whole.
- (2) Specifically Talimali Band is merely a surname.
- (3) The registrant did not create this name or any emblems for this tribe. The emblem was created by Mission San Luis museum in Tallahassee Florida from expanding on pottery found during an archaeological dig.
- (4) The registrant filed the trademark with a specific intent of malice after losing an election. Only after being voted out of governance did he file trademark and sent letters to tribal members threatening them with legal action if Talimali Band is used on any shirt, cup, decal etc. This will cause monetary damage because the tribe sells such articles for the expenses incurred.
- (5) Registrant has committed fraud against the USPTO by falsely claiming this to belong to him for it to even be allowed to be trademarked. Specifically, the registrant is willfully committing perjury before a federal agency as defined under US 18 code 1001 statements or entries generally.
- (6) This registration will hurt and damage the Apalachee Talimali Band in its attempts for State and Federal recognition.

Paper No. 1, *Petition for Cancellation*.

As Registrant detailed in its Rule 12(b)(6) Motion to Dismiss,³ Petitioner failed to show that the above statements are legally sufficient to cancel the Registration. In addition to the fact that Petitioner lacks standing, Petitioner failed to submit any facts that Registrant committed fraud on the USPTO. Most importantly, Petitioner, who claims to be the authorized representative of the Registrant non-profit corporation, apparently petitions against the interests of that same entity.

³ Paper No. 5.

Moreover, in the TTAB-set trial schedule,⁴ Registrant’s responsive pleading was due on August 29, 2020. In lieu of an Answer, Registrant filed its Rule 12(b)(6) Motion to Dismiss on August 28, 2020. On September 1, 2020, the TTAB suspended these proceedings pending disposition of the potentially dispositive motion.⁵ Despite the suspension, Petitioner filed the Motions on September 14, 2020. Importantly, Petitioner’s voluminous submissions lacked the most important document – a proposed amended pleading – to which Registrant could file an Answer. FED. R. CIV. P. 15. Therefore, Registrant is left in the dark as to whether the request for leave to amend rests on the same or new allegations.

LAW AND ARGUMENT

Pursuant to FED. R. CIV. P. 15(a), the Board should freely grant leave to amend pleadings “when justice so requires.” However, if allowance of the amendment would cause undue prejudice to the nonmoving party or be futile, the amendment will be denied. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Am. Optical Corp. v. Am. Olean Tile Co., Inc.*, 168 USPQ 471, 473 (TTAB 1971). Registrant respectfully submits that it will suffer undue prejudice and the lack of a proposed amended pleading makes the Motions legally insufficient.

1. Petitioner Troy Kerry Failed to Present Any Facts to Support His Standing.

The majority of Petitioner’s Motions and Exhibits seem to be directed to the issue of him being the true representative of the “main body of the Apalachee Tribe” by virtue of him being “the [alleged] legitimately elected Chief” and by being an alleged descendant of one of the founding members of the non-profit corporation, Registrant herein. However, as submitted in Registrant’s Rule 12(b)(6) Motion to Dismiss, the issue of governance belongs in the tribal council, not in the Trademark Office. The evidence submitted by Registrant of Petitioner Troy Kerry

⁴ Paper No. 2.

⁵ Paper No. 6.

voluntarily leaving the Registrant non-profit corporation is sufficient to deny Petitioner standing to initiate or to prosecute this trial.

2. Petitioner Troy Kerry Failed to State Any Facts That Would Suggest Fraud on the Trademark Office.

The standard of showing fraud is relatively high. The Board has synthesized this standard to three elements: statements that are (1) “false,” (2) “material,” and (3) “made knowingly.” *Mister Leonard Inc. v. Jacques Leonard Couture Inc.*, 23 U.S.P.Q.2d 1064, 1066 (TTAB 1992).

Petitioner accuses Chief Arthur Bennett, Chairman of the Registrant non-profit corporation, of some criminal activity. However, this accusation has nothing to do with the trademark dispute. The sole issue in this case is whether Registrant knowingly made a misrepresentation of material fact during the service mark application process.

Petitioner also suggests that Registrant’s Chairman does not represent the Tribe; that “the entire historic Apalachee Tribe owns the trademark. It is not the exclusive property of Registrant and his collaborators. By holding himself out before the USPTO as the duly-elected Chief or leader of the main body of the Apalachee Tribe when applying for trademark registration, Registrant’s actions were deceptive and fraudulent.” Registrant repeats again that Petitioner’s ramblings are woefully insufficient to meet the high burden of proof required for fraud allegations. Suffice it to say that the Registration’s registrant is not Chief Arthur Bennet, but the non-profit corporation, Talimali Band of the Apalachee Indians of Louisiana, i.e., the entire Tribe.

3. Petitioner Troy Kerry’s Motions Attempt to Introduce Claims Not on the Record.

Where the moving party seeks to add a new claim or defense, and the proposed pleading thereof is legally insufficient, or would serve no useful purpose, the Board should deny the motion for leave to amend. T.B.M.P. § 507.02.

Petitioner's Motions suggest that the service mark should belong to the "main body of the Apalachee Tribe." This is a new concept that was not recited in the original allegations or claims. In the Petition, Petitioner alleged and claimed that "The name Apalachee Talimali Band is a historical name that describes the entire tribe as a whole" in the first claim. It is not clear what that "main body" is and how the rights of the "main body" affect the service mark of Registrant herein. In any event, on the record, the Registration belongs to a specific non-profit corporation, representing a specific Band of Apalachee Indians, the Talimali Band, and the "main body of the Apalachee Indians" apparently does not challenge the Registration. Furthermore, because a proposed amended pleading was not filed, it is impossible to ascertain what that new claim might recite. Based on the current recitation, the Petition still fails to state a claim upon which relief can be granted and should be dismissed.

4. Petitioner Troy Kerry Conceded His Second and Third Claims.

Because there is no proposed amended pleading, Registrant can rightfully assume that Petitioner no longer asserts his second claim (merely a surname) and third claim (emblem of the tribe). These claims should therefore be dismissed with prejudice, and leave to amend should be denied.

5. Petitioner Troy Kerry's Fourth Claim Still Fails as a Matter of Law.

As to the fourth claim (claim of malice), Petitioner failed to state with any particularity how the actions of the non-profit corporation, Registrant herein, were intentionally made with knowledge of the harmful consequences or what such harmful consequences could even be. The only reference seems to be made to the alleged criminal activity by Chief Arthur Bennett, who is not registrant of the mark at issue. Consequently, Petitioner's fourth claim should be dismissed with prejudice, and leave to amend should be denied.

6. Petitioner Troy Kerry's Sixth Claim Still Fails to State a Claim Upon Which Relief Can Be Granted.

Petitioner's sixth claim (damage to the Apalachee Talimali Band in its attempts for State and Federal recognition) similarly fails as a matter of law. Petitioner fails to state any facts that would demonstrate harmful effect of the Registration on the Talimali Band of the Apalachee Indians.

CONCLUSION

In view of the above, the Board should dismiss Petitioner's claims with prejudice. "In deciding whether to grant leave to amend, the Board may consider undue delay, prejudice to the opposing party, bad faith or dilatory motive, futility of the amendment, and whether the party has previously amended its pleadings." *Embarcadero Tech., Inc. v. Delphix Corp.*, 117 USPQ2d 1518, 1523 (TTAB 2016).

Here, Petitioner not only failed to submit a proposed amended pleading, the purported proof in the form of Affidavits and video still lacks the requisite details to survive Registrant's Rule 12(b)(6) Motion to Dismiss. For the foregoing reasons, Registrant respectfully asks the Board to deny Petitioner's Motions, to grant Registrant's Rule 12(b)(6) Motion to Dismiss, and to dismiss all of Petitioner's claims with prejudice.

Respectfully submitted,

Dated: September 25, 2020

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that on September 25, 2020, this pleading is being submitted to the Trademark Trial and Appeal Board via electronic means by filing with the Electronic Systems for Trademark Trial and Appeals.

By: /s./ Thomas S. Keaty
THOMAS S. KEATY

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of this foregoing pleading has been served upon Petitioner by e-mail and by mail at his addresses of record, namely:

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By: /s./ Thomas S. Keaty
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