

ESTTA Tracking number: **ESTTA1325968**

Filing date: **12/01/2023**

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

Proceeding no.	92074759
Party	Plaintiff Chief Troy Kerry, For And On Behalf Of The Apalachee Indians Of Louisiana, Talamali Band
Correspondence address	MITCHELL H. STABBE WILKINSON BARKER KNAUER LLP 1800 M STREET NW SUITE 800N WASHINGTON, DC 20036 UNITED STATES Primary email: trademark@wbklaw.com Secondary email(s): mstabbe@wbklaw.com, rraju@wbklaw.com 202-783-4141
Submission	Other Motions/Submissions
Filer's name	Mitchell H. Stabbe
Filer's email	trademark@wbklaw.com, mstabbe@wbklaw.com, rraju@wbklaw.com
Signature	/Mitchell H. Stabbe/
Date	12/01/2023
Attachments	2023 12 01 Apalachee Indians- Cancellation- Reply to Response to Mot ion for Sanctions.pdf(630189 bytes)

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

Chief TROY KERRY, for and on behalf)
of the Apalachee Indians of Louisiana,)
Talimali Band,)
)
Petitioner,)
)
v.)
)
TALIMALI BAND OF THE)
APALACHEE INDIANS OF LOUISIANA,)
)
Respondent/Registrant)

Cancellation No. 92074759

**REPLY TO OPPOSITION TO MOTION FOR SANCTIONS FOR FAILURE TO
COMPLY WITH ORDER OF JANUARY 17, 2023**

Petitioner Chief TROY KERRY, for and on behalf of the Apalachee Indians of Louisiana, Talimali Band (the “Tribe”), submits the following Reply to Respondent’ Opposition to Petitioner’s Motion for Sanctions for Failure To Comply With Order of January 17, 2023.

After a complete briefing by the parties, on January 17, 2023, the Board issued an Order (hereinafter, “the Order”) that, in brief, granted most of Petitioner’s requests, directing Respondent to provide supplemental answers to interrogatories, supplemental production of documents and a privilege log. Despite three consented-to extensions of time, without excuse and without requesting additional time to comply, Respondent has still not complied with the Order.

Counsel for Petitioner has tried to show Respondent every courtesy, without escalating Respondent’s disregard of its discovery obligations and this Court’s order into a dispute to be brought before the Board, as evidenced by the communications between counsel prior to the bringing of this motion, namely:

- On February 16, 2023, the date on which the supplemental responses to discovery were due, counsel for Respondent requested a thirty (30) day extension of time to respond, making them due by March 15, 2023. On the condition that the other trial dates be

extended, counsel for Petitioner consented.¹

- On April 11, 2023, counsel for Petitioner followed up with counsel for Respondent, noting that the responses (which were due a month earlier) had not been received and, as a result, Petitioner could not prepare pretrial disclosures. They also asked when the supplemental would be provided and proposed a sixty (60) day extension of time to file Petitioner's pretrial disclosures. On the condition that the other trial dates be extended, counsel for Petitioner consented.²
- On April 13, 2023, counsel for Respondent sent a response, asking for another thirty (30) day to provide the supplemental responses to discovery and, if there was consent, agreeing to a sixty (60) days extension for the Petitioner's pretrial disclosures. On April 14, 2023, counsel for Petitioner filed the motion, but due to the format of the TTAB forms, had to request a ninety-day extension, but noted that the supplemental responses to discovery were due by May 14, 2023.³
- On May 15, 2023, counsel for Respondent requested a sixty-day extension of time to respond, which would make them due by July 16, 2023. In response, counsel for Petitioner asked that responses be provided and then supplemented in sixty days⁴ based on whatever response might be received in response to Respondent's FIOA request.⁵ There was no response.
- On May 17, 2023, counsel for Petitioner followed up and asked for a response to their prior e-mail. Again, no response was received from Respondent and they did not ask for another extension of time to provide the supplemental responses to discovery nor did they comply with the TTAB's order and did not serve supplemental responses to discovery.⁶
- On June 8, 2023, counsel for Petitioner followed up again to express disappointment that their prior e-mails had been ignored. They also said that they had given serious thought to

¹ See Attachment A.

² See Attachment B.

³ See Attachment C.

⁴ See Attachment D.

⁵ Indeed, now that Respondent has provided information on the nature of its FOIA request, it is clear that any documents in the possession of the government would have no bearing whatsoever on most, if any, of the supplemental responses to discovery that were ordered. To pick just a few, examples include:

- the date when a letter dated October 15, 2015, in which Arthur Bennett claimed to have assumed the position of Chief, was prepared and signed, and whether the purported witnesses were present when it was signed (Interrogatory No. 6);
- the circumstances under which the purported "Letter of Consent" for use of the Mark signed (Interrogatory No. 11; Request for Production No. 12);
- the occasions on which Respondent sent complaints or cease desist letters and the nature of the fact supporting the complaint or demand ((Interrogatory No. 31; Request for Production No. 7);
- and whether Respondent has made any statements by Respondent that there is a court ruling that Troy Kerry has no right to use the "Talimali Band" name and the basis for any such claim (Interrogatory No. 33)

⁶ See Attachment E.

simply filing a Motion for Sanctions, but said, “that is not how I like to handle things.” Counsel for Petitioner nevertheless offered to consent to another extension of time to response to July 15, 2023, and noted that the date for Pretrial Disclosures had run and would also need to be changed by a consent motion to August 29, 2023, along with changes to the other trial dates.⁷ There was no response from Registrant.

- Once again, having received neither the supplemental responses to discovery nor a request to further extend the time to serve them, on October 11, 2023, counsel for Petitioner contacted counsel for Respondent, reiterating that the supplemental responses to discovery were due and that Petitioner could not take the next steps for trial. Despite the fact that Respondent was three to four months overdue in serving the supplemental responses, as had been agreed, and that counsel for Respondent continued to remain incommunicado, to try to work things out without having to bring a Motion for Sanctions, counsel for Petitioner offered to extend Respondent’s deadline to December 1, 2023, with a formal consent motion to extend the remaining trial deadlines thereafter.⁸
- Receiving no response, Petitioner filed the instant motion.

In sum, after a period of cooperation on repeated extensions of deadlines, for unknown reasons, counsel for Respondent would not communicate with counsel for Petitioner about when they would comply with the TTAB’s order to provide supplemental discovery nor about formalizing the de facto agreements to request extensions of time.

Nevertheless, Respondent has made no excuse for its conduct and now attempts to shift all blame to Petitioner. Moreover, despite Petitioner’s repeated reminders that they could not make the post-discovery disclosures without receiving the supplemental responses that they were owed, Respondent characterizes Petitioner as having ignored its pre-trial obligations.

The simple fact is that Respondent has failed to comply with the Court’s order and has ignored Petitioner’s efforts to work matters out consensually. Indeed, Respondent is implicitly blaming Petitioner for not immediately filing a Motion for Sanctions as soon as it could, instead of trying to be patient and resolve matters cooperatively. All Respondent needed to do was to respond to one of the various e-mails requesting an update on when it anticipated providing the

⁷ See Attachment F.

⁸ See Attachment G.

supplemental responses to discovery.

Based on the prior communications between counsel, Petitioner expected that Respondent would act in good faith and would provide the responses in due course and that the parties would mutually consent to seek an amended order for trial deadlines. As it has become clear that this was not occurring and in the absence of any communications from counsel for Respondent for several months, Petitioner now seeks such an order without Respondent's consent.

Respondent characterizes Petitioner's request for relief as "preposterous." As previously stated, Petitioner does not believe that a second order which merely repeats the obligations set out in the Order of January 17, 2023, would be sufficient. Although entry of judgment is a sanction authorized by the rules, the Board has previously indicated that entry of judgment is warranted only as a sanction for repeated failures to comply with a reasonable order of the Board. Accordingly, Petitioner has limited its request for relief to the relief granted by the TTAB in similar circumstances.⁹

Finally, Petitioner requests that a new scheduling order be issued, for any dates subsequent to the close of discovery and/or the date on which Registrant must comply with any order issued in response to this Motion to Compel, including the parties' Pretrial Disclosures and Testimony Periods.

WHEREFORE, Petitioner requests that the Board issue an Order imposing appropriate sanctions against Respondent for its disregard of and failure to comply with the Board's order

⁹ See *HighBeam Marketing LLC v. HighBeam Research LLC*, 85 U.S.P.Q.2d 1902, 1905 (TTAB 2008) (a party may not use "as evidence at trial any information or documents" relating to the subject matter described in the order granting the motion to compel discovery, but not disclosed until after being served with a motion for discovery sanctions). See also *M.C.I. Foods Inc. v. Bunte*, 86 USPQ2d 1044, 1047-48 (TTAB 2008) (sanctioned party prohibited from relying on documents that were the subject of an order granting a motion to compel the production of documents but not produced until after the filing of a motion for sanctions).

January 17, 2023., and that a new scheduling order be issued.

Respectfully submitted,

Petitioner Chief Troy Kerry, for and on
behalf the Apalachee Indians of Louisiana,
Talimali Band

By: /Mitchell H. Stabbe/
Mitchell H. Stabbe
Radhika P. Raju
Its Attorneys

WILKINSON BARKER KNAUER, LLP
1800 M Street, NW
Suite 800N
Washington, DC 20036
202-783-4141
trademark@wbklaw.com
mstabbe@wbklaw.com
rraju@wbklaw.com

December 1, 2023

CERTIFICATE OF SERVICE







I hereby certify that a true and complete copy of the foregoing Reply to Response to Motion
for Sanctions has served upon the following persons, by email, on December 1, 2023:

Thomas S. Keaty, Esq. (tskeaty@keatypatentfirm.com)
Jason D. Broecker, Esq. (jdbroecker@keatypatentfirm.com)
Keaty Law Firm, LLC
365 Canal Street, Suite 2410
New Orleans, LA 70130

/Mitchell H. Stabbe/
Mitchell H. Stabbe

ATTACHMENT A

TTAB Cancellation No. 92074759

 Jason Broecker <jdbroecker@keatypatentfirm.com>
To:  Stabbe, Mitchell
Cc:  Thomas Keaty;  Bella Safro;  Raju, Radhika;  Trademark

You replied to this message on 2/17/2023 3:24 PM.

Attachments Get more add-ins

Mr. Stabbe,

We need more time to confer and serve supplemental written responses and documents. Will you consent to a thirty day extension of time for us to complete such discovery? We are of course open to extending the pretrial disclosure deadlines and testimony periods by thirty days too.

Thank you very much for your consideration.

With kind regards,

Jason D. Broecker
Keaty Law Firm LLC
[365 Canal Street, Suite 2410](#)
[New Orleans, LA 70130](#)
Telephone: 504-524-2100
Facsimile: 504-524-2105

Re: B20-4289

From: Stabbe, Mitchell <MStabbe@wbklaw.com>
Sent: Friday, February 17, 2023 2:25 PM
To: Jason Broecker <jdbroecker@keatypatentfirm.com>
Cc: Thomas Keaty <[tsкеaty@keatypatentfirm.com](mailto:tскеaty@keatypatentfirm.com)>; Bella Safro <bsafro@keatypatentfirm.com>; Raju, Radhika <RRaju@wbklaw.com>; Trademark <Trademark@wbklaw.com>
Subject: TTAB Cancellation No. 92074759

Jason,

I would like your assurance that, when you provide your supplemental answers to interrogatories, you will ignore our drafting errors in stating the date of the Letter of Consent (see Brief in Support of Motion to Compel at 10, n.2) and read Interrogatory No. 10 as referring to "the Tribe or Registrant" (see Brief in Support of Motion to Compel at 11, n.3). If so, we will consent to the Motion.

Thank you,

Mitch Stabbe

WILKINSON) BARKER) KNAUER) LLP
Mitchell H. Stabbe (He/Him/His)
Partner
1800 M Street NW Suite 800N
Washington, DC 20036
Tel: [202.383.3379](tel:202.383.3379)
Cell: [301.943.4393](tel:301.943.4393)
MStabbe@wbklaw.com
[vCARD](#)

ATTACHMENT A

RE: TTAB Cancellation No. 92074759



Jason Broecker <jdbroecker@keatypatentfirm.com>
To: Stabbe, Mitchell
Cc: Thomas Keaty; Bella Safro; Raju, Radhika; Trademark

Reply Reply All Forward

Wed 2/22/2023 12:45 PM

Attachments

Get more add-ins

Mitch,

Thank you for your response. I am just coming back from the Mardi Gras holiday, so apologies for the slight delay.

We will ignore those drafting errors you identified, and so we will request a 30-day extension of the pretrial disclosure deadlines and testimony periods so we may complete the subject discovery, as follows:

Plaintiff's Pr	03/03/2023	04/02/2023
Plaintiff's 30	04/17/2023	05/17/2023
Defendant's	05/02/2023	06/01/2023
Defendant's	06/16/2023	07/16/2023
Plaintiff's Re	07/01/2023	07/31/2023
Plaintiff's 15 Ends	07/31/2023	08/30/2023
Plaintiff's Op	09/29/2023	10/29/2023
Defendant's	10/29/2023	11/28/2023
Plaintiff's Re	11/13/2023	12/13/2023
Request for Due	11/23/2023	12/23/2023

With kind regards,

Jason D. Broecker
Keaty Law Firm LLC
[365 Canal Street, Suite 2410](#)
[New Orleans, LA 70130](#)
Telephone: 504-524-2100
Facsimile: 504-524-2105

ATTACHMENT B

TTAB Cancellation No. 92074759- Outstanding discovery and Subsequent Deadlines.



Stabbe, Mitchell

To: Jason Broecker

Cc: Thomas Keaty; Bella Saffro; Raju, Radhika; Trademark

Reply Reply All Forward

Tue 4/11/2023 3:07 PM

This message was sent with High importance.

Attachments

+ Get more add-ins

Jason,

We have not received your supplemental responses to discovery and therefore cannot prepare pretrial disclosures.

Please advise regarding the status of those responses. In addition, please let me know if you will consent to a 60 day extension of time for us to file pretrial disclosures (and corresponding changes to the other dates).







Thank you,


Mitch

Mitchell Stabbe
202.383.3379
MStabbe@wbklaw.com


ATTACHMENT C

RE: TTAB Cancellation No. 92074759- Outstanding discovery and Subsequent Deadlines.

 Jason Broecker <jdbroecker@keatypatentfirm.com>
To:  Stabbe, Mitchell
Cc:  Thomas Keaty;  Bella Saffro;  Rajju, Radhika;  Trademark

 Reply  Reply All  Forward  

Thu 4/13/2023 5:09 PM

 You replied to this message on 4/13/2023 5:50 PM.

Attachments

+ Get more add-ins

Dear Mitch,


Unfortunately, it has taken more time than we anticipated to collect the documents ordered for production by the TTAB. We are diligently working with the client to collect these documents. We anticipate that we will require additional 30-day extension of time to complete the task. Please advise if your client agrees to the extension. On our part, we will agree to the 60-day extension for you to prepare the pretrial disclosures.

With kind regards,

Jason D. Broecker
Keaty Law Firm LLC
[365 Canal Street, Suite 2410](#)
[New Orleans, LA 70130](#)
Telephone: 504-524-2100
Facsimile: 504-524-2105

Re: B20-4289


TTAB Cancellation No. 92074759- Outstanding discovery and Subsequent Deadlines.

 Stabbe, Mitchell
To:  Jason Broecker
Cc:  Thomas Keaty;  Bella Saffro;  Rajju, Radhika;  Trademark

 Reply  Reply All  Forward  

Fri 4/14/2023 2:15 PM

 You replied to this message on 10/11/2023 6:46 PM.

 2023 04 14 P Motin for Extension with Consent.pdf
4 MB

Attachments

+ Get more add-ins

Jason,

Attached is your service copy of the Motion to Extend with Consent that we have filed. As you are undoubtedly aware, the TTAB forms only allow requests of 30, 60 or 90 days for extensions of time. Accordingly, in order to fit within the deadlines we agreed to, the only option was to request a 90 day extension.

We look forward to receiving the supplemental responses to discovery by May 14, 2023.

Mitch

Mitchell Stabbe
202.383.3379
MStabbe@wbklaw.com

ATTACHMENT D

From: Thomas Keaty <tskeaty@keatypatentfirm.com>
Sent: Monday, May 15, 2023 1:48 PM
To: Stabbe, Mitchell <MStabbe@wbklaw.com>
Cc: Bella Safro <bsafro@keatypatentfirm.com>; Jason Broecker <jdbroecker@keatypatentfirm.com>
Subject: TTAB Cancellation No. 92074759

Dear Mitch,

We still have not received responses to our FOIA request that was needed to answer your client's discovery requests. Will you consent to another extension of time? We would like to play it safe and ask for a 60-day extension.

With kind regards,

(dictated, not read – db)

Thomas S. Keaty
Keaty Law Firm
365 Canal Street, Suite 2410
New Orleans, LA 70130
504-524-2100 – Office
504-524-2105 – Facsimile

Sent: Monday, May 15, 2023 2:50 PM
To: Thomas Keaty <tskeaty@keatypatentfirm.com>
Cc: Bella Safro <bsafro@keatypatentfirm.com>; Jason Broecker <jdbroecker@keatypatentfirm.com>
Subject: RE: TTAB Cancellation No. 92074759

Tom,

Can you send me what you have now and you can supplement within 60 days?

Mitch

WILKINSON) BARKER) KNAUER) LLP

Mitchell H. Stabbe (*He/Him/His*)
Partner
1800 M Street NW Suite 800N
Washington, DC 20036
Tel: [202.383.3379](tel:202.383.3379)
Cell: [301.943.4393](tel:301.943.4393)
MStabbe@wbklaw.com
[vCARD](#)

This electronic message transmission contains information from the law firm of Wilkinson Barker Knauer, LLP which may be confidential or privileged. The information is intended for the use of the individual or entity named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution, or use of the contents of this information is prohibited. If you have received this electronic transmission in error, please delete this message and any attachments from your system and contact us immediately by telephone at 202.783.4141 or by electronic mail to the sender.

ATTACHMENT E

From: Stabbe, Mitchell <MStabbe@wbklaw.com>

Sent: Wednesday, May 17, 2023 5:59 PM

To: Thomas Keaty <tskeaty@keatypatentfirm.com>

Cc: Bella Safro <bsafro@keatypatentfirm.com>; Jason Broecker <jdbroecker@keatypatentfirm.com>; Raju, Radhika <RRaju@wbklaw.com>; Trademark <Trademark@wbklaw.com>

Subject: TTAB Cancellation No. 92074759

Tom,

Please respond, thanks.

Mitch

Mitchell Stabbe
202.383.3379
MStabbe@wbklaw.com

ATTACHMENT F

From: Stabbe, Mitchell <MStabbe@wbklaw.com>

Sent: Thursday, June 8, 2023 2:06 PM

To: Thomas Keaty <tskeaty@keatypatentfirm.com>

Cc: Bella Safro <bsafro@keatypatentfirm.com>; Jason Broecker <jdbroecker@keatypatentfirm.com>; Raju, Radhika <RRaju@wbklaw.com>; Trademark <Trademark@wbklaw.com>

Subject: TTAB Cancellation No. 92074759

Tom,

To say the least, I am disappointed that you did not respond to my previous e-mails and gave serious thought to simply filing a Motion for Sanctions for your failure to comply with the Board's order granting our Motion to Compel. However, that is not how I like to handle things, so I have filed a Motion for Extension (with consent) and your service copy is attached.

Accordingly, although the deadline has technically passed, by agreement, your time for complying with the Motion to Compel is extended to July 15, 2023. Assuming your responses are satisfactory, I trust you will also agree that the deadline for our Pretrial Disclosures will be August 29. As that deadline has technically run, we will also need to file another Motion for Extension of the remaining trial dates.

Mitch


Mitchell Stabbe






202.383.3379

MStabbe@wbklaw.com

ATTACHMENT g

TTAB Cancellation No. 92074759- Outstanding discovery and Subsequent Deadlines.

 Stabbe, Mitchell
To: Jason Broecker
Cc: Thomas Keaty, Bella Safro, Raju, Radhika, Docketing

 Reply  Reply All  Forward  

Wed 10/11/2023 6:46 PM

Attachments

[+ Get more add-ins](#)

Jason and Tom,

Despite your agreement to provide us by May 14, 2023, with the supplemental responses to discovery that were ordered by the TTAB, we have not received anything from you nor even heard from you to request additional time. Without your supplemental responses, we have been unable to take the next steps necessary for the trial. Nevertheless, we are willing to extend the time for providing these responses to December 1, 2023. However, we would like your consent to a motion to reschedule the TTAB deadlines after the close of discovery.

Please let me know if you agree.

Mitch

Mitchell Stabbe
202.383.3379
MStabbe@wbkllaw.com