No. 19-_____

In the Supreme Court of the United States

JAMES J. MAKSIMUK,

Petitioner,

v.

CONNOR SPORT COURT INTERNATIONAL, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES J. MAKSIMUK
PETITIONER PRO SE
38325 6TH STREET EAST
PALMDALE, CA 93550
(323) 420-6794

OCTOBER 11, 2019

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QUESTIONS PRESENTED

1. Did the CAFC, District Court, 10th Cir., TTAB Orders and Judgments and referenced Supreme Court rulings—that required corporations to be represented by legal counsel in court rooms—violate the Equal Protection Clause and Due Process of Law and; should these Supreme Court rulings be amended or over-turned so to conform with the Equal Protection Clause? If so, should the CAFC, District Court, 10th Circuit, TTAB decisions be overturned?

2. Did the Dist. Court, 10th Cir. and CAFC exclude cumulative evidence, ignore Supreme Court rulings, U.S. Codes and Fed. R. Civ. P. in a prejudicial, bias and erroneously manner so to meet abuse of discretion standards? If so, should a retrial be granted in the proper venue?

3. Did the Dist. Court violate the 5th & 14th Amendments when it ruled that the Petitioner "is enjoined from using" the domain name?

4. Owning to the errors of law committed by the CAFC, Dist. Court, 10th Cir. and TTAB and the preponderance of evidence and referenced SC rulings, should the trademark 'sport court' be cancelled and remove from the trademark Registry?

LIST OF PROCEEDINGS BELOW

The United States Court of Appeals for the Federal Circuit
USCA No. 2019-1156
James J. Maksimuk v.
Connor Sport Court International, LLC
May 13, 2019 (Judgment Affirmed)
July 15, 2019 (Petition for rehearing and rehearing *en banc* denied)

United States Patent and Trademark Office, Trademark Trial and Appeal Board
Cancellation No. 92066311
James J. Maksimuk v.
Connor Sport Court International, LLC
June 22, 2018 (Decision Entered)

RULE 29.6 STATEMENT

Petitioner James J. Maksimuk is an individual who is not subject to the corporate disclosure requirements of S.Ct. 29.6

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Opinion of the Federal Circuit dated May 13, 2019 is reported at App.1a. Decision of the TTAB stated on June 22, 2018 is on App.9a. Petition for rehearing en banc was denied. (App.27a).

JURISDICTION

This petition is filed within 90 days of the order dated July 15, 2019, denying a timely filed petition for rehearing. (App.27a). This Court has jurisdiction under 28 U.S.C.§ 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

- **U.S. Const. amend. I**

  Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

- **U.S. Const. amend. V**

  No person shall be held to answer for a capital, or otherwise infamous crime, unless on a pre-

> sentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- **U.S. Const. amend. XIV, Section 1**

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1840, when Martin Van Buren was president, *Commercial & RR Bank of Vicksburg v. Slocomb, Richard & Col*, 39 U.S. 60 (1840) decided "because, as such a corporation cannot appear but by attorney" Subject ruling has not been amended in 179 years. Consequently, this ruling has breed gross judicial disparity between wealthy and poor corporations and

resulted in non-judicial access for low income corporations.

Over the decades the legal definition of a corporate entity has been amended and should have an effect on added constitutional protections for corporations:

The rights for a corporations to self represent itself in a court of law without legal counsel.

This case presents questions related to constitutional rights of a corporation pertaining to Equal Protection Clause, Due Process and Constitutional Law, especially in the courtroom.

The issue of corporate self representation was raised by the Petitioner at the Dist. Court hearing when he stated and referenced: "*Quarrier vs. Peabody* . . . the appearance by a corporation in a plea to jurisdiction of a court should not be in person or by attorney but may be by the president." [*Quarrier vs. Peabody* is a W. VA Supreme Court ruling, 1877] (Exh."A" p.5 line 7) Court transcripts dated August 4, 2017)

Petitioner also raised constitutional issues in the Petitioner's Court of Appeals United States Courts for the Ninth Circuit dated January 15, 2018 When stated: "(The Appellant reserves the right to question the constitutionality of Utah Rules of Civil Procedure and *Tal v. Hogan*, 453 F.3d 1244, 1254 (10th Cir. 2006) that violated the Constitutional Rights of the Appellant)" (Exh. "B" p. 9 #C)

Therefore, the issue conforms to Fed. R. Civ. P. Rule 12(h) Waiving and Preserving Certain Defenses. (1) (A) and Fed. R. Civ. P., Rule 12(b) Defenses and Objections: (3) improper venue; whereas the Dist. Court Defendant—and now the Supreme Court Petitioner,

did raise the issue of corporate self-representation and venue, which was both denied by the Dist. Court. (Exb. Appendix 13a)

In addition, the venue, jurisdiction, trademark generic issue and Claim Preclusion issues including; the decisions by the Dist. Court, TTAB and CAFC did not conform to Supreme Court ruling, Due Process of Law and violated the Equal Protection Clause.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. To Apply the Equal Protection Clause for All Corporations Who Can't Afford to Pay for Legal Services in a Court Room so they can be Self Represent in Court Without Legal Counsel

The state of Arizona has recognized the judicial inequities for low income corporations and therefore has acknowledged a class of burdened litigants. Arizona has taken steps to solve part of the problem: R-18-0004 Rule 31, Rules of Arizona Supreme Court has enacted or is near enactment subject amended Rule 31 which states:

> "A person who is not an active member of the state bar may represent any entity that is not an issuing public corporation" (Exh. "C")
>
> [R-18-0004] "Would amend Rule 31, Rules of the Arizona Supreme Court, to improve access

> to justice for small business litigants and to reorganize and modernize the rule." . . . the specters of legal fees or default judgments sink small business litigants before they even start." Hon. David. B. Gass, Maricopa County Superior Court, Petitioner (Exh. "D") (emp ours)

> Subject amendment to Rule 31, is supported by:

- Aundrea DeGravina on behalf of Glenn Hamer, President & CEO Arizona Chamber of Commerce & Industry, 602.248.9172 (Exh "E")
- Hon. Ann Timmer, Attorney Regulation Advisory Committee, 602-452-3415 (Exh "F")
- Mark Brnovich, The Arizona Attorney General/Angelina B. Nguyen, Assistant Attorney General (Exh "G")
- Paul V. Avelar (AZ Bar No. 023078), Managing Attorney, Institute for Justice Arizona Office, www.IJ.org (Exh "H") [Note: Atty. Paul Avelar Exh. "H" is the same text in the Petitioner's "Reasons for Granting the Writ of Certiorari", FYI.]

Preface to the below COMMENT: R-18-0004 is an amendment to Rule 31, Rules of the Arizona Supreme Court to permit certain corporations to self-represent without legal counsel in courtrooms statewide.

The below Comment of Atty. Paul Avelar, Institute for Justice, Arizona Office at: https://www.azcourts.gov/Rules-Forum/aft/804 states:

> Pursuant to Rule 28(D)(b)(ii), I submit the following comments in support of R-18-0004.

This Court should adopt the changes proposed by R-18-0004 as a small but important curtailing of Arizona's unjustified restrictions on the "unauthorized practice of law."

Although "access to justice" is one of the frequently expressed goals of the organized bar, including the Arizona Bar, the United States falls far short of that goal, especially in its civil system. The World Justice Project, an organization founded as part of an American Bar Association initiative and focused on improving worldwide rule of law, publishes a yearly Rule of Law Index ranking legal systems across the globe based on eight categories and forty-four subcategories. In its recent 2017-2018 report, the United States ranked 96th of 113 countries in access and affordability of civil justice. http://data.worldjusticeproject.org/ (dataset available for download) (last accessed May 18, 2018).

One of the biggest drivers of this high cost is the monopoly on legal representation—especially in court—that lawyers enjoy and enforce through unauthorized practice of law regulations and the resulting high cost of lawyers. Arizona Attorney reported that the median hourly billing rate for Arizona-licensed attorneys was $275 in 2016, and that the rate has "steadily climbed in the four previous surveys." Olabisi Onisile Whitney & Rick DeBruhl, *Attorney Survey: Arizona Lawyers Report on Economic of Practice,* ARIZONA ATTORNEY (Sept. 2016) at 24. Nation-

ally, studies have found that a large proportion of civil cases—76%—had at least one party that was self-represented and that the costs of legal representation is one of, if not the, biggest reasons for this. *National Center for State Courts Civil Litigation Project, The Landscape of Civil Litigation in State Courts* (2015), https://www.ncsc.org/~/media/Files/ . . . 2015.ashx. [https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx] And it is not just individuals who cannot afford legal representation. A 2013 study by LegalShield found that the average annual expenditure for legal services by small businesses is $7,600 and, as a result, 60% of small businesses go without assistance in facing serious legal problems. Tom Gordon, *Hell Hath No Fury Like a Lawyer Scorned*, WALL ST. J. (Jan. 28, 2015), https://www.wsj.com/articles/tom-gordon-hell-hath-no-fury-like-a-lawyer-scorned-1422489433

Whatever one thinks about the advisability of foregoing an attorney and representing oneself pro se, it is at least an option under Arizona's current rules that individuals have but businesses do not. As Judge Gass's Petition notes, this Court's current Rule 31 deems the owner of a small business representing his or her own business in court to be the unauthorized practice of law. This means that only a lawyer may represent the business. Given the large number of businesses that cannot afford a lawyer, this has

the practical effect of, as Judge Gass further notes, foreclosing these businesses' access to the courts and causing loss by default. The entry of a default judgment has long been recognized by this Court as contrary to public policy. *E.g., Richas v. Superior Court*, 133 Ariz. 512, 514 (1982) ("The law favors resolution on the merits and therefore resolves all doubts in favor of the moving party" to set aside a default judgment.). Accordingly, entering a default judgment against a party because the party could not afford a lawyer must certainly be against public policy. R-18-0004 would prevent this injustice by allowing certain small businesses to self-represent.

Eventually, this Court must do more to afford the public access to justice. It should further curtail UPL regulations to allow non-lawyers to provide "legal services" in a broader variety of areas. "Many people who cannot afford a licensed attorney need some help, and many of them could probably pay something reasonable for it, but those options are not available." Laurel A. Rigertas, *The Legal Profession's Monopoly: Failing to Protect Consumers*, 82 FORDHAM L. REV. 2587, 2684 (2014). Rigid insistence that only lawyers can "practice law" is not borne out by facts. A 2013 study found that more than two-thirds of lawyers in charge of state agencies responsible for enforcing unauthorized-practice laws could not even name a situation during the past year where an unauthorized-

practice issue had caused serious public harm. Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2595 (2014). Not surprisingly, the study also found that the most common source of referrals for enforcement action was attorneys, *id.* at 2591-92, who stand to profit from restricting competition. The study concluded that "unauthorized-practice law needs to increase its focus on the public rather than the profession's interest and that judicial decisions and enforcement practices need to adjust accordingly." *Id.* at 2588. And this study is just one of several now calling into question lawyers' existing monopoly on the provision of legal services. Given that there is little evidence that lawyers are more effective at providing certain legal services or more ethical than qualified nonlawyers, the primary justification for the legal profession's monopoly of the legal services market does not hold up to scrutiny. Instead, the public would be better served if more nonlawyer representatives—who were subject to educational and licensing requirements—could provide more legal services to the public.

Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 Fordham L. Rev. 2611, 2615 (2014); *see also* Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality*

> *of Lawyering*, 67 HASTINGS L.J. 1191 (2016) (comparing non-exclusive legal regulation in the United Kingdom to the United States' monopoly regulatory model).
>
> Given these studies, there is little reason to believe that R-18-0004 will leave those affected by it—small businesses who want or need to self-represent—in worse circumstances. Rather, given what is happening to small businesses in Arizona Courts because of Rule 31's unauthorized practice of law restrictions, there is every reason to believe they will be better off. Until this Court meaningfully addresses "access to justice" and the monopoly on legal representation enjoyed and enforced by lawyers through unauthorized practice of law regulations, R-18-0004 is the next-best solution to the problems identified by Judge Gass. For these reasons, this Court should adopt R-18-0004. [(emp ours)]

Paul V. Avelar (AZ Bar No. 023078)
By:
Managing Attorney
Institute for Justice Arizona Office
http://www.ij.org/arizona

ARGUMENTS

I. DID THE CAFC, DISTRICT COURT, 10TH CIR., TTAB ORDERS AND JUDGMENTS AND REFERENCED SUPREME COURT RULINGS-THAT REQUIRED CORPORATIONS TO BE REPRESENTED BY LEGAL COUNSEL IN COURT ROOMS-VIOLATE THE EQUAL PROTECTION CLAUSE AND DUE PROCESS OF LAW AND; SHOULD THESE SUPREME COURT RULINGS BEAMENDED OR OVER-TURNED SO TO CONFORM WITH THE EQUAL PROTECTION CLAUSE? IF SO, SHOULD THE CAFC, DISTRICT COURT, 10TH CIR., TTAB DECISIONS BE OVER-TURNED?

Government's judicial actions has produced and imposed a burden against the low income corporation and conferred benefit to other class-wealthy corporations. Nor is there permissible government interest or purpose to deny corporate self-representation in courtrooms. The burdens imposed by the government are documented in this Writ of Certiorari, Dist., court transcripts and other filings at the Dist. Court, 10th Cir. and CAFC. These government actions warrant Strict Scrutiny because fundamental constitutional right was infringed and that the Equal Protection Clause was violated.

Since a corporation is a person under the Equal Protection Clause it shall be interpreted as subject person will not be required to be represented by a lawyer in a courtroom-just like a physical person. And, yes, the Petitioner is also a physical person.

"The Court does not wish to hear argument

> on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does.". . . . ." The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United."

Court Santa Clara County v. Southern Pacific R. Co., 118 U.S. 394 (1886) (emp ours)

The violation of Equal Protection and Due Process against the Petitioner is also documented in the Dist. Court transcripts: (Exh "A")

> THE COURT: "Yeah. You're welcome to observe, but you're not going to be able to participate." (Exh "A" Page 3, line 18)
>
> THE COURT: "I won't listen to you, and I'll tell you why. I'll tell you why." (Exh "A" Page 3, line 22)
>
> THE COURT: Three times you have been told that an entity can't represent itself. (Exh "A" Page 3, line 25)
>
> THE COURT: You're not a lawyer. Our local rule requires a lawyer to represent the entity." (Exh "A" Page 4, line 3)
>
> THE COURT: And that's fine. So sit down, and you may observe, but you're not going to participate." (Exh "A" Page 4, line 14)
>
> THE COURT: "Sit down" (Exh "A" Page 4, line 18)

THE COURT: "Sit down" (Exh "A" Page 4, line 20) [twice stated 'sit down']

THE COURT: "Sit down. We'll consider that, but I'm going to listen to the motion first" (Exh "A" Page 4, line 23 &24)

THE COURT: "Sit down".

THE COURT: "Sit down. I don't want to have to have the marshal have you sit down" (Exh "A" Page 5 line 1 & 4)

MR. MAKSIMUK: "Do I have any opportunity to refute that, Your Honor?" (Exh "A" Page 12, line 24 (last line)

THE COURT: "No. You sit there. You listen." (Exh "A" Page 13, line 1)

This Petitioner was never heard by the Dist. Court. The essence of due process is "due process of law signifies a right to be heard in one's defense," *Hovey v. Elliott* (1897)

Entrenched in our jurisprudence that grant Constitutional Rights to corporate entities are the following:

- U.S. Constitution 1st Freedom of Speech, The 5th Amendment says to the federal government that no one shall be "deprived of life, liberty or property without due process of law." and 14th Amendments, Section 1 Due Process.
- *U.S. Supreme Court Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886)

- *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)
- *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778 (1978)

These ruling require legal representation for corporations:

- *Tal v. Hogan*, 453 Fed. 1244, 1254 (10 Cir. 2006)
- *Harrison v. Wahatoyas, L.L.C.* (2001)
- *DeVilliers v.Atlas Corporation* (1966)
- *Osborn v. President of Bank of United States*, 9 Wheat. 738, 829 (1824)
- *Turner v. American Bar Assn.*, 407 F.Supp. 451, 476 (ND Tex. 1975) *Schreibman v. Walter E. Heller & Co. (In re Las Colinas Dev. Corp.)*, 585 F.2d 7 (1st Cir. 1978) (cert. denied)
- *Shapiro, Bernstein & Co. v. Cont'l Record Co.*, 386 F.2d 426 (2d. Cir. 1967)
- *Flora Constr. Co. v. Fireman's Fund Ins. Co.*, 307 F.2d 413, 414 (10th Cir. 1962)
- *Commercial & R.R. Bank of Vicksburg v. Slocomb, Richard & Co.*, 39 U.S. 60 (1840)

The legal disconformities between the above Supreme Court rulings that on one hand state that corporations must be represented by a lawyer; and other Supreme Court rulings state the U.S. Constitution applies to corporations is antitheoretical to law. As well, it is impossible to apply both ruling concurrently without one litigant being deprived of Equal

Protection. When applying both of these rulings synchronously in the real-life court room the end result is that the Constitution would only apply if you pay for a lawyer/if the corporation had legal counsel. This is unequal access to our courts and is a violation of the Equal Protection Clause.

The above rulings have NOT classified corporations between rich, small or indigent corporations. However, the Dist. Court/government have definitively identified and assigned the Dist. Court Defendant to a classification: The Low Income Corporation. Subject classification by the government against the Dist. court defendant was accomplished by applying a requirement; that legal counsel is required for corporations. That involuntary requirement was impossible to comply with due to economics. It is the fault of the U.S. government and U.S. courts to impose this requirement; that too often result in unfavorable Default Judgments against low income corporations to the advantage of wealthier corporation who can afford legal counsel.

This has created a class of low income corporate litigants that were routinely denied equal access to justice. Consequently, this resulted in Default Judgments. The Default Judgment ratio between low income and wealthy corporations can be quantified. This is clear evidence that the burdens of low income corporations are higher/more unequal than high income corporations. Consequently, the benefits are unequal.

It is evident by the Dist. Court transcripts that the wealthy Plaintiff corporation, Connor Sport Court International, "World's largest Court Builder"™ had access to justice while the less affluent Defendant

was told to 'sit down' or "Sit down. I don't want to have to have the marshal have you sit down." (Exh. "A" p.5 line 1&2) Dist. Court Judge Bruce Jenkins referred to 'the local rule' (a rule of the government) to justify his judicial disparity. (Exh. 'A' p. 28 line 17) Judge Jenkins states:

> THE COURT: You're not a lawyer. Our local rule requires a lawyer to represent the entity." (Exh. "A" p. 4 line 3)

> THE COURT: " . . . that the local rule involving lawsuits in Federal Court in Utah require an appearance by a company through counsel." (Exh. 'A' p. 28 line 17)

There exists no compelling government interest or purpose to disfavor low income corporation and to favor wealthy corporations in a court room. There is no rational basis to deny James Maksimuk, a business owner, CEO, corporate board member or designated spokesperson to represent their company in court without legal counsel. Government action at the Dist. Court and Cir. Court substantially infringed on the Constitutional Rights, Due process of Law and the Equal Protection Clause against this Petitioner and thousands of low income corporations in court rooms nationwide. The Supreme Court is more competent to quantify the number of small corporations that have been 'legally out-gunned' by rich corporations than this Petitioner can speculate.

The Supreme Court can remedy this 'institutional' judicial inequity against low income corporations by amending and over-turning court Rules and rulings that conflict with the Equal Protection Clause and

enact new rulings that are in conformity with the Equal Protection Clause and Due Process of Law.

If the court fails to level the playing field between low income and wealthy corporations, this would be tantamount to promoting and enriching lawyers by forcing all businesses to hire lawyers. This will <u>not</u> uphold Equal Protection but only promote more opportunity for lawyers.

The U.S. courts by their actions place favor to the law industry resulting in unequal access for low income corporations.

The Dist. Court did in fact treat the Petitioner unequally and caused great harm:

(a) Denied the right to speak in court

(b) Due Process was denied

(c) Private property was "<u>enjoined from using</u>"

(d) That the Petitioner can't participate in the hearing

(e) Adjudicated in the wrong venue

(f) Adjudicated in the wrong jurisdiction because the TTAB case was ongoing.

(g) Was ordered to pay Plaintiff's legal fees.

If the Petitioner was granted Due Process and Equal Protection was granted at the Dist. Court, 10th Cir. & CAFC the results would have been different because the Dist. Court would have adjudicated on the merits.

The merits of the Petitioner's TTAB Petition for Cancellation (Exh. "I") are on record dated 06/13/2017

and the Petitioner's Appellant's Opening Brief (Exh. "J") Petition for Rehearing En Banc & Request for Oral Rehearing En Banc (Exh. "K") to the CAFC dated June 03, 2019 are also on record.

This Petitioner asks the Supreme Court to review the merits of these submissions.

If given the opportunity by granting access to The Courts-and if adjudicated on the merits; the case would of:

1. Been adjudicated in California.
2. Trademark 'Sport Court' would have been cancelled.
3. Claim Preclusion issue would have not been applied against the Petitioner.
4. Order to pay legal fees would have not been ordered.

If Due Process and Equal Protection was applied at the Dist. Court The Defendant would have:

(1) Addressed the court

(2) Questioned the VENUE

(3) Questioned the jurisdiction

(4) Submitted exculpatory evidence

(5) Referenced legal citations favorable to the Defendant

(6) Motioned to move the VENUE from Utah to California (which was done on deaf ears)

(7) Not been threatened and intimidated by the Dist. Court to have the marshals sit me down.

Petitioner did not motion the court for a free lawyer, but instead just–among other requests-asked the court to move the venue to California, per 28 U.S.C. 1391(b) and 28 U.S.C. § 1400(b) [Amended May 22, 2017 *TC Heartland LLC v. Kraft Foods Group Brands*] [interpreted in *Fourco Glass Co. v. Transmirra Products*] and to rebut allegations against the Dist. Court Defendant in the proper venue.

The patent venue statute, 28 U.S.C. § 1400(b), provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

Mr. Justice WHITTAKER delivered the opinion of the Court.

> The question presented is whether 28 U.S.C. 1400(b), 28 U.S.C.A. § 1400(b), is the sole and exclusive provision governing venue in patent infringement actions, or whether that section is supplemented by 28 U.S.C. 1391(c), 28 U.S.C.A. § 1391(c).
>
> Section 1400 is title 'Patents and copyrights,' and subsection (b) reads:
>
> '(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.'
>
> Section 1391 is titled 'Venue generally,' and subsection (c) reads:

> '(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.' [emp ours]

The Petitioner's company is incorporated in the state of California. The Dist. Court docketed and adjudicated the case in the wrong venue. This cause alone merits a retrial.

Subject case CAFC In Re: Micron Technology, Inc. Case # 2017-138 Decided November 15, 2017 resulted in the CAFC to transfer a case V.E. Holding to *TC Heartland* states:

Section 1406(a) of Title 28 of the United States Code provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." A defendant objecting to venue may file a motion to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3). (emp ours)

The Dist. Court, Utah docketed and adjudicated the case in the wrong venue. The Petitioner asks the Supreme Court to dismiss the case or transfer the case to the proper venue: California

Any such law or court ruling that requires all businesses to be represented by a lawyer is a violation of the Equal Protection Clause because all businesses can't afford a lawyer. It's not Equal Protection if a ruling presents burdens on some and not others.

And these government actions, enacted Rules and ruling are an action by the U.S. Government that imposed a burden against low income corporations; and to the benefit to wealthy corporations. Consequently, this creates a two-class judicial system.

What clearer way to prove that the government imposed a burden against the Petitioner and prove the benefits (due process, equal protection, etc.) was applied unequally against the Petitioner than the Dist. Courts own transcripts. In addition, the action of the government created the classification (corporation) starting in 1840 with *Commercial + RR Bank of Visksburg v. Slocomb, Richard & Col*:

> " . . . an aggregate corporation, and there could be no appearance but by attorney."

This case also proves that the low income corporate class is not illusory. There is no way to date the low income classification but the evolution of the low income corporate class evolved from government backing through court ruling and Rules. It is not the road that determines whether or not the government complied with the Equal Protection Clause it is the end result that in fact created a disadvantage to the Petitioner; and an advantage to another. This obviously caused the Petitioner harm.

It is evident by the Dist. Court transcripts that the wealthy Plaintiff Corporation, Connor Sport Court International, "World's largest Court Builder™" had access to justice while the less affluent Defendant was told to 'sit down' or "Sit down. I don't want to have to have the marshal have you sit down." (Exh. "A" p. 5 line 1&2)

The government's action to enact a prerequisite-which all businesses must be represented by a lawyer in order to defend itself in a court of law-has created 'institutional injustice.' In addition, the high cost of legal representation has scared away small corporations from even filing lawsuits against wealthy corporations.

This is the definition of UNEQUAL ACCESS. This has emboldened wealthy corporations and enriched lawyers all at the expense of low-income corporations.

Referenced Rules and antiquated Supreme Court rulings can't usurp or conflict with the Equal Protection Clause. And if one corporate defendant can't afford a lawyer it shall NOT mean Equal Protection shall NOT apply.

Hypothetically, let's say there's a new ruling that requires all individual entities in all civil cases involving more than $50,000 in damages are required to hire lawyers. Would that give a disadvantage to the litigant who can't afford to pay a lawyer? And what if, the wealthier litigant won by Default Judgment because the other litigant can't afford legal counsel.

Is this a violation of Equal Protection Clause?

If you answered 'yes' then this Petitioner asks for consistent rulings, intent, interpretation and applications of the Equal Protection Clause by granting this Writ of Certiorari.

The same hypothetical situation would apply to wealthy corporations versus poor corporations.

It is evident; access to equal justice was accorded the wealthy litigants but was not accessible to the less affluent litigant. This is a violation of the Equal

Protection Clause, Amendment XIV to the United States Constitution:

> "nor shall any State [. . .] deny to any person within its jurisdiction the equal protection of the laws".

And this judicial disparity and non-accessibility did <u>not</u> apply to wealthy corporations.

Just like low income individual entities, low income corporate entities are subject to limited 'access to justice' because they can't afford lawyers/can't afford to be heard. Nor is a corporation permitted to represent itself without a lawyer. The common outcome is a Default Judgment that almost always favors the wealthier corporation. This has created a judicially disenfranchised corporate classification against the advantage of a wealthier corporate class. Our nation's laws, esp. Constitutional Law would not permit this inequality if it was rich person-vs-a poor person in a court room. Nor should the Supreme Court accept this disparity between rich corporations-vs-small corporations.

That the limit of wealth of a corporation (CWF Flooring, Inc.)-in fact and documented in court record-has caused limited access-by existing law-to First Amendment rights due to the legal requirement for corporations to hire legal counsel. "<u>The Court has recognized that the First Amendment applies to corporations</u>", *e.g., First Nat. Bank of Boston v. Bellotti* (1978)

The documented fact is; limited corporate funds of CWF Flooring, Inc. suppressed speech inside a court room. This is clearly a violation of the 1st Amendment

and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The CAFC-Panel cites, *Rowland v. Cal. Men's Colony*, Unit II Men's Advisory Council, which states:

> "The Federal courts have maintained for generations that corporations must be represented by counsel" "(It has been the law for the better part of two centuries . . . that a corporation may appear in federal courts only through licensed counsel." *Osborn v. Bank of the United States*; *Tal v. Hogan*

The CAFC and Cir. Court referenced of *Osborn v. Bank of the United States* and *Tal v. Hogan*. Subject reference is based on tradition. Legal tradition has no place in the science of law. If tradition is the legal rationale then our 'Living Constitution' is dead.

The end result of implementing *Tal v. Hogan* and the current (below) Supreme Court rulings:

- *Osborn v. Bank of the United States*
- *Tal v. Hogan*
- *Cottringer v. State, Dept. of Employment Sec.*
- *Jones v. Niagara Frontier Transp. Authority*
- *DeVilliers v. Atlas Corp.*

. . . have created an unfair playing field for corporations, especially for small corporations, for generations . . . for the better part of two centuries.

It is evident that low income corporations-just like low income individuals-historically, have been and continue to be subjected to discrimination, judicial disparity, non-access, violations of Due Process &

Equal Protection. As well, prone to legal threats by wealthy corporation; "I'm going to sue you if you don't [blank blank]" A common scenario encountered by low income corporations.

Requiring a corporate litigant to hire a lawyer serves no compelling state interest. Under Strict Scrutiny, a law will be struck down unless it serves a compelling governmental interest and is necessary to achieve that end. *United States v. Carolene Products Co.* Footnote 4 (1938)

The fundamental right to due process and equal protection warrants Strict Scrutiny Review by the Hon. Supreme Court.

The government is prohibited from imposing restrictions on due process and liberty that service NO government interest or constitutional legitimate end.

The non-lawyer Petitioner pleas with the Supreme Court; to set legal precedence and rule that corporations are people too and shall have the right to defend itself in court without being required to hire a lawyer.

Now I ask the Supreme Court to "secure or maintain uniformity of the court's intentions" Which is to provide "any person within its jurisdiction the equal protection of the laws". 14th Amendment, Equal Protection Clause, U.S. Constitution, whether a person or corporate entity.

Turner v. American Bar Assn. states "Corporations and partnerships, both of which are fictional legal persons"

Turner v. American Bar Assn is no longer valid because *Citizens United v. Federal Election Commission* has re-clarified the constitutional protections of a corporate entity that now includes freedom of speech and is a now considered a legal 'person.' This new personal entity must apply in a court of law. A corporation is no longer a 'fictional legal person.'

It is obvious that the First amendment has granted corporate entities constitutional rights. These rights will not be denied if a corporation is in a court room/nor will these rights be denied if a corporation can't afford legal counsel.

The Dist. Court, 10th Cir. and CAFC violated U.S. Supreme Court *Santa Clara County v. Southern Pacific Rail* and *Citizens United v. Federal Election Commission*, decided January 21, 2010 that the First Amendment, Freedom of Speech and Equal Protection applies to a corporations:

> "(a) Although the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech," § 441b's prohibition non corporate independent expenditures is an outright ban on speech . . ."

Certainly if the 1st Amendment is applied to a corporation, applying the 5th, 14th Amendment and entire U.S. Constitution, all its Amendments and Sections should also apply to Corporations. "Corporations are people too."

Fifth Amendment: "nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"

> 14th Amendment, Section 1: "Section 1.
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

A judge in a lower court can't restrict Constitutional amendments/protections; that's a violation of Constitutional articles. Chief Justice Marshall's classic opinion in *McCulloch v. Maryland*, 17 U.S. 316-1819

> "Let the end be legitimate," he wrote, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

Outdated rulings requiring corporations to hire lawyer is based more on status quo and 'economics.'

Shenandoah Sales & Service, Inc v. Assessor of Jefferson County, (2012) Angela Banks states:

> (Chief Justice John Marshall, writing for the majority, stated, "[a] corporation, it is true, can appear only by attorney[.]"). (1840) Courts have offered a number of policy reasons why a corporation must be

> represented by a lawyer in a court of record. One court observed that, "unlike lay agents of corporations, attorneys are subject to professional rules of conduct and thus amenable to disciplinary action by the court for violations of ethical standards." *Oahu Plumbing and Sheet Metal, Ltd. v. Kona Construction, Inc.*, 60 Haw. 372, 378, 590 P.2d 570, 574 (1979). A lawyer purportedly has the legal expertise necessary to participate in litigation and other proceedings. Conversely, a non-lawyer corporate agent's lack of legal expertise could "frustrate the continuity, clarity and adversity which the judicial process demands." *State ex rel. Western Parks, Inc. v. Bartholomew County Court*

The above, is old school folks~! That a 'non-lawyer' could "frustrate the continuity, clarity and adversity which the judicial process demands" There's NO evidence to prove this claim. Even if a 'non-lawyer' did 'frustrate the continuity . . ." this does not justify an outcome of unequal access to our courts. As if only a non-lawyer can "frustrate the continuity, clarity and adversity which the judicial process demands" These are not quantifiable 'facts' and have less probative value than conjecture.

And if *Western Parks, Inc. v. Barthomloew Court* is 'factual' the Petitioner "may be challenged by showing to the court that those facts have ceased to exist. *Chastleton Corporation v. Sinclair*, 264 U.S. 543"

The requirement that all corporations must hire legal counsel does not further any government

compelling interest. An examination of all germane jurisprudence is absent of reason for this requirement.

The benefits a corporation would receive if they can self-represent without legal counsel are:

1. Would have access to the judicial system that otherwise would not.
2. Lessen Default Judgments that are often disfavor able to low income corporations.
3. Won't be 'forced' to pay for legal services that resulted in Default Judgments.
4. Improve the win/lose ratio of low income corporations.
5. Be less prone and less intimated to legal threats by wealthy corporations.
6. Low income corporations would compete more even handedly against large corporations because judicial access is available.
7. Won't be forced to settle because they can't afford a lawyer because they can self-represent.
8. More likely that the merits of the case will be addressed.

Law, especially Constitutional law evolves with society:

> "In United States constitutional interpretation, the living Constitution (or loose constructionism) is the claim that the Constitution has a dynamic meaning or it has the properties of an animate being in the sense that it changes. The idea is associated

> with views that contemporaneous society should be taken into account when interpreting key constitutional phrases.[1]" By Wikipedia.org, on the Living Constitution

It's also old school that "*Woman Are Too Sentimental for Jury Duty*"–Anti-Suffrage argument/Kenneth Russell Chamberlain, 1891-1984

And, its old school that layperson does not possess the skills to self-represent in a court of law or that a lawyer has higher moral standards than a non-lawyer.

With current technologies, Westlaw and the Internet's access to laws, court decisions, procedures, rules and a vast quantity of legal templates online have resulted in more *pro se* litigants than ever. In addition, the high cost of lawyers has priced the common person out of the 'justice market', even small corporations.

However, the judicial disparity gap between corporations is being <u>address</u> by the Supreme Court of Arizona but only <u>stagnant</u> by the U.S. government.

- Rule 31(d)(9) Rules of the Supreme Court of Arizona, [Amendment pending] Jan. 2018 which states: "public corporation may be represented by "a person who is not an active member of the state bar" before any court and in any proceeding." Author of amended Rule 31, Hon. David. B. Gass Maricopa County Superior Court, Arizona states: "Would amend Rule 31, Rules of the Arizona Supreme Court, to improve access to justice for small business litigants and to reorganize and modernize the rule"

- *Citizens United* (2010) states: . . . the rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." . . . "Political speech is "indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation." *Bellotti, supra*, at 777 (footnote omitted). This protection is inconsistent with Austin's rationale, which is meant to prevent corporations from obtaining "'an unfair advantage in the political marketplace'" by using "'resources amassed in the economic marketplace.'" 494 U.S., at 659. First Amendment protections do not depend on the speaker's "financial ability to engage in public discussion." *Buckley, supra*, at 49. *Citizens United v. Federal Election Commission*

- *Quarrier v. Peabody*, W. VA 507 (1877) states: "*Quarrier vs. Peabody* . . . the appearance by a corporation in a plea to jurisdiction of a court should not be in person or by attorney but may be by the president." [*Quarrier vs. Peabody* is a W. VA Supreme Court ruling]

- *First National Bank of Boston v. Bellotti* (1978) states: "whether its rights are designated 'liberty' rights or 'property' rights, a corporation's property and business interests are entitled to Fourteenth Amendment protection. . . . [A]s an incident of such protection, corporations also possess certain rights of

speech and expression under the First Amendment."

- *U.S. Supreme Court Santa Clara County v. Southern Pacific Rail Co* (1886) states: "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does."

2. DID THE DIST. COURT, 10TH CIR AND CAFC EXCLUDE CUMULATIVE EVIDENCE, IGNORE SUPREME COURT RULINGS, U.S. CODES AND FED. R. CIV. P. IN A PREJUDICIAL, BIAS AND ERRONEOUSLY MANNER SO TO MEET ABUSE OF DISCRETION STANDARDS? IF SO, SHOULD A RETRIAL BE GRANTED IN THE PROPER VENUE?

With Application to the Fed. R. Civ. P., Rule 59. New Trial; Altering or Amending a Judgment, though a 28 day limit for the Dist. Court has passed, for the reason to fulfill the purpose of substantial justice we PRAY the Supreme Court will override this 28 day rule and issue a new trail. The 28 day limit to file was not possible because the Dist. Court Defendant did not have legal counsel/was denied Due Process. This is not the fault of the Petitioner.

It is clear by the preponderance of misjudgments and legal errors that the Dist. Court, 10th Cir and CAFC made does meet the abuse of discretion standards. Alleged abuse of discretions was against established law, legal reason and evidence.

The legal errors are:

1. Dist. Court Clerk docketed case in wrong venue. [see Petitioner's "Corrected Response Brief, p. 11 dated Feb. 12, 2019 (Exh."L") and Petitioner's "Petition for Rehearing En banc and Request for Oral Rehearing En banc, dated June 03, 2019 (Exh."K" p. 5 #2)

2. Dist. Court judge adjudicated case in wrong venue despite the Defendant questioning the venue nine times (Exh. "A" p. 4, 5, 7, & 8, yellow highlight) [see Petitioner's "Corrected Response Brief, p. 11 dated Feb. 12, 2019 (Exh."L") and Petitioner's "Petition for Rehearing En banc and Request for Oral Rehearing En banc, dated June 03, 2019 (Exh. "K" p. 5#2]

3. Dist. Court unlawfully ruled 'sport court' is NOT generic term WITHOUT legal citations.

4. Dist Court and TTAB unlawfully Ruled 'sport court' is NOT generic which is in conflict of referenced Supreme Court ruling. (*see* Exh."I" & "J" p. 4-8)

5. Erroneously applied the Claim Preclusion issue against the Dist. Court Defendant without a legal basis and arbitrarily. Petitioner had only ONE case vs. Connor Sport Court International. One case can't produce two causes of action hence, Claim Preclusion can't apply. As well, the Default Judgment by the Dist. Court can't be applied probatively because the judgment was of a different cause

> of action than at the TTAB (*See* Appeal for En banc to CAFC Exh. "K" p. 14-17)

The Dist. Court's Plaintiff's corrected response brief and motion to dismiss from appellee Connor Sport Court International, LLC. with appendix pursuant to Fed. Cir. R. 30(e) IV. Factual Background Filed: 02/19/2019 states:

> "8. CWF never asserted a claim or defense in the Federal Action that the '328 Registration was invalid or should not have been registered, including without limitation any claim or defense that the subject mark of the '328 Registration was descriptive, not distinctive, or generic. (Exh. "M" p.4 #8 dated Feb. 19, 2019)

The reason the Dist. Court defendant did NOT state a claim regarding the trademark generic issue with the Dist. Court was because this issue was pending with the TTAB. If-which the defendant did NOT-motioned the Dist. Court and motioned the TTAB both to cancel the trademark, then that would meet the claim preclusion requirements.

It is evident that the Dist. Court judge made substantial errors in law. An error of law is an abuse of discretion.

Koon v. United States (1996) states:

> "A district court by definition abuses its discretion when it makes an error of law." . . . "The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."

Rabkin v. Oregon Health Sciences Univ. (9th Cir. 2003) states:

> "An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found."

United States v. Washington, 157 F.3d 630, 642 (9th Cir.1998) states:

> "The district court abuses its discretion when its equitable decision is based on an error of law or a clearly erroneous factual finding."

Int'l Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819, 822 (9th Cir.1993) states:

> "An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." (internal quotations and citation omitted)

Petitioner motions the Supreme Court to set aside the TTAB, Dist. Court, 10th Cir and CAFC decisions because they all were not in conformity with the above SC ruling and 5 U.S.C. 706(2) which states:

> "5 U.S.C. 706(2) provides that a reviewing court <u>shall</u> "hold unlawful and <u>set aside</u> agency action, findings, and conclusions found to be-"(A) arbitrary, capricious, an abuse of discretion, or otherwise <u>not in accordance with law</u>; "(B) contrary to con-

> stitutional right, power, privilege, or immunity; "(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; "(D) without observance of procedure required by law; "(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or [490 U.S. 360, 376] " (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." (emp ours)

The TTAB, Dist. Court and 10th Cir. and CAFC also abused its discretion by erroneously interpreting the law. *U.S. v. Beltran-Gutierrez* (9th Cir. 1994) and by resting its decision on an inaccurate view of the law or the application of an absence of law. *Richard S. v. Dept. of Dev. Servs.* (9th Cir. 2003)

And the erroneous interpretations / errors of the laws were:

1. That 'sport court' was a generic term.

   [No law was cited to support the non-genericness term decision of the Dist. Court]

2. That the proper Venue is Utah.

3. The adjudication of a trademark issue while a trademark case was pending with the TTAB. Petitioner never had his day in court at the

TTAB because the Claim Preclusion issue was erroneously applied.

4. Due Process was denied.

5. Claim Preclusion allegation was contrary to law because Petitioner did not have two causes of action against Connor Sport Court International.

6. Equal Protection was NOT accorded.

The Petitioner motions the Supreme Court to set aside all adverse rulings against the Petitioner for reasons stated; and in the furtherance of justice rule for a retrial.

3. Did the Dist. Court Violate the 5th & 14th Amendment When It Ruled that the Petitioner "Is Enjoined from Using" the Domain Name?

Obviously, the Dist. Court violated the 5th & 14th Amendments to the United States Constitution when it ruled in its Default Judgment:

> "CWF is hereby permanently enjoined from using the plasticsportcourtiles.com" domain name in connection with the marketing or sale of flooring products and services, including redirecting visitors from plasticsportcourtiles.com to other internet domains having website marketing or selling flooring products or services." (Emp ours) (Exh. Appendix 13a, p. 3)

The District Court ordered the privately owned property of James J. Maksimuk (a domain name: www.

plasticsportcourttiles.com) (Exh. "N")—not the corporate defendant—to "permanently enjoined from using."

This is without a doubt a violation of the U.S. Constitution. 'Enjoined from using' is tantamount to being deprived of property without Due Process.

> 'We hold these truths to be sacred & undeniable; that all men are created equal & independent, that from that equal creation they derive rights inherent & inalienable, among which are the preservation of life, & liberty, & the pursuit of happiness'

> 5th Amendment: "nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

4. OWNING TO THE ERRORS OF LAW COMMITTED BY THE CAFC, DIST. COURT, 10TH CIR. AND TTAB AND THE PREPONDERANCE OF EVIDENCE AND REFERENCED SC RULINGS, SHOULD THE TRADEMARK 'SPORT COURT' BE CANCELLED AND REMOVE FROM THE TRADEMARK REGISTRY?

Special attention needs to be given to:

"*Canal Company v. Clark*, 80 U.S. 311 (13 Wall. 311, 20 L.Ed.581) (1871)." which states,

> "No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the

> public would be injured rather than protected, for competition would be destroyed. Nor can a <u>generic</u> name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection." (emp ours)
>
> This citation clearly warrants the cancellation of the trademark 'sport court'

See Petitioner's CAFC "Appellant's Opening Brief, dated Oct. 06, 2018 (Exh. "J" p.1-8)

PRAYER

1. Overturn and/or amend Supreme Court rulings and Rules so to CONFORM to Due Process of Law and the Equal Protection Clause.

2. Overturn and/or amend all Supreme Court rulings that deny the right for corporations to self-representation.

3. Overturn TTAB, Dist. Court, 10th Cir. and CAFC Orders/Decisions/Mandates because they violated the Petitioner's Equal Protection Clause.

4. Overturn TTAB Cancellation Case Number: 92066311, Dist. Court, 10th Cir. and CAFC Orders/Decisions/Mandates because abuse of discretion standards have been met.

5. Refer Dist. Court Case #2:17-cv-00042-BSJ to the proper Venue, California for retrial or dismiss or

to transfer for lack of venue and/or rule that 'sport court' is a generic term and cancel the trademark.

CONCLUSION

For reasons stated above this Petitioner respectfully urge the Hon. Supreme Court to grant this Writ of Certiorari.

Respectfully submitted,

JAMES J. MAKSIMUK
PETITIONER PRO SE
38325 6TH STREET EAST
PALMDALE, CA 93550
(323) 420-6794
SALES@SPORTTILES.PRO

OCTOBER 10, 2019

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OPINION OF THE FEDERAL CIRCUIT
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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES J. MAKSIMUK,

Appellant,

v.

CONNOR SPORT COURT INTERNATIONAL, LLC,

Appellee.

2019-1156

Appeal from the United States Patent and Trademark Office, Trademark Trial and Appeal Board in No. 92066311

Before: DYK, REYNA, and TARANTO, Circuit Judges.

PER CURIAM

Connor Sport Court International, LLC holds Registration No. 2,479,328 for the word mark SPORT COURT associated with plastic, interlocking floor tiles in International Class 21. That registration issued in August 2001, and it has since become incontestable. *See* 15 U.S.C. § 1065. James J. Maksimuk also sells interlocking floor tiles through his company, CWF Flooring, Inc. Mr. Maksimuk petitioned the Trademark

Trial and Appeal Board for cancellation of Connor's '328 registration, arguing that the SPORT COURT mark is generic. The parties filed several motions before the Board, including Connor's motion for summary judgment based on claim preclusion. The Board granted Connor's motion and dismissed the cancellation petition with prejudice, and Mr. Maksimuk now appeals. We affirm.

I

In January 2017, Connor sued CWF Flooring in the U.S. District Court for the District of Utah, alleging (among other things) infringement of Connor's SPORT COURT trademark by one of the domain names for CWF Flooring, "plasticsportcourttiles.com." App. 34-38. Before the district court, Mr. Maksimuk attempted to appear on behalf of CWF Flooring, but the court informed him that corporations must be represented by counsel. App. 54-55, 57. CWF Flooring never hired counsel. When CWF Flooring failed to respond to the complaint, the court entered a default judgment against it on August 10, 2017. App. 60-63. Referring to five registrations, including the '328 registration, the court found that "[t]he Sport Court Marks are distinctive and not generic." App. 61. The court enjoined CWF Flooring from using the domain name at issue because it is confusingly similar to Connor's SPORT COURT mark.

CWF Flooring timely appealed the default judgment to the U.S. Court of Appeals for the Tenth Circuit. App. 65. But several days later, the Tenth Circuit abated CWF Flooring's appeal because the company was still not represented by counsel. App. 67-68. Mr. Maksimuk moved (among other things) to

appear on behalf of CWF Flooring, but the Tenth Circuit denied the motion. App. 70-71. When CWF Flooring failed to hire counsel by the deadline, the Tenth Circuit dismissed its appeal for failure to prosecute on October 12, 2017. App. 73-74.

In June 2017, while the district-court proceedings were still pending, Mr. Maksimuk petitioned the Trademark Trial and Appeal Board to cancel Connor's '328 registration.[1] App. 77-81. Mr. Maksimuk argued that the SPORT COURT mark is generic.[2] Connor moved for summary judgment in the fall of 2017, after the district court had entered its judgment, arguing that the district-court judgment precluded Mr. Maksimuk from raising genericness in the Board proceeding. The Board determined that claim preclusion barred Mr. Maksimuk's cancellation petition, granted Connor's motion for summary judgment, and dismissed the petition with prejudice on June 22, 2018. App. 11-17. Mr. Maksimuk filed his notice of appeal with the Board on July 5, 2018. After Mr. Maksimuk sent his appeal to two of our sister circuits, we eventually received it on October 25, 2018. We have exclusive jurisdiction

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[1] The cover sheet for the cancellation petition lists CWF Flooring as the petitioner, but the petition itself lists Mr. Maksimuk as the petitioner. The Board assumed that the cover sheet reflected a clerical error, gave Mr. Maksimuk the benefit of the doubt that he was the proper petitioner, and granted his motion to amend the case caption accordingly. App. 10-11.

[2] Mr. Maksimuk also argued that the SPORT COURT mark is descriptive. But while incontestable marks may be challenged as generic, they may not be challenged as merely descriptive. *See* 15 U.S.C. § 1064(1), (3). Therefore, the Board read Mr. Maksimuk's petition as properly raising only the genericness issue. App. 7.

over appeals from the Board under 28 U.S.C. § 1295 (a)(4)(B).

II

The Lanham Act grants parties in cancellation proceedings the right to appeal to this court: "[A] party to a cancellation proceeding . . . who is dissatisfied with the decision of the Director or Trademark Trial and Appeal Board[] may appeal to the United States Court of Appeals for the Federal Circuit. . . ." 15 U.S.C. § 1071(a)(1). It further indicates how the dissatisfied party must initiate the appeal:

> When an appeal is taken to the United States Court of Appeals for the Federal Circuit, the appellant shall file in the United States Patent and Trademark Office a written notice of appeal directed to the Director, within such time after the date of the decision from which the appeal is taken as the Director prescribes, but in no case less than 60 days after that date.

Id. § 1071(a)(2). The U.S. Patent and Trademark Office has promulgated a regulation interpreting the latter statutory provision: "The notice of appeal . . . must be filed with the Director no later than sixty-three (63) days from the date of the final decision of the Trademark Trial and Appeal Board or the Director." 37 C.F.R. § 2.145(d).

Connor argues that we do not have jurisdiction over Mr. Maksimuk's appeal because it was not filed within the 63 days prescribed by regulation. More specifically, Connor argues that Mr. Maksimuk was 62 days late because his deadline to submit his appeal

to this court was August 24, 2018, but we did not receive it until October 25, 2018. But the statutory and regulatory provisions quoted above say nothing about when this court must receive the notice of appeal. Rather, the statute says that the appellant must file "a written notice of appeal directed to the Director" by the Director-set deadline. 15 U.S.C. § 1071(a)(2) (emphasis added). And the Director's regulation repeats that the notice of appeal "must be filed with the Director" within 63 days. 37 C.F.R. § 2.145(d) (emphasis added). Because Mr. Maksimuk filed his notice of appeal only a couple of weeks after the Board issued its decision, he did what the relevant statutory and regulatory provisions require.

The Federal Rules of Appellate Procedure do not bar our review of Mr. Maksimuk's appeal. The relevant rule states that "[r]eview of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order." Fed. R. App. P. 15(a)(1) (emphasis added). But Connor points to no source of law, besides the already-discussed provisions, that prescribes such a time limit. We hold that we have jurisdiction to hear this appeal.[3]

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[3] Mr. Maksimuk appears to have violated this court's own Rule 15(a)(1):

> To appeal a decision of the . . . Trademark Trial and Appeal Board . . . under 15 U.S.C. § 1071(a), the appellant must file in the Patent and Trademark Office a notice of appeal within the time prescribed by law. Notwithstanding Rule 25(b)(1), the appellant must simultaneously send to the clerk of court one paper copy of the notice and pay the fee set forth in Federal Circuit Rule 52.

III

We turn now to the claim-preclusion issue. Claim preclusion, historically known as *res judicata*, prevents a party from litigating a matter that should have been litigated in an earlier proceeding. *See generally* 18 Charles Alan Wright et al., Federal Practice and Procedure § 4402 (3d ed. 2018). Claim preclusion applies when three elements are met: "(1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first." *Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 1324 (Fed. Cir. 2008) (quoting *Jet, Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 1362 (Fed. Cir. 2000)). When wielded against the defendant from the first action, claim preclusion applies "only if (1) the claim or defense asserted in the second action was a compulsory counterclaim that the defendant failed to assert in the first action, or (2) the claim or defense represents what is essentially a collateral attack on the first judgment." *Id.* (citing *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974)). Claim preclusion can apply against the defendant even if the first judgment was a default judgment. *Id.* at 1329-30 (collecting cases). We review de novo the Board's determination that claim preclusion bars Mr.

Fed. Cir. R. 15(a)(1) (emphasis added). But our rules are not jurisdictional. *Cf. Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 n.9 (2017) ("In cases not involving the timebound transfer of adjudicatory authority from one Article III court to another, we have additionally applied a clear-statement rule: A rule is jurisdictional if the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." (emphasis added) (cleaned up)). In the circumstances in this case, we proceed to consider the correctness of the Board's decision.

Maksimuk's cancellation petition and its grant of summary judgment on that basis. *See id.* at 1323.

We conclude that the Board did not err in determining that claim preclusion bars Mr. Maksimuk's cancellation petition. The Board rightly determined, on the facts here, that Mr. Maksimuk is in privity with CWF Flooring because he is its founder, owner, and CEO and he controlled the earlier district-court litigation. App. 12-13 (citing *Kreager v. Gen. Elec. Co.*, 497 F.2d 468, 472 (2d Cir. 1974)). The Board also correctly determined that there was an earlier final judgment on the merits of a claim, *i.e.*, the district court's default judgment. App. 14. And the Board properly concluded that the cancellation petition amounted to a collateral attack on the district court's judgment, which specifically stated that Connor's SPORT COURT mark is "distinctive and not generic." App. 15 (quoting App. 61). Therefore, we agree with the Board that the elements of claim preclusion are met here.

We see no special circumstances demanding a departure from the generally applicable standards of claim preclusion. Mr. Maksimuk argues that the Board's claim-preclusion analysis is flawed because he was denied due process during the district-court proceedings when he was not allowed to appear on CWF Flooring's behalf. But besides making unfounded accusations that the district court was biased against him, Mr. Maksimuk has not explained to us why he did not have an opportunity to raise his due-process concerns before the district court or the Tenth Circuit. Regardless, there is no due-process violation.

The federal courts have maintained for generations that corporations must be represented by counsel. *E.g.*,

Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 201-02 (1993) ("It has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel." (citing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 829 (1824))); *Tal v. Hogan*, 453 F.3d 1244, 1254 & n.8 (10th Cir. 2006). Both the district court and the Tenth Circuit timely informed Mr. Maksimuk of the longstanding rule that corporations must be represented by counsel. App. 54-55, 57, 67-68. Mr. Maksimuk cannot complain that he was denied a full and fair opportunity to litigate his claim because of a technicality he did not know about. Accordingly, we discern no denial of due process in the district-court proceedings that would make claim preclusion inappropriate here.

IV

We have considered the parties' remaining arguments but find them unpersuasive. We therefore affirm the decision of the Trademark Trial and Appeal Board.

No costs.

AFFIRMED

DECISION OF THE TRADEMARK TRIAL AND APPEAL BOARD (JUNE 22, 2018)

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

JAMES J. MAKSIMUK
(by correction from CWF Flooring, Inc.)

v.

CONNOR SPORT COURT INTERNATIONAL, LLC

Cancellation No. 92066311

Before: KUHLKE, BERGSMAN and GOODMAN, Administrative Trademark Judges.

By the Board:

On June 13, 2017, Petitioner filed a petition to cancel Respondent's Registration No. 2479328, issued August 21, 2001 (renewed), for the mark SPORT COURT in typed form for "plastic interlocking floor tiles" in International Class 21, on grounds that the mark is generic and, if not generic, then merely descriptive.[1] Because the petition to cancel was filed

[1] On May 22, 2017, Mr. Maksimuk also filed a petition to cancel Respondent's Registration Nos. 1100976 and 1155586. In a

more than five years after the issuance of the registration at issue, the ground that the mark is merely descriptive is unavailable. *See* Trademark Act Section 14(3), 15 U.S.C. § 1064(3). Accordingly, we treat the petition to cancel as seeking cancellation solely on the ground of genericness.

The following motions are pending herein: (1) Respondent's renewed motion (filed November 29, 2017) for summary judgment on the ground of *res judicata* based on previous litigation styled *Connor Sport Court Int'l, LLC, v. CWF Flooring, Inc.*, Case No. 2:17-cv-00042, filed in United States District Court for the District of Utah (10 TTABVUE);[2] (2) Petitioner's motion (filed December 10, 2017) to correct the caption of this proceeding (13 TTABVUE); and (3) Respondent's motion (filed March 2, 2018, 18 TTABVUE) to strike Petitioner's February 7, 2018 submission (17 TTABVUE) on the ground that it is an impermissible surreply in connection with the renewed motion for summary judgment.

June 6, 2017 order, the Board stated that the May 22 filing was not accompanied by the required filing fee and therefore would receive no consideration.

[2] Respondent filed a first motion for summary judgment on the ground of *res judicata* on October 17, 2017 (5 TTABVUE). The Board, in an October 25, 2017 order (6 TTABVUE), denied that motion without prejudice because it was based on an unpleaded defense. Respondent then filed a motion for leave to file an amended answer on October 30, 2017 (7 TTABVUE), which the Board granted as conceded in a November 28, 2017 order (9 TTABVUE).

I. Motion to strike denied

Trademark Rule 2.127(a) allows a nonmovant one brief in response to a motion. Trademark Rule 2.127 (e)(1) allows a nonmovant until thirty days from the date of service of the brief in support of the motion for summary judgment to file a brief in response thereto. Based on the foregoing, Petitioner was allowed until December 28, 2017 to file one brief in response to Respondent's renewed motion for summary judgment. After the November 29, 2017 filing of the renewed motion for summary judgment, the parties filed the following relevant documents herein:

- 13 TTABVUE: Petitioner's motion (filed December 10, 2017) to amend the caption of this proceeding;
- 14 TTABVUE: Petitioner's response (filed December 14, 2017) to the Board's December 8, 2017 suspension order (12 TTABVUE);
- 16 TTABVUE: Respondent's combined reply brief (filed February 2, 2018) in support of the motion for summary judgment and brief in response to the motion to amend the caption; and
- 17 TTABVUE: Petitioner's brief (filed February 7, 2018) in response to the renewed motion for summary judgment.

In a one-page response to the Board's December 8, 2017 suspension order (14 TTABVUE), Petitioner, in the context of seeking action on the motion to amend the caption, timely argued in opposition to the

motion for summary judgment,[3] but did not otherwise respond to the motion.

The Board, in a January 13, 2018 order (15 TTABVUE), indicated that it would consider Petitioner's response to the suspension, notwithstanding the lack of proof of service thereof, and set time for remaining permissible briefing of the pending motions. Under Rule 2.127(a), Petitioner was limited to filing a reply brief in connection with the motion to amend the caption. Nonetheless, Petitioner filed a brief in response to the motion for summary judgment (17 TTABVUE), instead of a reply brief in support of the motion to amend the caption.

Because Petitioner's brief in response to the motion for summary judgment was filed more than thirty days after the service of the motion for summary judgment, that brief in response is untimely. Although the brief in response does not include a showing that Petitioner's failure to timely file it was caused by excusable neglect (see Fed. R. Civ. P. 6(b)(1)(b); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380 (1993); *Pumpkin, Ltd. v. Seed Corps*, 43 USPQ2d 1582 (TTAB 1997)), we elect to exercise our discretion to consider it. Based on the foregoing, the motion to strike is denied.

II. Motion to amend the caption

The ESTTA cover form for the petition to cancel identifies CWF Flooring, Inc. ("CWF") as Petitioner

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[3] In particular, Petitioner contends that *res judicata* is inapplicable because CWF Flooring and James J. Maksimuk are different entities.

(1 TTABVUE 1).[4] Because the text of the petition to cancel states that "[t]he PETITIONER is James J. Maksimuk" (1 TTABVUE 2), Petitioner asks that the caption be corrected to identify Mr. Maksimuk as plaintiff.

In opposition, Respondent contends that the proposed correction is futile because correcting the caption will not prevent application of the doctrine of *res judicata* in this case because Mr. Maksimuk was in privity with CWF Flooring, Inc. when the district court entered its final judgment (16 TTABVUE 2-3).

When the plaintiff in a Board *inter partes* proceeding misidentifies itself in the complaint, if the plaintiff can establish to the Board's satisfaction that this misidentification was merely a non-substantive mistake, the Board may allow amendment of the complaint, pursuant to Fed. R. Civ. P. 15(a), to correct the misidentification. *See Mason Eng. & Design Corp. v. Mateson Chem. Corp.*, 225 USPQ 956, 957 n.3 (TTAB 1985) (deeming pleadings amended to recite opposer's correct name); TBMP § 512.04 (June 2017).

Whether this proceeding is barred by the doctrine of *res judicata* is not at issue in the motion to correct the caption of this proceeding. Because the text of the petition to cancel makes clear that Mr. Maksimuk is the intended Petitioner herein, we treat Petitioner's identification of CWF Flooring, Inc. in the ESTTA cover form[5] as a clerical error. Petitioner's motion to

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[4] Petitioner submitted a filing fee for a single petitioner in a single class. *See* Trademark Rule 2.6(a)(16)(ii).

[5] Contrary to Petitioner's apparent belief, the Board does not enter information in ESTTA cover forms. The filing party enters that information.

correct the caption of this proceeding is therefore granted, and the caption of this proceeding is hereby amended to identify Mr. Maksimuk as petitioner and party plaintiff.

III. Motion for Summary Judgment Granted

Under the doctrine of *res judicata* (or claim preclusion), the entry of a final judgment "on the merits" of a claim (*i.e.*, cause of action) in a proceeding serves to preclude the relitigation of the same claim in a subsequent proceeding between the parties or their privies, even in those cases where the prior judgment was the result of a default or consent. *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Chromalloy Am. Corp. v. Kenneth Gordon, Ltd.*, 736 F.2d 694, 222 USPQ 187 (Fed. Cir. 1984); *Flowers Indus., Inc. v. Interstate Brands Corp.*, 5 USPQ2d 1580 (TTAB 1987). More specifically, in the circumstances presented by the case at hand, "[c]laim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984); *Nasalok Coating Corp. v. Nylok Corp.*, 522 F.2d 1320, 86 USPQ2d 1369, 1371 (Fed. Cir. 2008).

Regarding whether the parties in this proceeding and the parties in the prior civil action are legally equivalent, we find initially that there is no genuine dispute that Respondent was the plaintiff in the earlier civil action and that Mr. Maksimuk was in privity with CWF when judgment was entered in the civil

action. The basis for applying preclusion against him herein rests on his being the founder (16 TTABVUE 7), "owner" (10 TTABVUE 42) and "CEO" (10 TTABVUE 46 and 56) of CWF, the defendant in the prior civil action. *See e.g.*, *Kraeger v. General Electric Co.*, 497 F.2d 468, 472 (2d. Cir. 1974) (president and sole shareholder of a corporation bound by the corporation's defeat in an action that he effectively controlled); *Vitronics Corp. v. Conceptronic, Inc.*, 27 USPQ2d 1046, 1049 (D.N.H. 1992) (founder and CEO of corporation in privity with corporation); *John W. Carson Foundation v. Toilets.com Inc.*, 94 USPQ2d 1942, 1947 (TTAB 2010) (president and sole owner of corporation in privity with corporation).

Section 39 of the Restatement (Second) of Judgments (1982) states the applicable black-letter law: "A person who is not a party of an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party." *See also* 18A C. Wright, A. Miller & E. Cooper, Fed. Prac. & Proc. Juris. § 4451 (April 2018 update). The record herein indicates that Mr. Maksimuk fully controlled CWF's case in the civil action[6] by

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[6] The Board notes the following procedural history in the civil action:

- Following receipt of the service copy of the complaint in the civil action (10 TTABVUE 14-33), Mr. Maksimuk, appearing *pro se* on behalf of CWF, sent an email on April 27, 2017 to the magistrate judge in the United States District Court for the District of Utah in which CWF requested an extension of time to answer (10 TTABVUE 35-36).

- Mr. Maksimuk, however, was informed in an April 27, 2017 response from the magistrate judge's law clerk that any such request must be in the form of a motion filed on the docket by an attorney (10 TTABVUE 35).

- In a June 6, 2017 notice from the district court, CWF and Petitioner were advised that CWF, as a corporation, "cannot appear except through counsel" and that Mr. Maksimuk was "previously notified by Magistrate Judge Paul M. Warner to that effect. Absent proper appearance through counsel, the court cannot deal with the Motion for Stay of Proceedings, forwarded to chambers via e-mail from James Maksimuk on June 6, 2017." (10 TTABVUE 38).

- After CWF failed to retain an attorney to represent it in the civil action in accordance with the district court's local rules and failed to file an answer or other response to the complaint, the district court entered default judgment against CWF in an August 10, 2017 decision (10 TTABVUE 41-44, 17 TTABVUE 14-17). In that decision, CWF

> was permanently enjoined from using the plasticsportcourttiles.com domain name in connection with the marketing or sale of flooring products and services, including redirecting visitors from plasticsportcourttiles.com to other internet domains having websites marketing or selling flooring products or services . . . [and] from using an internet domain name containing the term 'sport court,' 'sports court,' 'sport courts,' or any variation thereof in connection with the marketing or sale of flooring products and services, including redirecting visitors from such a domain to other internet domains having websites marketing or selling flooring products or services.

(10 TTABVUE 43).

Mr. Maksimuk, again appearing *pro se* on behalf of CWF, appealed that default judgment to the United States Court of Appeals for the Tenth Circuit, but that appeal was dismissed on October 12,

attempting to represent CWF *pro se* therein in contravention of local rules. In view thereof, we find that there is no genuine dispute that privity exists between Mr. Maksimuk, Petitioner in this proceeding, and CWF, the defendant in the prior civil action, for *res judicata* purposes. Accordingly, there is no genuine dispute that the parties in this case and the civil action are legal equivalents.

Further, there is no genuine dispute of material fact that there was a final judgment on the merits of a claim in the civil action. The United States District Court for the District of Utah entered default judgment in the civil action after CWF refused to hire an attorney. In its decision entering such judgment, the district court found that "the Sport Court marks [including Respondent's involved Registration No. 2479328] are distinctive and not generic" and that CWF's use of the domain plasticsportcourttiles.com infringed Respondent's SPORT COURT marks (10 TTABVUE 42-43). Further, the United States Court of Appeals for the Tenth Circuit dismissed CWF's appeal of that default judgment after CWF failed to hire an attorney to appear on its behalf. Although Petitioner asserts in his brief in response to the motion for summary judgment that he intends to file a petition for writ of certiorari with the Supreme Court in this case (17 TTABVUE 5), his time for so filing had lapsed by the time he filed the brief in response. *See* Sup Ct. R. 13.1 (a petition for writ of certiorari is timely when it is filed within 90 days after entry of a judgment by a United States Court of Appeals). The record herein does not indicate that any such petition was filed.

2017, after CWF failed to retain an attorney to represent it in that appeal (10 TTABVUE 54).

We now consider whether the cancellation proceeding is based on the same set of transactional facts as the civil action. Where, as in this case, a party seeks to preclude a defendant in the first action from bringing certain claims as plaintiff in a second action, the rules of defendant preclusion apply. *See Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 86 USPQ2d 1369, 1372 (Fed. Cir. 2008). A defendant in the first action is precluded from bringing such claims in a subsequent proceeding only if: (1) the claim or defense asserted in the second action was a compulsory counterclaim that the defendant failed to assert in the first action; or (2) the claim or defense represents what is essentially a collateral attack on the first judgment. *Id.*

Regarding the first basis for applying defendant claim preclusion, Trademark Act Section 37, 15 U.S.C. § 1119, allows a trademark infringement defendant to assert a counterclaim to cancel the registration. However, our primary reviewing court has determined that a claim that a trademark registration is invalid is not a compulsory counterclaim to a claim of trademark infringement brought in a federal district court.[7] *See id.,* 86 USPQ2d at 1373.

We turn then to the second basis for applying claim preclusion against defendants—where the effect of the later action is to collaterally attack the judgment

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[7] By contrast, in Board opposition and cancellation proceedings, a defense attacking the validity of a registration pleaded in a cancellation action is a compulsory counterclaim if grounds for the counterclaim existed at the time when the answer is filed or are learned during the course of the proceedings. *See* Trademark Rules 2.106(b)(3) and 2.114(b)(3); *Jive Software, Inc. v. Jive Commc'ns, Inc.*, 125 USPQ2d 1175, 1177 (TTAB 2017).

of the first action. Here, the district court's default judgment in the infringement action included the determination that Respondent's "Sport Court Marks are distinctive and not generic." 10 TTABVUE 41-42. Allowing Petitioner to challenge the validity of the involved registration for the mark SPORT COURT for "plastic interlocking floor tiles" upon which the prior judgment was based on the ground of genericness would allow Petitioner to collaterally attack the judgment of the first action.

Further, Section 18(2) of the Restatement (Second) of Judgments makes clear that a defense that could have been interposed cannot later be used to attack the judgment of the first action. Although Petitioner contends that he was denied due process because he was not allowed to participate in the civil action, the record clearly indicates that the default judgment was entered by the district court and the appeal was dismissed by the court of appeals as a direct result of CWF's refusal to hire an attorney despite multiple warnings from the district court and the court of appeals. CWF and Mr. Maksimuk were repeatedly advised by the district court of the requirement that CWF hire an attorney in the civil action (10 TTABVUE 35, 38, and 42; 17 TTABVUE 14-17). Likewise, CWF and Mr. Maksimuk were repeatedly advised that CWF must be represented by an attorney in CWF's appeal before the United States Court of Appeals for the Tenth Circuit (10 TTABVUE 48, 51-52 and 54). *See Tal v. Hogan*, 453 F.3d 1244, 1254 (10th Cir. 2006) ("It has been our longstanding rule that a corporation must be represented by an attorney to appear in federal court."). Notwithstanding this repeated advice, CWF chose not to hire an attorney in the civil action and

was thus not permitted to file submissions or appear in court therein.

Bearing in mind that the petition to cancel was filed on June 13, 2017, after entry of default and prior to entry of default judgment in the civil action,[8] there is no genuine dispute that the allegations set forth in the petition to cancel existed at the time of the civil action and could have been–and should have been–raised as a counterclaim in the civil action. *See Urock Network, LLC v. Sulpasso*, 115 USPQ2d 1409, 1412 (TTAB 2015). In sum, there is no genuine dispute of material fact that the requisite elements of *res judicata* have been satisfied.

Based on the foregoing, Respondent's motion for summary judgment is hereby granted. The petition to cancel is dismissed with prejudice.

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[8] Filing the petition to cancel instead of pursuing the counterclaim in the civil action was essentially an attempt to raise that claim in a forum where Petitioner could appear without an attorney.

ORDER OF THE TENTH CIRCUIT (AUGUST 22, 2017)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CONNOR SPORT COURT INTERNATIONAL, LLC,
a Delaware limited liability company,

Plaintiff-Appellee,

v.

CWF FLOORING, INC., d/b/a
plasticsportcourttiles.com, d/b/a sporttiles.pro, a
California corporation,

Defendant-Appellant.

No. 17-4130

This matter is before the court sua sponte upon review of the district court docket. Corporate entities may not appear pro se in this court and must be represented by counsel. *Tal v. Hogan*, 453 F.3d 1244, 1254 (10th Cir. 2006). Because Appellant CWF Flooring, Inc. does not have counsel at this time, proceedings in this appeal are ABATED.

Within 21 days from the date of this order, an attorney must file an entry of appearance on behalf of Appellant, along with a motion to lift the abatement. The appeal will be dismissed for failure to prosecute if an entry of appearance and motion to lift the abate-

ment are not filed by the deadline. *See* 10th Cir. R. 42.1.

Unless and until an entry of appearance has been filed on behalf of Appellant, any filings shall be served on CWF Flooring, Inc. at the following address:

CWF Flooring, Inc.
c/o James J. Maksimuk, CEO
38325 6th Street East
Palmdale, CA 93550

Entered for the Court

/s/ Elisabeth A. Shumaker
Clerk

by: Lindy Lucero Schaible
Counsel to the Clerk

DEFAULT JUDGMENT
(AUGUST 10, 2017)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CONNOR SPORT COURT INTERNATIONAL, LLC, a Delaware limited liability company,

Plaintiffs,

v.

CWF FLOORING, INC., d/b/a plasticsportcourttiles.com, d/b/a sporttiles.pro, a California corporation,

Defendant.

Case No. 2:17-cv-00042-BSJ

Before: Bruce S. Jenkins, United States District Judge

This matter comes before the Court on Plaintiff Connor Sport Court International, LLC's ("CSCI") Motion for Entry of Default Judgment against Defendant CWF Flooring, Inc. d/b/a plasticsportcourt tiles.com d/b/a sporttiles.pro ("CWF") under Federal Rule of Civil Procedure 55(b)(2). After considering the arguments and authorities submitted by the Plaintiff, the Court finds as follows:

1. The Complaint, including attachments, and an original summons were properly served on CWF on February 9, 2017.

2. This Court has personal jurisdiction over CWF and subject matter jurisdiction over the matters in controversy between CSCI and CWF. Venue in this judicial district is proper.

3. CSCI manufactures and sells flooring products and flooring installation services. CSCI owns several trademarks in connection with its products and services, all of which are valid, subsisting, and incontestable pursuant to 15 U.S.C. § 1065 (collectively, the "Sport Court Marks"):

Registration No.	Registration Date	Trademark
1,100,976	August 29, 1978	SPORT COURT
1,155,586	May 26, 1981	SPORT COURT
1,727,818	November 10, 1981	SPORT COURT
1,177,220	October 27, 1992	SPORT COURT
2,479,328	May 29, 2001	SPORT COURT

4. The Sport Court Marks are distinctive and not generic.

5. CWF markets and sells flooring for residential and commercial use and is a direct competitor to CSCI.

6. CWF owns and maintains the domain plastic sportcourttiles.com, which redirects internet users to

CWF's commercial web site selling flooring products at sporttiles.pro.

7. On April 27, 2017, in response to CWF's owner —who is not an attorney—asking for additional time to respond to the Complaint, the magistrate judge informed CWF that the company cannot proceed pro se and needed to be represented by an attorney in this case.

8. On May 18, 2017, entry of default was recorded against CWF due to its failure to answer or otherwise respond to the Complaint.

9. On June 6, 2017, in response to a motion to stay proceedings submitted by CWF's owner, the Court informed CWF that the company cannot appear except through counsel.

10. On June 22, 2017, during a hearing on CSCI's Motion for Entry of Default Judgment, the Court informed CWF's owner that the company needed to be represented by an attorney and gave CWF until July 25, 2017 to find local counsel.

11. As of August 4, 2017, CWF has not retained an attorney to represent it in this case in accordance with the local rules for the United States District Court for the District of Utah, nor has it answered or otherwise responded to the Complaint.

12. As stated on the record by counsel for Plaintiff, all other forms of relief in the way of damages are withdrawn.

Therefore, it is ADJUDGED that:

CWF's actions infringe CSCI's Sport Court Marks in violation of 15 U.S.C. § 1114 because the plastic

sportcourttiles.com domain is confusingly similar to the SPORT COURT marks.

CWF's actions infringe CSCI's common law trademark rights in the Sport Court Marks in violation of 15 U.S.C. § 1125 because the plasticsportcourttiles.com domain is confusingly similar to the SPORT COURT marks.

Furthermore, it is ORDERED that:

CWF is hereby permanently enjoined from using the plasticsportcourttiles.com domain name in connection with the marketing or sale of flooring products and services, including redirecting visitors from plasticsportcourttiles.com to other internet domains having websites marketing or selling flooring products or services.

CWF is hereby permanently enjoined from using an internet domain name containing the terms "sport court," "sports court," "sport courts," or any variation thereof in connection with the marketing or sale of flooring products and services, including redirecting visitors from such a domain to other internet domains having websites marketing or selling flooring products or services.

CSCI shall file a bill of costs and a motion for attorney's fees in accordance with DUCivR 54-2.

The Court shall retain jurisdiction of this matter for purposes of the interpretation, amendment, or enforcement.

/s/ Honorable Bruce S. Jenkins
United States District Judge

Dated: August 10th, 2017

ORDER OF THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING (JULY 15, 2019)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES J. MAKSIMUK,

Appellant,

v.

CONNOR SPORT COURT INTERNATIONAL, LLC,

Appellee.

2019-1156

Appeal from the United States Patent and Trademark Office, Trademark Trial and Appeal Board in No. 92066311

Before: PROST, Chief Judge, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, Circuit Judges.

PER CURIAM

Appellant James J. Maksimuk filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing

en Banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en Banc is denied.

The mandate of the court will issue on July 22, 2019.

FOR THE COURT

/s/ Peter R. Marksteiner
Clerk of Court

July 15, 2019
Date