
In the **Supreme Court of the United States**

PAIGE LEE, BUSINESS MOVES CONSULTING,
INCORPORATED, BRANDMIXER, INCORPORATED, AND
CURTIS BORDENAVE,

Petitioners,

v.

ANTHONY LAWRENCE COLLECTION, L.L.C., DEFRON
FOBB, THADDEUS REED, ALSO KNOWN AS REED
ENTERPRISE, COLLEGIATE LICENSING COMPANY,
L.L.C., INCORRECTLY SUED AS LEARFIELD
COMMUNICATIONS, L.L.C.,

Respondents.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Although Petitioners appear to present five questions for consideration, those questions seek only two answers and may be consolidated as follows:

1. Should the Court reverse its holding in *Provident Bank v. Patterson*, 390 U.S. 102, 118 (1968) that “whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation,” and set aside F.R.C.P. 19(a)’s multi-factor fact-specific analysis in the instance of a trademark infringement claim by one party claiming to own a trademark against licensees of another party claiming to own the same mark, adopting instead an absolute rule that the absent party whose trademark ownership is put at issue by the suit can never be required under Rule 19?
2. Should the Court reverse its holding in *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) that “where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign”?

CORPORATE DISCLOSURE STATEMENT

Respondent, Collegiate Licensing Company, L.L.C., does not have a parent company, and no publicly held company owns ten percent or more of its stock.

Respondent, Defron Fobb and Anthony Lawrence Collection, LLC, do not have a parent company, and no publicly held company owns ten percent or more of its stock.

Respondent, Thaddeus Reed d/b/a Reed Enterprise, does not have a parent company, and no publicly held company owns ten percent or more of its stock.

RELATED PROCEEDINGS NOT IDENTIFIED BY PETITIONERS

United States Trademark Trial and Appeal Board:

*Jackson State University v. Business Moves
Consulting Inc. DBA Business Moves*, TTAB
Opp. No. 92077130 (Pending/Suspended)

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REASONS FOR DENYING THE PETITION

I. Fundamental Flaws in the Petition

Either explicitly or implicitly, the Petition is based on multiple errant premises, both factual and legal:

- Nowhere does the Petition acknowledge the District Court completed the Rule 19 analysis. In fact, the District Court considered each of the factors set forth in both parts of Rule 19, and Petitioners do not argue that any of its findings constituted an abuse of discretion. *See* Pet. App. 34-38 re Rule 19(a) and Pet. App. 38-44 re Rule 19(b).
- Nowhere does the Petition acknowledge the standard of review in the Court of Appeals was abuse of discretion. *See* Pet. App. 8, citing *Moss v. Princip*, 913 F.3d 508, 513–14 (5th Cir. 2019) (“We review a district court’s assessment of whether a party is ‘required’ under Rule 19 for abuse of discretion”). Instead, Petitioners appear to fault the Court of Appeals’ review of the District Court’s Rule 19 findings as if it had been conducting a *de novo* review. Yet Petitioners do not ask this Court to establish a new standard of review, and none of the questions presented by the Petition would readily permit such a result. The Court of Appeals properly reviewed for abuse of discretion, which it did not find. Independent scrutiny on appeal of each subsidiary finding by the District Court would have been improper (and fruitless). *See* Pet. App. 8-11 re Rule 19(a) and Pet. App. 11-19 re Rule 19(b).

- The Petition glosses over that non-party Jackson State University (“JSU”) is actively contesting Petitioner Business Move Consulting Inc.’s trademark registration in THEEILOVE, through a cancellation proceeding before the Trademark Trial and Appeal Board in which JSU alleges fraud on the USPTO. Resp. App. 1, 10-34. But those proceedings are stalled (Resp. App. 44-45) in part based on Petitioner’s contradictory representations before the Board and in these proceedings. *See Jackson State University v. Business Moves Consulting Inc. DBA Business Moves*, TTAB Opp. No. 92077130, Resp. App. 1, 36-39, 42-43. *See also* Pet. 24. If JSU successfully establishes its own prior rights in its pending cancellation proceeding, even if Petitioners’ declaration is shown only to be mistaken versus fraudulent, Petitioners’ registration will be voided.
- Petitioners’ assertion, citing to 15 U.S.C. § 1057(b), that their own trademark registration “is powerful *prima facie* evidence of the mark’s validity” (Pet. at 20) misstates the law and misses the point. Section 1057(b) does not describe the *prima facie* evidence as “powerful.” In fact, while § 1065 can make a registration “incontestable,” it does so only when *both* (i) the mark has been in continuous use for five years after registration *and* (ii) “there is no proceeding involving said rights pending in the United States Patent and Trademark Office or in a court and not finally

disposed of.” 15 U.S.C. § 1065(2). Neither circumstance is present. Five years have not yet passed since registration, and the Petition acknowledges that a “proceeding involving said rights” is pending and “continues today.” Pet. at 25. Petitioners’ mark is in no respect incontestable.

- The Petition repeatedly disparages non-party JSU’s trademark rights as “purported” (Pet. At 11), “unregistered or poorly protected” (Pet. At 21), and “inchoate or speculative” (*id.*), going so far as to assert “the record otherwise reveals no JSU ‘non-frivolous interest.’” Pet. At 19). However, as the District Court correctly noted, Petitioners acknowledged *in their Complaint* that non-party JSU owns two Mississippi trademark registrations for “Thee I Love” – the exact mark at issue in this action. Pet. App. 28. Moreover, the District Court found JSU has been promoting the use of that phrase in many ways, including in its alma mater, since at least the 1940s. Pet. App. 5-6. The Court of Appeals found no reason to reject those findings and Petitioners do not ask this Court to reverse them. JSU is not a mere co-tortfeasor; it at the least is a competing claimant with colorable rights to the underlying mark. More, the *strength* of JSU’s marks is not properly at issue in any event. Indeed, given JSU’s undisputed Eleventh Amendment immunity,¹ delving into the merits of JSU’s ownership claims is

¹ As the Court of Appeals observed, “everyone agrees that the University enjoys sovereign immunity.” App. 11.

improper. As this Court held in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), “[o]nce it was recognized that those claims were not frivolous, it was error for the Court of Appeals to address them on their merits when the required entities had been granted sovereign immunity.” *Id.* at 864. Petitioners offer no reason why this Court should reverse itself on this point. The Petition fails to distinguish *Pimentel* or argue for a retreat from its holding.

II. None of Petitioners’ Questions truly presents any important issue requiring resolution by this Court.

A. Questions One and Two:

“The question presented is whether a nonparty’s status as trademark licensor, without more, makes his joinder as a defendant alongside his licensee required under Rule 19(a).”

“The question presented is whether a party required for joinder in an infringement action involving a federally-registered trademark mark must claim something more than the usual “non-frivolous interest” in the subject of the action and, if so, the interest the nonparty must claim to be Rule 19(a)-required.”

These two questions may be considered together because Petitioners' own argument treats them as essentially identical. Sections I(a) and I(b) of their argument (Pet. 12-22) both contend that an unjoined trademark owner may never be a "required" party on the basis of a "non-frivolous interest, without more." In the face of Petitioners' eventual acknowledgement that "JSU's interest isn't insignificant" (Pet. App. 26), this case does not present the questions of how the law might treat an unjoined party whose interest *was* insignificant. Regardless, the District Court found as a matter of fact based on Petitioners' admissions and other evidence that non-party JSU demonstrated far more than the mere licensee status of the named defendants. Pet. App. 37-38. Indeed, Petitioners do not dispute the validity of that finding.

The factors a court should consider in determining whether a non-party is "required under Rule 19(a)" are provided by the text of Rule 19, and the findings and holdings below comport with this Court's precedent concerning application of that Rule. The facts considered by the District Court, as required by Rule 19(a)(1)(B), in determining that JSU claims a non-frivolous interest relating to the subject of the action, are discussed at Pet. App. 35-38. On those facts, that court ultimately concluded that "JSU claims a trademark owner's interest in the phrase 'Thee I Love,' and engaging the merits of plaintiffs' complaint absent JSU's participation in the case would, as a practical matter, hinder JSU's ability to protect its interest." Pet. App. at 37. The Court of Appeals' abuse of discretion analysis of that holding and the subsidiary findings it is based on appears at Pet. App.

9-11. The Court of Appeals concluded that “the district court did not abuse its discretion in concluding that the University was a required party under Rule 19(a)(1)(B)(i).” Pet. App. 11. The question of whether a competing owner of any particular trademark is a required party, in any particular litigation involving the trademark, is no different in substance or significance than the question of whether any other party claiming an interest in the subject of any other type of litigation is required.

Petitioners do not assert that the District Court erred in its analysis or abused its discretion. The mere fact that two appellate courts reached different results in very different factual situations in no way amounts to a conflict. As this Court held in *Provident Bank v. Patterson*, 390 U.S. 102, 118 (1968), “whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation.”

In a context like the one presented here, Rule 19 precludes universal application of any bright-line rules, commanding instead a weighing of multiple factors in a fact-specific, practical analysis requiring an emphasis of pragmatism. *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1313 (5th Cir. 1986). That is what the District Court here did, and Petitioners do not contend that it abused its discretion in doing so.

Petitioners approach the Rule 19(a) inquiries as if the difference between one non-party’s status as an un-named plaintiff and another’s as an un-named defendant is the sole determinative factor, which necessarily evokes a bright-line rule. Although that

difference in perspective may influence the conclusion a court might reach after consideration of all the Rule 19(a) factors, Petitioners offer neither authority nor logic as to why it must, or even should, be dispositive of the joinder question. The authorities cited in the Petition indicate that an unjoined trademark owner may, or even “probably” should be joined when its licensee is the plaintiff in an infringement action. Pet. at 12-13. The same is true for an unjoined trademark owner whose licensee is the defendant in an infringement action: the owner may, or even probably should, be joined – *depending in both circumstances on the court’s analysis of all Rule 19(a) factors.*

This is especially true where, as here, the plaintiff bases its claim of trademark rights on a false declaration, under penalty of perjury, that it was the exclusive owner of the mark involved, because it is the unjoined party’s trademark rights that make the Petitioners’ declaration false. The Petition falsely asserts that the license agreement between JSU and Respondents is the “*only link*” between JSU and this case (Pet. at 20), overlooking both JSU’s decades of actual use of the mark and two valid prior state registrations, as recognized by the District Court. Although actual prior use is the foundation of all trademark rights, Petitioners deride JSU’s rights as “inchoate or speculative.” Pet. at 21. Asserting ownership of a trademark right while ignoring conflicting prior rights of another is inherently deficient. Rule 19 requires consideration of what an unjoined party’s actual rights might be, not just of what the adverse party says they are.

Petitioners next suggest that the only possible interest a trademark owner might have would be to prevent cancellation of a registration by analogy to the owner of a patent or copyright. The analogy fails for two reasons:

First, unlike patents and copyrights, which cannot be enforced without registration, registration is not what bestows trademark rights. *Use* of a mark is what creates trademark rights. Registration merely confirms, and enhances, rights already owned. Analogy to copyright and patent in this context is, therefore, inappropriate.

Second, cancellation of a trademark registration may make enforcing the mark more difficult, but does not of itself dispossess a trademark owner of all rights in the mark. A judicial determination that some third party has greater rights in the same mark, on the other hand, can create a devastating precedent, even if (or, perhaps, especially if) the trademark owner is not technically bound by the preclusive effect of such a judgment.

The risks of double recovery or inconsistent obligations are not the only ways a trademark owner's interests may be impaired. Here, the District Court properly found, as a matter of fact, that "both JSU and Collegiate would be prejudiced by JSU's absence."

Pet. App. 41. Petitioners do not contend that it abused its discretion in so finding.

Petitioners' ultimate premise that its status as holder of a federal registration, whether founded on a false declaration or not, is sufficient reason to refuse consideration of the rights of the absent party (Pet. at 22) is bereft of authority. Such an absolute rule would be contrary to Rule 19 itself and to all known authority applying it.

B. Questions Three and Four:

“The question presented is whether, under Rule 19(a), a district court trademark infringement claim *can* impair a nonparty's ability to establish or maintain its trademark rights before the USPTO or TTAB.” (Emphasis added).

“The question presented is whether, under the circumstances, nonparty Jackson State University can be Rule 19(b)(1) prejudiced by CLC's trademark infringement defense in the university's absence, where a resulting judgment will be against respondents and not the university, and where the licensing agreement CLC claims affords the university full indemnity.”

These two questions may be considered together because they raise only a single issue: whether the District Court's determination that JSU's rights could be impaired if the case proceeded without it was an abuse of discretion. The facts considered by

the District Court pursuant to Rule 19(b)(1) that show the extent to which a judgment rendered in JSU's absence might prejudice JSU or the existing parties are discussed at Pet. App. 39-42. The District Court concluded that "both JSU and Collegiate would be prejudiced by JSU's absence. Though plaintiffs insist that the case is about their federal trademark, not about JSU's state or alleged common law trademark to Thee I Love, those marks are not so clearly distinguished." Pet. App. at 41-42. The Court of Appeals' conclusion that the District Court's analysis of this factor was not an abuse of discretion is at Pet. App. 15-19. The Court of Appeals concluded that, "*even setting aside the University's sovereign status*, the balance of the Rule 19(b) factors weigh in favor of dismissal. As a result, the District Court did not abuse its discretion in dismissing the case." Pet. App. 19 (emphasis added).

Petitioners contend JSU's rights *cannot* be impaired by this litigation because "Petitioners' case is an infringement case; it doesn't seek to invalidate any JSU rights." Pet. at 24. In reality, Petitioners cannot prevail in the action without overcoming Respondents' defense that JSU has rights prior to or superior to those claimed by Petitioners -- a judgment eviscerating JSU's rights. Petitioner Business Moves is currently in a defensive posture before the TTAB in a matter brought in good faith by JSU to cancel Petitioner's trademark registration. Again, as this Court held in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), "[o]nce it was recognized that those claims were not frivolous, it was error for the Court of Appeals to address them on their merits when the

required entities had been granted sovereign immunity.” *Id.* at 864. As recognized by both of the courts below, in no event is JSU’s claim frivolous.

Moreover, contrary to Petitioners’ assertions to this Court that their “infringement claims (or even a judgment) against respondents won’t block JSU from going to USPTO or TTAB and asking for what it wants” (Pet. 24), Petitioners have successfully asked that agency to stay its own hand pending the outcome of this case (Resp. App. 36-39, 42-45), telling the TTAB the civil action justifies suspension as there are “clear bearings on the issues before the Board” and that “determinations of ownership, priority, and likelihood of confusion regarding the contested mark will have bearing on the determination of the issues in the present TTAB proceeding . . . as conclusions of law, findings of fact, and judgment by the Court will have a direct bearing on the key issues before the Board.” *See Jackson State University v. Business Moves Consulting Inc. DBA Business Moves*, TTAB Opp. No. 92077130, Docket No. 17, dated December 4, 2021, Resp. App. 36-39. These affirmative representations by Petitioners to the TTAB completely undermine their contradictory contention here that JSU could not be affected by the outcome of the litigation.

C. Question Five:

The question presented is “whether the dismissal of Petitioners’ infringement claims based on sovereign Jackson State University’s nonjoinder leaves Petitioners with an adequate remedy

against respondents under Federal Rules of Civil Procedure 19(b)(4).”

This final question does not aid Petitioners in this case for two reasons.

First, exclusive focus on subsection (4) of Rule 19(b) implicitly concedes the validity of the District Court’s findings on the factors in subsections (1), (2) and (3) of Rule 19(b), and leaves undisturbed the Court of Appeals’ determination that those findings did not abuse the District Court’s discretion. Pet. App. 14-18. The District Court considered, as required by Rule 19(b)(1), “the extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties,” finding that “both JSU and Collegiate would be prejudiced by JSU’s absence.” Pet. App. 41-42. The District Court also considered, as required by Rule 19(b)(2), “the extent to which any prejudice could be lessened or avoided by” either “protective provisions in the judgment; shaping the relief; or other measures,” finding that “JSU’s interest in the lawsuit is implicated not only by the potential judgment or the form of relief, but by the necessary inquiry into ownership of the trademark itself.” Pet. App. 42. Finally, the District Court considered, as required by Rule 19(b)(3), that a judgment rendered in JSU’s absence would not be adequate, finding that, “[u]nlike in *Gensetix*, the interests between JSU and its licensees are not ‘identical[,]’ see 966 F.3d at 1326; the Court cannot presume the licensees fully stand in JSU’s shoes.” Pet. App. 42-43. The Court of Appeals’ conclusion that the District Court’s analysis of these factors was not an abuse of discretion is at Pet. App. 14-18.

Second, the District Court actually resolved the fourth factor under Rule 19(b)(4) in favor of Respondents anyway. Petitioners indisputably have alternative remedies before the TTAB, including challenging JSU's trademark applications before the USPTO (Pet. App. 43), which the District Court found is adequate on the facts, and defending against JSU's fraud-based challenge (cancellation proceeding) to Petitioner Business Moves' own trademark registration before the TTAB. The facts considered by the District Court concerning the adequacy of the alternative remedy as required by Rule 19(b)(4) are discussed at Pet. App. 39-43. The court found that "Unlike in *Gensetix*, where plaintiff was 'without recourse to assert its patent rights because UT cannot be feasibly joined[,] 966 F.3d at 1326, plaintiffs in the instant case would not be fully without recourse if the instant case were dismissed. Rather, as defendants suggest, plaintiffs could challenge 'JSU's applications for THEE I LOVE at the United States Patent and Trademark Office.'" Pet. App. at 43. The only obstacle to review of the issue by the TTAB is Petitioners' own contradictory insistence that the issues be resolved in this case instead. *See Jackson State University v. Business Moves Consulting Inc. DBA Business Moves*, TTAB Opp. No. 92077130, Docket No. 17, dated December 4, 2021, Resp. App. 36-39. The Court of Appeals' conclusion that the District Court's analysis of this factor was not an abuse of discretion is at Pet. App. 18-19. Petitioners do not contend that the District Court abused its discretion in making that finding.

Ultimately, Petitioners' arguments reflect a fundamental misapprehension of the designed flexibility of the fact-specific Rule 19 analysis and the misperception that the District Court's analysis created (rather than avoided) a bright-line rule. "Pragmatic and equitable considerations control the Rule 19(b) analysis." *Lone Star Indus., Inc. v. Redwine*, 757 F.2d 1544, 1552 (5th Cir.1985). The District Court appropriately observed that "[d]etermining whether a suit should be dismissed in the absence of a required party is a highly-practical, fact-based endeavor, and [that] . . . a District Court will ordinarily be in a better position to make a Rule 19 decision than a circuit court would be."²

Here, as an alternative to its immunity analysis, the District Court analyzed that **every one** of the four factors that Rule 19(b) calls for **in this specific case** weighed heavily in favor of dismissing this case because it cannot proceed "in equity and good conscience" in the absence of JSU, and as confirmed by the Fifth Circuit, the District Court did not abuse its discretion on any one of the factors much less all four of them. Pet. App. 15-19, 39-42.

Indeed, while Petitioners suggest that the evaluation of the District Court's discretion by the Fifth Circuit in this trademark case conflicts with the Federal Circuit's evaluation of a different District Court's discretion in a patent case, the Petition fails to mention, let alone attempt to distinguish, the

² Pet. App. 35 (citing *Gensetix, Inc. v. Bd. of Regents of Univ. of Texas Sys.*, 966 F.3d 1316, 1324 (Fed. Cir. 2020) (citing *Hood v. City of Memphis*, 570 F.3d 625, 628 (5th Cir. 2009)).

dispositive holding of this Court in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008) that “where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.” *Id.* at 867. In that case, the Court contemplated circumstances where no alternative forum was available, and still required dismissal where the absent sovereign’s interests were “not frivolous.” Here, where the absent sovereign’s interests are not frivolous and there are alternative forums, it is difficult to conjure any ground for departing from this Court’s own teachings.

CONCLUSION

The Court should deny Petitioner’s writ of certiorari. The District Court appropriately applied Rule 19 in dismissing the Respondents, and for this multi-factor, fact-specific, practical analysis requiring an emphasis on pragmatism, the District Court did not abuse its discretion. Furthermore, neither the District Court nor the Fifth Circuit created new case law with hard-and-fast rules of universal applicability concerning Rule 19. The Respondents respectfully request the Court to deny the requested writ and allow the judgment of the Fifth Circuit to stand.

Respectfully submitted,

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