

ESTTA Tracking number: **ESTTA298365**

Filing date: **07/30/2009**

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

Proceeding	91168015
Party	Defendant Kern, David A
Correspondence Address	ALLISON L. RAPP LUTZKER & LUTZKER LLP 1233 20th Street NW, Suite 703 Washington, DC 20036 UNITED STATES allison@lutzker.com
Submission	Response to Board Order/Inquiry
Filer's Name	Allison L. Rapp
Filer's e-mail	allison@lutzker.com
Signature	/allison rapp/
Date	07/30/2009
Attachments	073009 Final Motion for leave to resubmit July 15 filing.doc.pdf (11 pages) (187147 bytes)

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

SIGNAL INVESTMENT &)	
MANAGEMENT CO.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91168015
)	
DAVID A. KERN)	
)	
Applicant.)	
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Motion for Leave to Resubmit
Filing of July 15, 2009 Due to ETAS Problem

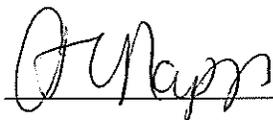
Counsel for Applicant has learned that, for unknown reasons related to the ETAS filing system or Counsel’s use of same, the enclosed “Declaration of Allison L. Rapp in Support of Applicant’s Response to Opposer’s Motion to Compel Discovery Responses and Motion to Reset Testimony Period,” along with the enclosed “Motion for Leave to Declaration of Allison L. Rapp in Support of Applicant’s Response to Opposer’s Motion to Compel Discovery Responses and Motion to Reset Testimony Period” (collectively, the “Filing”), was uploaded to the ETAS system on July 15, 2009 in a manner whereby only the signatures and some surrounding typed characters are visible in TTAB records. Accordingly, Applicant hereby requests leave to resubmit the Filing in order to provide the Board with a legible copy of same.

As averred in the enclosed Declaration of Allison L. Rapp (“Rapp Decl.”), a fully legible copy of the Filing was served upon Opposer on July 15, 2009. (Rapp Decl., ¶3). In addition, the underlying “Declaration of Allison L. Rapp in Support of Applicant’s Response to Opposer’s

Motion to Compel Discovery Responses and Motion to Reset Testimony Period” was served upon Opposer on July 14, 2009. (Rapp Decl., ¶4).

Applicant submits that the instant motion is supported by good cause inasmuch as access to a readable copy of the Filing is necessary to the Board’s proper review of the underlying matter. Applicant further submits that the legibility problem with the Filing should be deemed the result of excusable neglect because the problem appears to be a function of the ETAS system that occurred after Applicant’s counsel viewed an uploaded copy of the documents during the filing process (Rapp Decl., ¶2); because the underlying “Declaration of Allison L. Rapp in Support of Applicant’s Response to Opposer’s Motion to Compel Discovery Responses and Motion to Reset Testimony Period” was properly served on July 14, 2009 while the Filing was properly served on July 15, 2009 (Rapp Decl., ¶3, ¶4), thereby avoiding prejudice to Opposer; and because this Motion is being filed prior to the expiration of Opposer’s reply period, thereby avoiding any delay of Board action on the underlying matter.

Respectfully submitted,



Allison L. Rapp
Lutzker & Lutzker LLP
1233 20th St. NW, Ste 703
Washington, D.C. 20036

Phone: (202) 408-7600

Fax: (202) 408-7677

Date: July 30, 2009

Counsel for David A. Kern

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 30, 2009, a copy of the foregoing document was deposited in the U.S. mail, first class, postage prepaid, addressed to:

Douglas T. Johnson
Miller & Martin PLLC
Suite 1000 Volunteer Building
832 Georgia Ave.
Chattanooga, Tennessee 37402

By:

A handwritten signature in black ink, appearing to read "Allison L. Rapp", is written over a horizontal line.

Allison L. Rapp

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

SIGNAL INVESTMENT &)	
MANAGEMENT CO.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91168015
)	
DAVID A. KERN)	
)	
Applicant.)	
_____)	

Declaration of Allison L. Rapp in Support of
Applicant's Motion for Leave
to Resubmit Filing Of July 15, 2009 Due to ETAS Problem

Allison L. Rapp, being duly sworn, deposes and says:

1. I am over eighteen (18) years of age and believe in the obligations of an oath. I submit this declaration in support of Applicant's Motion for Leave to Resubmit Filing Of July 15, 2009 Due to ETAS Problem

2. On July 15, 2009, I filed a copy of the enclosed documents entitled "Declaration of Allison L. Rapp in Support of Applicant's Response to Opposer's Motion to Compel Discovery Responses and Motion to Reset Testimony Period" and "Motion for Leave to Declaration of Allison L. Rapp in Support of Applicant's Response to Opposer's Motion to Compel Discovery Responses and Motion to Reset Testimony Period" (collectively, the "Filing") using the ETAS system. The Filing appeared to have been properly uploaded to the system.

3. Also on July 15, 2009, I served upon counsel for Opposer, using United States Mail first class, postage prepaid, a fully legible copy of the Filing.

4. In addition, the underlying “Declaration of Allison L. Rapp in Support of Applicant’s Response to Opposer’s Motion to Compel Discovery Responses and Motion to Reset Testimony Period” was timely served upon counsel for Opposer on July 14, 2009, using United States Mail first class, postage prepaid.

5. I subsequently learned through a phone call from Angela Lycos, Interlocutory Attorney, that the July 15 upload of the Filing was defective. Upon further investigation, I learned that only the signatures throughout the Filing, along with a few typed characters in immediate proximity thereto, are visible in TTAB records.

6. Based on the foregoing, I am submitting for Board consideration, concurrently with this Motion, a duplicate copy of the Filing.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 30, 2009 in Washington, DC.



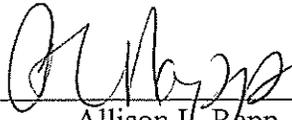
Allison L. Rapp

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By: 
Allison L. Rapp

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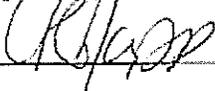
SIGNAL INVESTMENT &)	
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Opposer,)	
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v.)	Opposition No. 91168015
)	
DAVID A. KERN)	
)	
Applicant.)	
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Motion for Leave to File
Declaration of Allison L. Rapp in Support of
Applicant's Response to Opposer's Motion to Compel Discovery Responses and
Motion to Reset Testimony Period

Counsel for Applicant inadvertently failed to file the above-referenced and enclosed declaration along with Applicant's timely-filed Response to Opposer's Motion to Compel Discovery Responses and Motion to Reset Testimony Period. A copy of the declaration was, however, timely served upon Opposer.

In view of the minimal delay between the filing of Applicant's response and counsel's declaration in support of same, and also in view of the lack of prejudice to Opposer, Applicant hereby requests leave to file such declaration.

Respectfully submitted,



Allison L. Rapp
Lutzker & Lutzker LLP
1233 20th St. NW, Ste 703
Washington, D.C. 20036

Phone: (202) 408-7600
Fax: (202) 408-7677

Date: July 14, 2009

Counsel for David A. Kern

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 1^S~~4~~, 2009, a copy of the foregoing document was deposited in the U.S. mail, first class, postage prepaid, addressed to:

Douglas T. Johnson
Miller & Martin PLLC
Suite 1000 Volunteer Building
832 Georgia Ave.
Chattanooga, Tennessee 37402

By:

A handwritten signature in cursive script, appearing to read "A. Rapp", is written over a horizontal line.

Allison L. Rapp

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Opposer,)	
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Declaration of Allison L. Rapp in Support of
Applicant's Response to Opposer's Motion to Compel Discovery Responses and
Motion to Reset Testimony Period

Allison L. Rapp, being duly sworn, deposes and says:

1. I am over eighteen (18) years of age and believe in the obligations of an oath. I submit this declaration in support of Applicant's Response to Opposer's Motion to Compel Discovery Responses and Motion to Reset Testimony Period.
2. Opposer is correct in noting that the parties did agree on settlement parameters very early in the pendency of this proceeding and, on that basis, shared a belief that the case would settle. However, settlement negotiations subsequently broke down well prior to the commencement of Opposer's testimony period.
3. On September 24, 2008, I sent Douglas Johnson at djohnson@millermartin.com an email message notifying him that Applicant could not agree to a particular material term to which Opposer had, by email from Douglas Johnson dated July 7, 2008, expressed a commitment.

4. To the best of my knowledge and belief, I did not receive a response to my September 24, 2008 email at any time prior to the filing of this declaration.

5. On January 23, 2009, in an effort to solicit a response to my September 24, 2008 email, I forwarded a copy of that email to Douglas Johnson at djohnson@millermartin.com and reiterated Applicant's unwillingness to agree to any settlement incorporating the particular term at issue. I also said in the January 23 email that, "[a]lthough I am reluctant to pursue a Motion to Dismiss for Failure to Prosecute, I am under pressure from my client to conclude a settlement or move forward before the TTAB."

6. To the best of my knowledge and belief, I did not receive a response to my January 23, 2009 email at any time prior to the filing of this declaration.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 14, 2009 in Washington, DC.



Allison L. Rapp

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The undersigned hereby certifies that on July 14, 2009, a copy of the foregoing document was deposited in the U.S. mail, first class, postage prepaid, addressed to:

Douglas T. Johnson
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Chattanooga, Tennessee 37402

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Allison L. Rapp