

ESTTA Tracking number: **ESTTA334012**

Filing date: **02/24/2010**

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

Proceeding	91179090
Party	Defendant SIMPLYWELL, LLC
Correspondence Address	Christopher M. Bikus Husch Blackwell Sanders, LLP 1601 Dodge Street, Suite 2100 Omaha, NE 68102-1637 UNITED STATES chris.bikus@huschblackwell.com,pto-om@huschblackwell.com
Submission	Opposition/Response to Motion
Filer's Name	Timothy J. McFarlin
Filer's e-mail	tim.mcfarlin@huschblackwell.com, chris.bikus@huschblackwell.com, jamie.diener@huschblackwell.com
Signature	/Timothy J. McFarlin/
Date	02/24/2010
Attachments	20100224223539627.pdf (6 pages)(150640 bytes)

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

In the Matter of Application Serial No. 77/090,694
Published in the *Official Gazette* on August 7, 2007

ELGO, INC.,)	
)	
Opposer,)	
)	OPPOSITION NO. 91179090
v.)	
)	
SIMPLYWELL, LLC,)	
)	
Applicant.)	
)	

RESPONSE TO OPPOSER’S MOTION TO STRIKE APPLICANT’S BRIEF

The Board should deny Opposer Elgo, Inc.’s motion to strike because Applicant Simplywell, LLC filed its main brief in a timely fashion, or at the least, any slight untimeliness (three business days, at most) was due to a good-faith interpretation of the rules and a telephone call to the Board’s filing hotline. Further, any potential prejudice to Elgo can be easily remedied.

Elgo filed its main brief on January 11, 2010, and served it by U.S. mail on Applicant Simplywell, LLC (“Simplywell”). Simplywell received Elgo’s brief several days later. In calculating the deadline for its main brief, Simplywell used the thirty-day period prescribed by 37 CFR § 2.128(a) and added five days for service by mail. *See* 37 CFR § 2.119(c). Because 37 CFR § 2.128(a) and TBMP § 801 do not expressly refer to the five-day service-by-mail period, Simplywell also called the Board’s filing hotline at 571-272-8500 to confirm that it was proper to add five days to the thirty-day period, and was told by a Board representative that yes, it was proper. (*See* Declaration of Jamie Diener, attached hereto as Exhibit A.) Accordingly, Simplywell determined that thirty-five days from January 11, 2010, was February 15, 2010.

Because this date was President's Day (a.k.a. Washington's Birthday), and the Board was closed on that date, Simplywell filed its main brief on the next day, February 16, 2010. *See* 37 CFR § 2.196; TBMP § 112. Simplywell's brief was therefore timely filed.

Even assuming that it was not appropriate to add five days for service by mail to the thirty-day deadline set by 37 CFR § 2.128(a), Simplywell did so in good faith, in reliance on information from a Board representative. (*See* Exhibit A.) And Simplywell's brief was filed only three business days after the date it would have been due if time for service by mail had not been added (six days minus two weekend days and a federal holiday equals three business days). The brief was filed three weeks late in *Ariola-Eurodisc Gesellschaft Mit Beschränkter Haftung v. Eurotone Int. Ltd.*, 175 USPQ 250 (TTAB 1972), the case cited by Elgo in which the Board struck an untimely brief. The applicant in that case, furthermore, filed no response or offered any explanation for its brief's untimeliness. *Id.* at 250. On the other hand, the Board refused to strike the applicant's brief in *Seattle Pacific Industs. Inc. v. Brieland Professional Graphics Ltd.*, 45 USPQ2d 1478, 1749 (TTAB 1997) (unpublished) (citing *Ariola*), where the brief was filed five days late.¹ In that case, the Board found that although the applicant's brief was late, because the delay was caused by a mistaken interpretation of the rules, an extension of time for the opposer to file its reply brief was the appropriate resolution. *Id.* at 1479-80.

Here, a similar resolution can clear up any possible confusion. Even if the Board determines that Simplywell's brief was not timely filed, it certainly was not due to any willful or inexcusable neglect. And any potential prejudice can be cured by allowing Elgo twenty days to

¹ While the *Seattle Pacific* decision also stated that "opposer's brief was due 60 days from [the date the period for rebuttal testimony closed], namely July 23, 1997 [a]pplicant's brief was then due 30 days later, namely August 22, 1997," which was thirty calendar days exactly, the issue of whether 37 CFR § 2.119(c) applied (i.e., whether service by mail would have added five days to this deadline) does not appear to have been raised by the parties or the Board, nor does the decision indicate how the opposer's brief was served (whether by mail or otherwise). *Id.* at 1479-80.

file its reply brief (fifteen plus five days for service by mail), or whatever period the Board in its discretion deems just and proper. Accordingly, the Board should not strike Simplywell's brief.

Respectfully submitted,

/s/ Christopher M. Bikus
Christopher M. Bikus
Timothy J. McFarlin
Husch Blackwell Sanders LLP
1620 Dodge Street, Suite 2100
Omaha, NE 68102
Tel: 402-964-5144
Fax: 402-964-5050
chris.bikus@huschblackwell.com
tim.mcfarlin@huschblackwell.com

ATTORNEYS FOR APPLICANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via first class mail postage prepaid this 24th day of February 2010, addressed as follows:

Cynthia R. Moore
794 Los Robles Avenue
Palo Alto, CA 94306

Joseph A. Mandour, Esq.
Ben T. Lila, Esq.
Mandour & Associates, APC
16870 W. Bernardo Drive, Suite 400
San Diego, California 92127

/s/ Timothy J. McFarlin

CERTIFICATION UNDER 37 C.F.R. § 1.8

I hereby certify that the foregoing is being filed electronically with the United States Patent and Trademark Office utilizing the *Electronic System for Trademark Trials and Appeals* this 24th day of February 2010.

/s/ Timothy J. McFarlin

EXHIBIT A

