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

Proceeding	91181448
Party	Defendant Patriot Guard Riders, Inc.
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Signature	/James A. O'Malley/
Date	09/14/2009
Attachments	Reply.pdf (11 pages)(335265 bytes) Exhibit1Reply.pdf (3 pages)(91630 bytes) Exhibit2Reply.pdf (3 pages)(44800 bytes)

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

JEFF BROWN,	)	
	)	
Opposer,	)	
	)	Opposition No. 91181448
v.	)	
	)	Application No. 77/040,379
PATRIOT GUARD RIDERS, INC.,	)	
	)	
Applicant.	)	

APPLICANT'S COMBINED REPLY TO OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, STRIKE & RESPONSE TO OPPOSER'S MOTION TO REOPEN TIME TO SERVE AMENDED NOTICE OF OPPOSITION DUE TO EXCUSABLE NEGLECT

Applicant, Patriot Guard Riders, Inc. ("PGR"), by and through its counsel, hereby provides a combined Reply to the Response to PGR's Motion to Dismiss or, in the Alternative, Strike filed by Opposer, Jeff Brown ("Brown") and Response to Brown's Motion to Reopen Time to Serve Amended Notice of Opposition Due to Excusable Neglect (PGR notes that Brown erroneously identified this Motion as being "Applicant's" Motion in the title).

I. PGR'S MOTION TO DISMISS

A. Brown's Admission and Alleged Excusable Neglect

While Brown's counsel, Ms. Rachel Blue ("Ms. Blue"), admits that Brown did not comply with either the TTAB's mandate in its Opinion mailed July 21, 2009 or 37 CFR §2.119(a), Ms. Blue alleges that this failure to comply was due to excusable neglect. As discussed hereinbelow, however, there are a number of irregularities and inconsistencies in Ms. Blue's story.

1. Brown's Actions/Inactions on August 4, 2009

Ms. Blue alleges that the Amended Notice of Opposition was filed on August 4, 2009, but that "the certificate of service did not attach correctly to the electronic filing." Ms. Blue further alleges that she did not realize that the certificate of service did not attach to the electronic filing until the next day.

PGR is perplexed by these allegations for two reasons.

First, it is incumbent on users of ESTTA to verify their submissions are accurate and, prior to being allowed to submit anything through ESTTA, the user is prompted to validate and sign the submission, thereby attesting to the accuracy and completeness of the submission. (*See* Information page from http://estta.uspto.gov/ attached hereto as Exhibit 1). Obviously, as Ms. Blue was able to submit the Amended Notice of Opposition on August 4, 2009, Ms. Blue had to have verified and validated that the submission was accurate and complete.

Second, had Ms. Blue's submission actually contained a certificate of service that did not properly attach as she alleges, this certificate of service would necessarily have had to certify that the document was served on opposing counsel *that day* (or at some time prior to that day), as it is clearly improper to provide a certificate of service stating that it is the server's "intention" to serve the document on opposing counsel at some point in time in the future, e.g., in the next day or two.

As Ms. Blue validated the submission of the Amended Notice of Opposition and because Ms. Blue did not serve the Amended Notice of Opposition on PGR on or before August 4, 2009, Ms. Blue's statements regarding her actions on August 4, 2009 are puzzling.

2. Brown's Actions/Inactions on August 5, 2009

Ms. Blue further alleges that on August 5, 2009 she "realized that the service certificate had not properly attached, and directed Diane Goswick, her administrative assistant, to attach the certificate of service and mail it to opposing counsel." Ms. Blue further alleges that Ms. Goswick's child was hospitalized that day and, therefore, she did not complete the task until the following day. Ms. Blue then offers that "[t]he unexpected departure of a staff member due to a child's hospitalization was not within" her control, that she expected Ms. Goswick to return, and that she "had a reasonable expectation that directions would be carried out, as is the custom and practice of Ms. Goswick." Ms. Blue further alleges that Ms. Goswick "believed she would return to the office in time to perform the request and counsel

relied on her representation that she would do so." Finally, Ms. Blue submits that had either she or Ms. Goswick realized that Ms. Goswick "would not be in a position to return, alternative arrangements would have been made." PGR is confused by these allegations for the following reasons.

First, with regard to Ms. Blue's directive to Ms. Goswick, PGR notes that this e-mail (*see* Exhibit A of Brown's Resp.) was sent at 4:26 PM and clearly stated therein: "With a certificate of service?"[1]

The timing of this e-mail does not appear to accord with the rest of Ms. Blue's allegations relating to that day. Ms. Goswick has sworn that she "left the office at approximately 1:30 p.m. to meet [her son] at the hospital and had every intention of returning to the office before 5:00 p.m." (*See* Exhibit B, at ¶3 of Brown's Resp.). Ms. Goswick further swore that her son was not released from the hospital until after 5:00 p.m." such that she did not come back to the office on August 5, 2009, resulting in the Amended Notice of Opposition not being mailed. (*Id.*). Thus, at the time when Ms. Goswick left the office (approximately 1:30 p.m.), Ms. Goswick was not yet aware of Ms. Blue's request to mail a copy of the Amended Notice of Opposition to PGR's counsel (which was made at 4:26 p.m., about three hours later). Thus, PGR finds Ms. Blue's statement that "[Ms. Goswick] believed she would return to the office in time to perform the request and counsel relied on her representation that she would do so" to be baffling, as Ms. Goswick was not aware of the request when she left the office. Assuming Ms. Blue was indeed aware of Ms. Goswick's departure from the office at approximately 1:30 p.m., it seems prudent that Ms. Blue would have checked to make sure Ms. Goswick was in the office when the e-mail was sent at 4:26 p.m.[2], or at a minimum very soon afterwards, in order to ensure that the copy of the Amended Notice of Opposition was mailed to PGR's counsel on that day (the deadline for mailing/serving same).

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[1]PGR further notes that this e-mail is directed to an individual named "Diane Byrom", but Ms. Blue has advised that this e-mail was directed to an individual named "Diane Goswick".

[2]PGR also notes that apparent lack of urgency in Ms. Blue's e-mail with regard to the need to mail and serve the document that day, especially in view of the fact that it was sent so close to the end of the typical business day at 4:26 p.m.

Upon realizing that Ms. Goswick was not in the office, through what would presumably have been a quick check, Ms. Blue could, as stated, have made alternative arrangements.

Also, Ms. Blue's statement of "With a certificate of service?" in the August 5, 2009 e-mail appears contrary to other statements made in Brown's Response. "With a certificate of service?" clearly seems to be an inquiry from Ms. Blue to Ms. Goswick as to whether a certificate of service is, in fact, required to be attached to the Amended Notice of Opposition that was to be mailed to PGR's counsel. Thus, Ms. Blue's statements that she *directed* Ms. Goswick "to attach the certificate of service" and Ms. Goswick's sworn statement that Ms. Blue sent her an e-mail requesting that she send a copy of the Amended Notice of Opposition to PGR's counsel "with a Certificate of Service" (*see* Exhibit B, at ¶2 of Brown's Resp.), do not seem accurate. Furthermore, the questioning of whether a certificate of service was necessary in this e-mail is directly contradictory to statements previously made advising that a certificate of service had been prepared for the Amended Notice of Opposition and the filing thereof on August 4, 2009, but that the prepared certificate of service had not "properly attached".

In view of the foregoing, PGR is puzzled by Ms. Blue's and Ms. Goswick's statements regarding their actions on August 5, 2009.

3. Brown's Actions/Inactions on August 6, 2009

Ms. Goswick swore that when she came into the office on August 6, 2009, she realized that she had not mailed the Amended Notice of Opposition and, thus, proceeded to prepare the Certificate of Service for Ms. Blue's signature and mailing, and that she thereafter mailed the pleading with the Certificate of Service attached thereto that day via first class mail. (*See* Exhibit B, at ¶4 of Brown's Resp.). Ms. Goswick further swore that a postage log sheet attached to her Affidavit noted charges billed to Brown "for mailing the referenced pleading and Certificate of Service to Dave Marr and Trexler, Bushnell, Giangiorgi & Blackston, 36th Floor, 105 West Adams Street, Chicago, Illinois 60603." (*See* Exhibit B, at ¶5 of Brown's Resp.). Finally, Ms. Goswick swore that a copy of the pleading and

Certificate of Service was attached to her Affidavit. (*See* Exhibit B, at ¶4 of Brown's Resp.). PGR calls into question these allegations and sworn statements for the following reasons.

First of all, contrary to Ms. Goswick's sworn statement, a copy of the pleading and Certificate of Service allegedly mailed and served on August 6, 2009 is not attached to Ms. Goswick's Affidavit, nor can it be found anywhere else in Brown's Response.

Second, as of today, September 14, 2009 (thirty-nine (39) days after August 6, 2009, the day when the Amended Notice of Opposition with the alleged Certificate of Service was allegedly mailed and served), PGR's attorney has still not received a copy of this August 6, 2009 document by mail. (*See* Supplemental Declaration of David J. Marr, attached hereto as Exhibit 2 at ¶4).

Third, contrary to Ms. Goswick's sworn statement, the postage log sheet attached to Ms. Goswick's Affidavit does not provide definitive evidence that the referenced pleading and Certificate of Service were mailed to "Dave Marr at Trexler, Bushnell, Giangiorgi & Blackston, 36th Floor, 105 West Adams Street, Chicago, Illinois 60603." (*See* Exhibit B, at ¶5 of Brown's Resp.). Rather, this postage log sheet only purportedly provides evidence that *something* was mailed on August 6, 2009 that was billed to Brown; there is no specific indication on this postage log sheet of what was mailed, or to whom. It seems just as likely that a copy of the Amended Notice of Opposition that was electronically filed on August 4, 2009 was mailed to Brown himself, rather than to PGR's counsel, on August 6, 2009, especially in view of PGR's counsel attesting to the fact that he and his firm never received a copy of the Amended Notice of Opposition by mail. Based on the document provided, PGR is perplexed by Ms. Goswick's sworn statements.[3]

Finally, Ms. Goswick swore that she realized on August 6, 2009 that she had not mailed the

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[3]PGR also finds it interesting that on this postage log sheet, the only entry with both a client number and name provided on it is for Brown and that this is the only entry that identifies the lawyer for the client.

document and, therefore, she proceeded to prepare the Certificate of Service for Ms. Blue's signature and mailing and, thereafter, mailed the pleading with the Certificate of Service (presumably signed by Ms. Blue) via first class mail that day. (*See* Exhibit B, at ¶4 of Brown's Resp.). If this were true, Ms. Blue must have necessarily then known that the Amended Notice of Opposition was not properly served by the TTAB's mandated deadline and in accordance with 37 CFR §2.119(a). However, even with this knowledge, Ms. Blue apparently took absolutely no actions in an attempt to explain/justify the serving of the Amended Notice of Opposition after the mandated deadline, which could have easily been done by either notifying PGR's counsel regarding this apparent oversight/error and/or by filing a document with the TTAB requesting an extension of time and the reason(s) for same. Had Ms. Blue taken either of these steps, PGR's counsel likely would not have objected because of the courtesy that had been shown between counsel in this matter prior thereto (as discussed by Ms. Blue on page 2 of Brown's Resp.). Thus, PGR wonders why Ms. Blue did not take either of these steps in order to rectify her and Ms. Goswick's supposed "excusable neglect" at the time.

In view of the foregoing, PGR calls into question Ms. Blue's and Ms. Goswick's statements regarding their actions on August 6, 2009.

B. Brown's Motion To Reopen The Time To File And Serve The Amended Notice Of Opposition In View Of His "Excusable Neglect"

Based on the foregoing, PGR objects to Brown's Motion to Reopen as Brown has not shown that its failure to act was the result of excusable neglect. As discussed by Brown, a determination of excusable neglect must take into account all relevant circumstances surrounding the party's omission or dely, including four factors. While PGR does not dispute Brown's comments regarding the first and second factors, PGR does dispute Brown's comments regarding the third and fourth factors, namely the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

It has been held that the third factor may be deemed to be the most important factor in a particular case. TBMP §509.01(b)(1). Ms. Blue alleges that Ms. Goswick's son being taken to the hospital on August 5, 2009 and her reliance that Ms. Goswick would return later that day to mail and serve the Amended Notice of Opposition on PGR's counsel was not within her control. However, as stated by PGR herein, Ms. Blue's actions on August 5, 2009 are puzzling and, in PGR's opinion, were not justified. With Ms. Blue being aware that Ms. Goswick was out of the office in the afternoon, it was definitely in Ms. Blue's reasonable control to ensure that the Amended Notice of Opposition was mailed and served on PGR's counsel in the event that Ms. Goswick did not return to the office that day. As it turns out, Ms. Goswick apparently did not return to the office that day and Ms. Blue took absolutely no steps or alternative arrangements to ensure that the Amended Notice of Opposition was mailed and served that day, as mandated by the TTAB and by 37 CFR §2.119(a).

With regard to the fourth factor, PGR further objects to Brown's statement that Ms. Blue acted in good faith in this regard. While Ms. Blue did indeed electronically file the Amended Notice of Opposition on August 4, 2009, PGR is puzzled by Ms. Blue's and Ms. Goswick's "good faith" with regard to basically every other matter relating to the filing and service thereof, as discussed hereinabove with regard to Brown's Actions/Inactions on August 4, 5 and 6, 2009. More specifically, Ms. Blue's plain and apparent knowledge of the error of having "served" the Amended Notice of Opposition on August 6, 2009 (after the deadline mandated by the TTAB) (again PGR's attorney has sworn that he still has not received a copy of this supposed "served" document to date, *see* Exhibit 2 at ¶4), did not result in Ms. Blue taking any "good faith" actions by alerting PGR's counsel and/or the TTAB about this error and missed deadline.

Thus, PGR states that the TTAB should not consider Brown's Amended Notice of Opposition, should not grant Brown's Motion to Reopen, and should dismiss the present Opposition.

II. PGR's MOTION TO STRIKE COUNT ONE OF BROWN'S AMENDED NOTICE OF OPPOSITION

According to Section 309.03(a)(2) of the TBMP, "the pleading should include *enough detail* to give the defendant fair notice of the basis for each claim." (Emphasis added). As explained in detail in PGR's Motion to Strike, Brown's Amended Notice of Opposition utterly fails in this regard.

By way of example, Brown alleges that the PGR operated its association services by means of a license from Brown. However, Brown did not include any allegations of a license being in existence in connection with his original Notice of Opposition. Then, throughout discovery, Brown consistently alleged that a "license" existed and that this alleged "license" was an oral license. Once discovery was closed (where after PGR understood Brown's position to be that an alleged oral "license" existed), Brown then filed his Motion for Summary Judgment in which he waffled between this alleged "license" being an express, oral license and an implied license-in-fact. Thus, even with discovery long since closed, Brown is unsure of what type of a license the alleged "license" is and, because Brown doesn't know, he clearly cannot and could not provide enough detail in his Amended Notice of Opposition to give PGR fair notice of the type of license the alleged "license" is and, therefore, does not provide enough detail to give PGR fair notice of the basis for his claim.

Thus, because Brown's Count One is not sufficiently pleaded, PGR respectfully requests the TTAB to strike Count One from this Opposition proceeding.

III. PGR'S MOTION TO STRIKE COUNT TWO OF BROWN'S AMENDED NOTICE OF OPPOSITION

Brown claims that the TTAB placed no restrictions on the nature of the amended pleading such that Brown could rightfully broaden his fraud claim without any impedance, even to the point of including a claim of fraud in connection with a trademark application that is not even the subject of the present Opposition. PGR wholeheartedly disagrees with Brown's statements in this regard; as explained in PGR's Motion to Strike, the Board directed Brown to file and serve an amended notice of opposition

in order to "sufficiently allege likelihood of confusion under Fed. R. Civ. P. 8(a) and to allege ownership of application Serial No. 77041061, as well as priority and ownership of the mark in the '061 application." This allowance by the TTAB clearly did not set forth an avenue for Brown to expand upon his fraud claim as originally pleaded. As such, Brown's inclusion of matters relating to the specimens filed by PGR during prosecution of Application Serial No. 77/040,379 and relating to PGR's Application Serial No. 77/383,586 should be stricken from this Opposition.

Furthermore, PGR notes that Brown has not pleaded its fraud claims with the requisite particularity required under Fed. R. Civ. P. 9(a), which requires that the pleading identify the specific who, what, when, where and how of the material misrepresentation or omission committed before the USPTO. *See Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312 (Fed. Cir. 2009).

Finally, as Brown never sought leave to amend the pleadings on his own initiative, Brown should not now be allowed to try and take advantage of the TTAB's leniency as pleading the newly raised issues would be prejudicial to PGR, especially where, as here, discovery has long since closed and neither party addressed these issues during discovery. *See* Fed. R. Civ. P. 15(a) *and Buffett v. Chi-Chi's, Inc.*, 226 USPQ 428 (TTAB 1985); *see also Long John Silver's, Inc. v. Lou Scharf Inc.*, 213 USPQ 263 (TTAB 1982) (explaining that undue delay in moving to amend may be prejudicial to the non-moving party); *see also Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F. 2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990) (explaining that where the moving party seeks to add a new claim or defense, and the proposed pleading thereof is legally insufficient, or would serve no useful purpose, the TTAB will deny the motion for leave to amend).

IV. VARIOUS OTHER MATTERS RELATING TO BROWN'S AMENDED NOTICE OF OPPOSITION

While it is true that 37 CFR §2.126(a) deals with paper submissions, PGR notes that 37 CFR §2.126(c) deals with electronic submissions and specifically states that "[t]ext in an electronic

submission *must* be in at least 11-point type and *double-spaced.*" (Emphasis added). Thus, regardless of the form of submission (paper vs. electronic), the document must be double-spaced and, it is clear from a cursory review of Brown's electronically-filed Amended Notice of Opposition[4] that this document was not filed in double-spaced format.

Furthermore, it is true that PGR is aware of the capacity in which Ms. Blue signed the Amended Notice of Opposition, as well as Brown's entity type. The reason behind these statements, as well as the double-spacing requirement above, however, is merely to point out Brown's further flippant disregard for the TTAB's rules in this Opposition proceeding, above and beyond the other liberties which Brown has tried to take as have been discussed in connection herewith and in connection with PGR's filings related to the parties' motion's for summary judgment.

V. CONCLUSION

In view of the foregoing, PGR again respectfully requests the TTAB to dismiss Brown's Amended Notice of Opposition or, in the alternative, to strike portions of Brown's Amended Notice of Opposition.

Date: September 14, 2009

Respectfully submitted,

By: _____

One of Applicant's Attorneys
David J. Marr
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[4]Brown stated in his Response that "if, as claimed, Applicant's counsel has 'never received' the pleading by mail, on what grounds is such a complaint based?" PGR notes that the electronically-filed Amended Notice of Opposition (which is not double-spaced) is what PGR based its complaint on as PGR did not, in fact, ever receive a copy of Brown's Amended Notice of Opposition by mail. *See* Exhibit 2 at ¶4.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 14, 2009, a true and correct copy of the following document:

1. *"Applicant's Combined Reply to Opposer's Response to Applicant's Motion to Dismiss or, in the Alternative, Strike & Response to Opposer's Motion to Reopen Time to Serve Amended Notice of Opposition Due to Excusable Neglect"* including Exhibits 1 and 2 thereto,

were sent via electronic delivery and mailed, with proper postage thereon, to:

Tom Q. Ferguson (tferguson@dsda.com)
Courtney Bru (cbru@dsda.com)
DOERNER, SAUNDERS, DANIEL
& ANDERSON, L.L.P.
320 South Boston Avenue, Suite 500
Tulsa, Oklahoma 74103-3725

and

Rachel Blue (rachel.blue@mcafeetaft.com)
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100 West 5th Street
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One of Applicant's Attorneys

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	)	Opposition No. 91181448
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PATRIOT GUARD RIDERS, INC.,	)	
	)	
Applicant.	)	

EXHIBIT 1

of

"Applicant's Combined Reply to Opposer's Response to Applicant's Motion to Dismiss or, in the Alternative, Strike & Response to Opposer's Motion to Reopen Time to Serve Amended Notice of Opposition Due to Excusable Neglect"

United States Patent and Trademark Office

Electronic System for Trademark Trials and Appeals

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	)	Opposition No. 91181448
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	)	Application No. 77/040,379
PATRIOT GUARD RIDERS, INC.,	)	
	)	
Applicant.	)	

EXHIBIT 2

of

"Applicant's Combined Reply to Opposer's Response to Applicant's Motion to Dismiss or, in the Alternative, Strike & Response to Opposer's Motion to Reopen Time to Serve Amended Notice of Opposition Due to Excusable Neglect"

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PATRIOT GUARD RIDERS, INC.,	)	
	)	
Applicant.	)	

DECLARATION OF DAVID J. MARR IN SUPPORT OF APPLICANT'S COMBINED REPLY TO OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, STRIKE & RESPONSE TO OPPOSER'S MOTION TO REOPEN TIME TO SERVE AMENDED NOTICE OF OPPOSITION DUE TO EXCUSABLE NEGLECT

I, David J. Marr, declare and state as follows:

1. I am an attorney with the law firm of Trexler, Bushnell, Giangiorgi, Blackstone & Marr, Ltd., counsel for Applicant Patriot Guard Riders, Inc. in the above-captioned proceeding. As such, I have personal knowledge of the facts set forth below. If called upon and sworn as a witness, I could and would competently testify to the facts set forth below.

2. On August 18, 2009, I executed a Declaration in Support of Applicant's Motion to Dismiss or, in the Alternative, Strike, in which I declared that as of that day, our firm had not received service of the Amended Notice of Opposition that was electronically filed by Opposer on August 4, 2009.

3. Upon reading "Applicant's [sic] Motion to Reopen Time to Serve Amended Notice of Opposition due to Excusable Neglect and Brief in Response to Applicant's Motions to Dismiss and to Strike", I understood that Opposer did not serve a copy of the Amended Notice of Opposition on August 4, 2009, but rather that Opposer claims to have served the Amended Notice of Opposition on me, along with a Certificate of Service, by mail on August 6, 2009.

4. At the time of my execution of this Declaration today, September 14, 2009 (thirty-nine (39) days after Brown alleges the Amended Notice of Opposition, along with a Certificate of Service, were served by mail), neither I nor any of the other attorneys in my firm have received service of this Amended Notice of Opposition, including a Certificate of Service dated August 6, 2009, by e-mail, first class mail or any other appropriate manner.

Executed on: 9/14/09

David J. Marr

AG5059