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

Proceeding	91181448
Party	Plaintiff Jeff Brown
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

JEFF BROWN,)
)
 Opposer,)
) Opposition No. 91181448
)
 PATRIOT GUARD RIDER, INC.,)
)
 Applicant.)

**OPPOSER'S MOTION TO AMEND
NOTICE OF RELIANCE PURSUANT TO RULE 2.122(e)**

Pursuant to Rule 2.122(e) of the Trademark Rules of Practice, Opposer, Jeff Brown ("Opposer") hereby moves the Board to allow Opposer to amend his Notice of Reliance and make of record and notify Applicant, Patriot Guard Rider, Inc. ("Applicant") of his reliance on the following:

1. All evidence identified in Opposer's Motion for Summary Judgment and Combined Brief, and all exhibits attached thereto; and
2. The Supplemental Declaration of Courtney Bru in Support of Opposer's Response in Opposition to Applicant's Motion for Summary Judgment and Memorandum (the "Supplemental Declaration"), and all exhibits attached thereto.

In support of this Motion, Opposer states as follows:

SUMMARY

Opposer filed his Motion for Summary Judgment on January 22, 2009, and the Supplemental Declaration on February 26, 2009. More than two years later, on April 20, 2011, Opposer filed his Notice of Reliance, unintentionally omitting all reference to the evidence previously submitted in his Motion for Summary Judgment and Supplemental Declaration and

upon which Opposer relies for proving his case. All facts, issues, and evidence have remained substantially the same since Opposer filed his Motion for Summary Judgment and Supplemental Declaration two years ago and the parties have proceeded under the assumption that each other's arguments and positions have remained the same. Indeed, Opposer did not add any significant evidence to his Notice of Reliance because he continues to support his case with the evidence and information contained in the Motion for Summary Judgment and Supplemental Declaration.

Opposer moves the Board to allow Opposer to amend his Notice of Reliance to include the evidence contained in his Motion for Summary Judgment and Supplemental Declaration. The equitable considerations under *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 390 (1993) favor allowing Opposer to amend his Notice of Reliance as Applicant will not be prejudiced, the proceedings will not be lengthened, and Opposer's inadvertent mistake was made in good faith. In the alternative, Documents Numbered 2 through 8 identified in Applicant's Notice of Reliance should be admitted into evidence in their entirety, as the portions selected by Applicant are misleading and out of context. Additionally, Opposer states that his due process rights will be violated if he is not permitted to present his evidence. Finally, Opposer requests that the Board take judicial notice of the evidence identified in Opposer's Motion for Summary judgment and Supplemental Declaration.

PROPOSITION I: OPPOSER SHOULD BE PERMITTED TO AMEND HIS NOTICE OF RELIANCE BECAUSE HIS MISTAKE IS EXCUSABLE

Pursuant to FRCP 6(b)(1)(B), the Board may extend the time for any "act" if "the party failed to act because of excusable neglect." The Supreme Court in *Pioneer Investment* held:

[D]elays and omissions caused by negligence and carelessness cannot be deemed to be inexcusable per se. Rather, the determination of whether a party's neglect is excusable is an equitable one which takes into account all relevant circumstances surrounding the party's delay or omission, including the danger of prejudice to the nonmovant, the length of the delay and its potential impact on judicial

proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Pumpkin Ltd. v. The Seeds Corps, 43 USPQ2d 1582, *4 n. 2 (TTAB 1997). The *Pioneer Investment* analysis favors Opposer's Motion to Amend Notice of Reliance.

First, Applicant will not be prejudiced by Opposer's amended Notice of Reliance. Applicant LEARNED OF Opposer's evidence when Opposer filed his Motion for Summary Judgment and Supplemental Declaration. Since that time, the parties have not engaged in substantive discovery of new evidence and nothing has put Applicant on notice that Opposer did not intend to use the evidence from his Motion for Summary Judgment and Supplemental Declaration in his case in chief. Indeed, if Applicant feels that it is in some way being caught off-guard, Opposer agrees to any reasonable extension of time necessary. Simply put, Applicant has been aware of Opposer's evidence for over two years.

The second factor also favors strongly in allowing Opposer to amend his Notice of Reliance, as there will be no delay or potential impact on the judicial proceedings if the Board grants Opposer's motion. Opposer does not request any extensions, postponements, or other amendments to the judicial proceedings. Opposer only requests that he be allowed to amend his Notice of Reliance so that he may use the available and highly relevant evidence.

Opposer concedes that he had the ability to correctly identify this evidence in his Notice of Reliance, as contemplated by the third factor. Rather than list the evidence, Opposer inadvertently assumed that the previous Motion for Summary Judgment and Supplemental Declaration would suffice for placing the evidence in the record. However, excusable neglect "is not limited strictly to omissions caused by circumstances beyond the control of the movant." *Pioneer Investment*, 507 U.S. at 392. Thus, Opposer's mistake does not preclude just relief.

Finally, the fourth *Pioneer Investment* factor favors the Board granting Opposer's Motion, as Opposer has acted in good faith.

The balance of the factors supports Opposer's motion to amend his Notice of Reliance, as the parties have pursued this action under the assumption that each party intended to use all evidence available to it. This action should not be decided on Opposer's counsel's inadvertent omission, as Opposer will be severely prejudiced without the requested evidence. As such, Opposer requests that the Board grant his Motion.

PROPOSITION II: DOCUMENT NUMBERS 2 THROUGH 8 OF APPLICANT'S NOTICE OF RELIANCE SHOULD BE ADMITTED IN THEIR ENTIRETY BECAUSE THEY ARE OTHERWISE MISLEADING

Pursuant to 37 C.F.R. § 2.120 (j)(5):

Written disclosures, an answer to an interrogatory, or an admission to a request for admission, may be submitted and made part of the record only by the receiving or inquiring party except that, if fewer than all of the written disclosures, answers to interrogatories, or fewer than all of the admissions, are offered in evidence by the receiving or inquiring party, the disclosing or responding party may introduce under a notice of reliance any other written disclosures, answers to interrogatories, or any other admissions, which should in fairness be considered so as to make not misleading what was offered by the receiving or inquiring party. The notice of reliance filed by the disclosing or responding party must be supported by a written statement explaining why the disclosing or responding party needs to rely upon each of the additional written disclosures or discovery responses listed in the disclosing or responding party's notice, and absent such statement the Board, in its discretion, may refuse to consider the additional written disclosures or responses.

In short, a party's one-sided curating of evidence permits the Board to allow in the remainder of the document. Because Applicant has selectively identified misleading portions of Applicant's First Requests for Admission to the Opposer, Petitioner's Response to Applicant's First Request for Admission, Petitioner's Amended Responses to Certain Requests for Admissions, Applicant's First Set of Interrogatories to the Opposer, Petitioner's Answer to Applicant's First Set of Interrogatories, Applicant's Second Set of Interrogatories to the Opposer, and Opposer's

Amended Responses to Applicant's Second Set of Interrogatories, Opposer requests the Board allow him to introduce the remainder of those documents.

PROPOSITION III: OPPOSER'S DUE PROCESS RIGHTS WILL BE VIOLATED IF HE IS NOT PERMITTED TO USE THE REQUESTED EVIDENCE

Pursuant to the Fifth Amendment's guarantee of procedural due process, no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Opposer faces the loss of his trademark property rights in this action, and is therefore entitled to due process of law. For more than two years now, Opposer has made known the evidence of his trademark. To disallow Opposer to use this evidence to defend his property and livelihood because of a procedural mishap would amount to the sort of travesty that the founding fathers proscribed in our Constitution. This Board should permit Opposer to use the evidence, as required by the Due Process Clause.

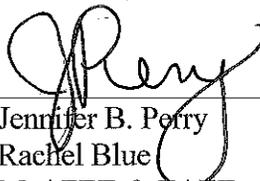
PROPOSITION IV: THE BOARD SHOULD TAKE JUDICIAL NOTICE OF THE EXHIBITS IDENTIFIED IN OPPOSER'S MOTION FOR SUMMARY JUDGMENT AND SUPPLEMENTAL DECLARATION

Pursuant to 37 C.F.R. § 2.122(a), the Trademark Trial and Appeal Board follows the Federal Rules of Evidence. FRE 201 permits the Board to take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FRE 201 (b). Opposer's Motion for Summary Judgment and Supplemental Declaration and the accompanying exhibits contain admissions by Applicant and its representatives under oath, the veracity of which "cannot reasonably be questioned." Opposer requests the Board take judicial notice of the admissions contained in Opposer's Motion for Summary Judgment and Supplemental Declaration, and the exhibits attached thereto.

CONCLUSION

Opposer requests that the Board permit him to amend the Notice of Reliance to include the evidence identified in his Motion for Summary Judgment and Supplemental Declaration, and the exhibits attached thereto, on the grounds of excusable neglect or procedural due process. Otherwise, Opposer will be severely prejudiced in this Opposition. Alternatively, Opposer requests that the Board admit Document Numbers 2 through 8 identified in Applicant's Notice of Reliance. Finally, Opposer requests that the Board take judicial notice of the evidence identified in his Motion for Summary Judgment and Supplemental Declaration, and the exhibits attached thereto.

Dated this 21st day of **November, 2011**.



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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2011, a true and correct copy of the foregoing OPPOSER'S MOTION TO AMEND NOTICE OF RELIANCE PURSUANT TO RULE 2.122(e) was sent via e-mail and first class mail, postage prepaid to:

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