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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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Date	12/08/2011
Attachments	Response.pdf ( 13 pages )(634439 bytes ) Exhibit A.pdf ( 3 pages )(78230 bytes )

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

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

**APPLICANT’S RESPONSE TO OPPOSER’S MOTION TO AMEND  
NOTICE OF RELIANCE PURSUANT TO RULE 2.122(e)**

Applicant, Patriot Guard Riders, Inc., by and through its counsel, hereby responds to Opposer’s Motion to Amend Notice of Reliance Pursuant to Rule 2.122(e), filed on November 21, 2011.

**SUMMARY**

Opposer, Jeff Brown, filed his Motion to Amend Notice of Reliance Pursuant to Rule 2.122(e) (“Opposer’s Motion”) on the same day he filed his Trial Brief. By his Motion, Opposer seeks to have made of record all of the evidence and exhibits identified in or attached to Opposer’s Motion for Summary Judgment and Combined Brief and the Supplemental Declaration of Courtney Bru and all of its exhibits (“Omitted Evidence”). Opposer does not attempt in his Motion to identify the specific pieces of evidence upon which he needs to rely in his Trial Brief, but instead seeks to admit all of the Omitted Evidence in its entirety.

Opposer has failed to make a proper showing as to why he should be allowed to make the Omitted Evidence of record under any of the four theories he proposes, and therefore his motion should be denied. The Board has made clear that evidence not submitted in accordance with applicable rules will not be considered. Opposer first seeks to get around these rules by arguing

that its omission is excusable neglect under the *Pioneer* test. An analysis of the four-factor *Pioneer* test shows that Opposer's omission was not the result of excusable neglect. Opposer's mistake, whether inadvertent or not, was well within Opposer's control, and occurred in spite of the Board specifically informing the parties that evidence submitted for summary judgment purposes was of record only with respect to the motions. As a result of Opposer's omission, he now asks the Board to expend valuable resources, and delay an already lengthy proceeding, to consider a motion that has already caused severe prejudice to Applicant. Opposer also forces Applicant to request a suspension of these proceedings pending the Board's ruling on Opposer's Motion, as the Board's ruling will clearly affect Applicant's strategy with regard to how to respond to Opposer's Trial Brief.

Next, Opposer seeks to have the Omitted Evidence made of record through the fairness rule, which permits the inclusion of additional written disclosures, admissions, and interrogatories where necessary to clarify potentially misleading responses. However, Opposer's Motion violates the intent of the rule by asking to have every omitted response made of record. Although Opposer seeks to admit all of the hundreds of additional written disclosures, admissions, and interrogatories that are not part of the record, he fails in his Motion to identify even a single specific one upon which he needs to rely as required by statutory language to which he cites. Opposer also fails to meet the statutory requirement that he provide a written statement explaining why he needs to rely on each additional response.

Finally, Opposer alternatively relies on due process and judicial notice as avenues to have the Omitted Evidence made of record, but in so doing, misconstrues the requirements for each. Opposer has no property rights in his trademark application, and so is not entitled to due process in this proceeding. To the extent that Opposer is entitled to due process, the Board's

proceedings have afforded Opposer the opportunity to exercise his rights by introducing evidence during his testimony and rebuttal periods. No more is required. Opposer similarly asks the Board to take judicial notice of entire exhibits, despite the fact that Opposer does not identify even a single fact within any of the exhibits that is suitable for judicial notice.

## ARGUMENT

### I. **OPPOSER SHOULD NOT BE PERMITTED TO AMEND HIS NOTICE OF RELIANCE BECAUSE INADVERTENT OMISSIONS DO NOT CONSTITUTE EXCUSABLE NEGLIGENCE.**

Evidence that is not timely submitted in accordance with applicable rules will not be considered, and a party that fails to follow applicable rules does so “at its own peril.” *Acme Boot Co. v. Tony & Susan Alamo Foundation, Inc.*, 213 USPQ 591, 592 (TTAB 1980); see also *Life Zone, Inc. v. Middleman Group, Inc.*, 87 USPQ2d 1953, 1955 (TTAB 2008). However, Opposer correctly asserts that the Board may grant extensions of time for an act if “the party failed to act because of excusable neglect.” Fed. R. Civ. P. 6(b)(1)(B). Courts determine if a party’s conduct constitutes excusable neglect using an equitable analysis and “taking account of all relevant circumstances surrounding the party’s omission”. *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993). Specifically, courts consider four factors:

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.

*Pioneer*, 507 U.S. at 395. An analysis of the *Pioneer* factors weighs strongly against a finding that Opposer’s omission was the result of excusable neglect. Applicant considers each of the factors in order of their relative importance.

**A. Pioneer Factor 3: The Reason for the Delay, Including Whether it Was Within the Reasonable Control of the Movant**

Of the *Pioneer* factors, the third, “the reason for the delay, including whether it was within the reasonable control of the movant” may be considered the most important. *Pumpkin, Ltd. v. The Seed Corps*, 1997 TTAB LEXIS 24, \*15 n.7. Where the opposer’s failure is “wholly within the reasonable control of opposer,” this factor “weighs heavily against a finding of excusable neglect.” *Id.* at \*18-19. In response to the third factor, Opposer concedes that “he had the ability to correctly identify this evidence in his Notice of Reliance.” Opposer’s Motion at 3. Opposer also admits that the reason for the omission was because Opposer “inadvertently assumed” that the Omitted Evidence was already in the record. *Id.* Opposer fails to explain how it made the “inadvertent assumption”, particularly given the Board’s previous warning to the parties:

The parties should note that evidence submitted in connection with the motions for summary judgment *is of record only for consideration of the motions*. To be considered at final hearing, any such evidence *must be properly introduced in evidence during the appropriate trial period*.

Board’s Order Denying Motions for Summary Judgment (Dkt. 24) at 6 n.4 (emphasis added). Moreover, it has been long-settled that evidence filed by a party in connection with a motion for summary judgment is not automatically part of the record. *See American Meat Institute v. Horace W. Longacre, Inc.*, 211 USPQ 712, 716 n.2 (TTAB 1981); *Pet Inc. v. Bassetti*, 219 USPQ 911, 913 n.4 (TTAB 1983). Despite the well-established rule, and despite Opposer having specific written notice from the Board that it needed to take further action to have its evidence on summary judgment made of record, Opposer makes no further effort to explain the omission and provides no evidence showing that the omission was the result of anything other

than Opposer's negligence. Therefore, the third factor weighs strongly in favor of denying Opposer's Motion.

**B. *Pioneer* Factor 2: The Length of the Delay and its Potential Impact on Judicial Proceedings**

The second *Pioneer* factor, the length of delay caused by the omission and its potential impact on judicial proceedings, may be considered in combination with the third factor described above. See *Firsthealth of the Carolinas, Inc. v. Carefirst of Maryland, Inc.*, 479 F.3d 825, 829-30 (Fed. Cir. 2007). Opposer feels the second factor weighs in his favor because Opposer submitted his Trial Brief on time, and therefore did not cause any delay in the proceedings. At the same time, Opposer seems to recognize that his Motion is likely to cause delay, as it offers to agree to a "reasonable extension of time" for Applicant to consider the potential impact of the evidence included in the Motion. Opposer's Motion at 3. Although the extent of the delay caused by Opposer's Motion is uncertain at this time, there will certainly be a delay because Opposer's Motion has forced Applicant to file a Motion for Suspension of Proceedings concurrently herewith.

Opposer also fails to consider the impact of its Motion on the Board as a result of the "additional, unavoidable delay arising from the time required for briefing and deciding the motion". *Pumpkin*, 1997 TTAB LEXIS at \*20. Because the Board has limited resources available to it, it has an interest in deterring motions which, like Opposer's Motion, arise solely as the result of "sloppy practice...on the part of litigants or their counsel." *Id.* at \*21. This interest "weighs heavily against a finding of excusable neglect under the second *Pioneer* factor." *Id.*

**C. *Pioneer Factor 1: Danger of Prejudice to the Nonmovant***

Opposer argues in response to the first factor that Applicant “has been aware of Opposer’s evidence for over two years”, and therefore that Applicant will not be prejudiced by its last-minute inclusion in the record. Opposer’s Motion at 3. Opposer is correct that Applicant has known of the existence of the Omitted Evidence since it was filed with the Board in early 2009. However, Applicant had absolutely no reason to know—or even suspect—that Opposer planned to rely on the Omitted Evidence as Opposer failed to properly place it into the record.

Allowing Opposer to include the Omitted Evidence at this late stage in the proceeding would cause considerable prejudice to Applicant. Notices of reliance must be submitted during the offering party’s testimony period, pursuant to Trademark Rule 2.122(e). By his Motion, Opposer is effectively requesting that the Board reopen Opposer’s testimony period so that additional evidence may be entered into the record, which is improper and highly prejudicial to Applicant.

As a result of both Opposer’s omissions and its failure to bring its omissions to the attention of the Board until the day his Trial Brief was due, Applicant has already been prejudiced as Applicant has been forced to expend valuable time and energy addressing Opposer’s Motion and preparing this response brief rather than exclusively focusing on preparing its main brief during this time period. Additionally, Applicant’s strategy, from its testimony period to the present, has been based on the evidence Opposer made of record during his testimony period. Had Opposer timely submitted a notice of reliance making the Omitted Evidence of record, Applicant would have reconsidered its approach to its own testimony period, possibly including asking additional questions of witnesses and introducing additional evidence. Because Opposer has waited until the submission of his Trial Brief to mention his need to

include the Omitted Evidence, Applicant is foreclosed from pursuing additional evidence in response. Similarly, Applicant has also been forced to reconsider its entire strategy with regard to its Trial Brief while it evaluates the significance of Opposer's Omitted Evidence.

**D. *Pioneer* Factor 4: Whether the Movant Acted in Good Faith**

Opposer briefly notes that the fourth factor, acting in good faith, weighs in his favor, but makes no effort to explain how his apparent failure to notice his mistake until the last business day prior to filing his Trial Brief was the result of a good faith error. Applicant notes that the timing of Opposer's Motion, filed concurrently with his Trial Brief, is questionable. Applicant was first made aware of Opposer's desire to enter additional materials into the record through a voicemail left by Opposer's counsel after the close of business on Friday, November 18, 2011, the final business day before Opposer's Trial Brief was due. Exhibit A (Declaration of James A. O'Malley). It is difficult to believe that Opposer, who presumably had done considerable work on his Trial Brief in advance of the due date, somehow did not discover that he failed to have the Omitted Evidence made of record until after close of business on the last business day before filing. In his Motion, Opposer makes no effort to describe the circumstances or timing surrounding the discovery of his mistake, which might aid the Board in determining that Opposer's actions were in good faith. Therefore, it is not clear that this factor favors Opposer.

Considered together, the *Pioneer* factors weigh heavily in favor of the Board denying Opposer's Motion. Opposer's omission, which was entirely within his control, has caused considerable and unreasonable delay for both Applicant and the Board, and prejudices Applicant by seeking to admit more evidence just weeks before Applicant's Trial Brief deadline. The mere assertion that Opposer's omission was made in good faith is insufficient to mitigate the delay and prejudice caused by Opposer's failure to properly enter the Omitted Evidence into the record.

**II. DOCUMENTS 2 THROUGH 8 OF APPLICANT'S NOTICE OF RELIANCE SHOULD NOT BE ADMITTED IN THEIR ENTIRETY BECAUSE OPPOSER FAILED TO COMPLY WITH RULE 2.120(j)(5).**

Rule 2.120(j)(5) permits parties to make of record additional written disclosures, interrogatories, and admissions where necessary to clarify potentially misleading responses. However, Rule 2.120(j)(5) "was not intended to permit the blanket filing of any interrogatory answers by the answering party which had not been introduced by the propounding party." *Heaton Enterprises of Nevada, Inc., v. Lang*, 7 USPQ2d 1842, 1844 n.5 (TTAB 1988). Opposer's Motion, which seeks to introduce into evidence all of the hundreds of omitted responses, clearly violates the spirit of Rule 2.120(j)(5).

Additionally, although Opposer seeks to admit hundreds of additional responses from Applicant's Notice of Reliance, the majority of which are not even cited in his Trial Brief, Opposer fails to meet either of the requirements of Rule 2.120(j)(5). As Opposer indicates in his Motion at page 5, where the receiving party introduces fewer than all of the written disclosures, interrogatories, or admissions, "the disclosing or responding party may introduce *under a notice of reliance*" any additional written disclosures, interrogatories, or admissions necessary to make the evidence not misleading. 37 C.F.R. § 2.120(j)(5) (emphasis added). The notice of reliance "*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...notice." *Id.* (emphasis added).

First, Opposer's request to admit additional written disclosures or discovery responses should have been presented in the form of a notice of reliance during Opposer's rebuttal period. Opposer had plenty of time during his rebuttal period to review the responses included in Applicant's notice of reliance and determine whether they were misleading, but chose not to

submit his own rebuttal notice of reliance to include additional responses at that time. Instead, despite being clearly aware of the relevant statutory requirements for admission of additional responses, because he cites the statutory language verbatim in his Motion, Opposer chose to wait until submission of his Trial Brief to argue that the specific responses made of record by Applicant are misleading.

Second, even if Opposer's request had been timely submitted in a notice of reliance, Opposer still did not comply with the requirement that he give a written explanation as to why he needs to rely on each of the responses he seeks to have made of record. Opposer instead seems to rely on the blanket statement that Applicant has admitted "misleading portions" of the relevant documents as an excuse to have dozens, if not hundreds, of additional written disclosures and responses made a part of the record, the majority of which are not even cited by Opposer in his Trial Brief. Opposer's Motion at 4. Even though Opposer's Motion was submitted at the same time as his Trial Brief, and Opposer therefore was fully aware of which specific responses he needed to correct the "misleading portions" allegedly identified by Applicant, Opposer nevertheless filed a motion seeking to have every single response admitted. Opposer clearly did not even bother to take the time to review his own Trial Brief to determine which responses he needed to include in his Motion, and instead asks the Board to admit everything just to cover Opposer's mistake. At the same time, Opposer fails to specifically identify even one "misleading portion" of Applicant's responses, which consist entirely of complete Interrogatories and Requests for Admission and their respective complete responses. In Applicant's opinion, it would therefore be impossible for any of Opposer's responses to be misleading unless Opposer, himself, omitted information when preparing his responses.

Permitting the documents to be admitted in their entirety at this late stage would be highly prejudicial to Applicant, which timely filed its Notice of Reliance. Opposer's failure to meet the applicable statutory requirements to have additional responses made of record was not in any way caused by Applicant. Applicant should not be forced to bear the burden of Opposer's inattention and laziness, and the motion to admit these documents should be denied.

**III. OPPOSER HAD AMPLE OPPORTUNITY TO EXERCISE ANY DUE PROCESS RIGHTS HE MAY HAVE BY ADMITTING EVIDENCE DURING BOTH HIS TESTIMONY AND REBUTTAL PERIODS.**

Despite Opposer's sweeping assertion that his trademark property rights are in jeopardy unless his Motion is granted, there is no constitutionally protected right to a federal trademark registration for any mark. *In re International Flavors & Fragrances*, 183 F.3d 1361, 1368 (Fed. Cir. 1999). Therefore, Opposer does not have any constitutionally protected property interest in obtaining a registration. *See Id.*

However, even if Opposer did have property rights at stake sufficient to invoke the constitutional guarantee of due process, Opposer has already been afforded every opportunity to exercise his due process rights by entering evidence into the record at the appropriate time. The mere fact that Opposer chose not to enter all of the evidence available to him does not in any way translate to a denial of his due process rights.

**IV. THE BOARD SHOULD NOT TAKE JUDICIAL NOTICE OF THE OMITTED EVIDENCE BECAUSE THE EXHIBITS THEREIN ARE NOT PROPER SUBJECT MATTER.**

Federal Rule of Evidence 201(b) allows the Board to take judicial notice of facts "capable of accurate and ready determination by resort to sources whose *accuracy* cannot reasonably be questioned" (emphasis added). Such sources include dictionaries, standard reference works, and

technical reference works. See *In re 3Com Corp.*, 56 USPQ2d 1060, 1061 n.3 (TTAB 2000); *In re Broyhill Furniture Industries Inc.*, 60 USPQ2d 1511, 1514 n.4 (TTAB 2001).

Opposer misinterprets the rule to permit judicial notice of facts from sources whose *veracity* cannot reasonable be questioned, when the rule only permits judicial notice of facts from sources whose *accuracy* cannot reasonably be questioned. Opposer properly cites Rule 201(b), but in the next sentence states that the Omitted Evidence “contain[s] admissions by Applicant and its representatives under oath, the *veracity* of which ‘cannot reasonably be questioned.’” Opposer’s Motion at 5 (emphasis added). However, to properly be the subject of judicial notice, facts must also be from sources whose *accuracy* cannot be reasonably questioned. The alleged admissions made by Applicant and its representatives will not be found in any reference work of the kind contemplated by the rule, nor are they facts generally known to be accurate. Therefore, they are generally not proper subject matter for judicial notice.

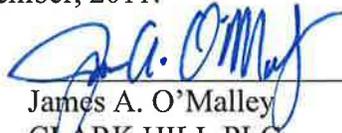
Additionally, Opposer fails to identify even one response in any of its exhibits that is properly the subject of judicial notice. Instead, Opposer seeks to have all of the exhibits from the Omitted Evidence judicially noticed, regardless of the actual contents of the documents. Because Opposer has not identified any specific facts capable of being judicially noticed, his motion should be denied.

### CONCLUSION

Opposer’s Motion should be dismissed because the Omitted Evidence was not submitted in accordance with applicable rules, and therefore should not be considered. Opposer’s Motion to Amend Notice of Reliance should also be denied because it fails to meet the requirements of any of the four theories Opposer articulates. Opposer’s mistake does not meet the four-factor *Pioneer* test for excusable neglect, because the omission, which was entirely within Opposer’s

control, has already caused delay to these proceedings and prejudice to Applicant. Opposer similarly fails to meet the statutory requirements to admit additional written disclosures or responses because he fails to provide a written statement showing why he needs to rely on each of the hundreds of additional responses he seeks to have made of record. Opposer had ample opportunity to exercise any due process rights he may possess during his testimony and rebuttal periods. Finally, Opposer has not presented even a single fact suitable for judicial notice.

Dated this 8<sup>th</sup> day of December, 2011.



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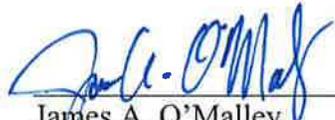
*Attorney for Applicant, Patriot Guard Riders, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5th day of December, 2011, a true and correct copy of the foregoing APPLICANT'S RESPONSE TO OPPOSER'S MOTION TO AMEND NOTICE OF RELIANCE PURSUANT TO RULE 2.122(e) was sent via e-mail and via first class mail, postage pre-paid to:

Rachel Blue  
Jenna Rader  
McAFEE & TAFT  
900 Mapco Plaza  
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Tulsa, Oklahoma 74119  
Tel: 918-587-0000  
Fax: 918-599-9317  
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	)	Opposition No. 91181448
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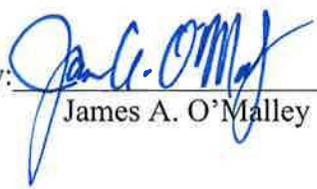
**DECLARATION OF JAMES A. O'MALLEY IN SUPPORT OF APPLICANT'S  
RESPONSE TO OPPOSER'S MOTION TO AMEND NOTICE OF RELIANCE  
PURSUANT TO RULE 2.122(e)**

I, James A. O'Malley, declare and state as follows:

1. I am an attorney with the law firm of Clark Hill PLC, 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. Opposer's Trial Brief was due to be filed with the Trademark Trial and Appeal Board on Monday, November 21, 2011.
3. On Friday, November 18, 2011, I received a voicemail message from Jenna Rader, counsel for Opposer, at 6:03 P.M. Central time (after the close of business). In her voicemail message, Ms. Rader wanted to know whether Applicant would consent to Opposer including evidence -- generally evidence from the summary judgment motions filed by the parties -- in his Trial Brief that was not previously made of record.

4. After communications with co-counsel and Applicant over the weekend and on Monday morning regarding Ms. Rader's request, I e-mailed Ms. Rader late Monday morning to advise her that Applicant would not consent to Opposer including evidence in his Trial Brief that was not previously made of record.

Executed on: December 8, 2011

By:   
James A. O'Malley

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