

**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

Mailed: August 28, 2013

Opposition No. 91194706

1047406 Ontario Ltd. and
Purifics ES, Inc.

v.

UVCleaning Systems, Inc. dba
Puralytics Corporation

**Robert H. Coggins,
Interlocutory Attorney:**

Now before the Board are applicant's motion (filed June 19, 2013) to strike opposer's reply brief on the case, and opposer's cross-motion (in the brief in opposition) for leave to file a late reply.

By way of the motion to strike, applicant states that opposer's reply brief is late and overlength. Opposer admits as much, but states that (1) it filed the late brief due to a calendaring error, and (2) it erroneously excluded from the page count the accompanying table of contents and index of authorities. Opposer argues that the Board should accept the late brief because the calendaring error constitutes excusable neglect, and that the Board should

either exercise its discretion to consider the minimally overlength brief or to accept the (even later) reply brief filed concurrently with the brief in opposition to the motion.

Because opposer did not timely file its reply brief on the case, opposer must establish that its untimeliness was the result of excusable neglect. *Pioneer Investment Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380 (1993); *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997); Fed. R. Civ. P. 6(b)(1).

Opposer cites, *inter alia*, two non-precedential Board decisions in which late briefs were accepted, and argues that the Board should exercise its discretion similarly in this case. Opposer first cites to *The Village Recorder v. Schnur, AKA Allworks Media, LLC*, 2013 Westlaw 3191217 (TTAB May 20, 2013, Opposition No. 91195190). However, in that decision, the Board's acceptance of the applicant's late brief was predicated in large part on the way that opposer had objected to the late brief. The Board noted therein that "[i]nasmuch as the timeliness of applicant's brief was raised in opposer's Reply Brief instead of a motion to strike, applicant had no opportunity to make a showing of excusable neglect." But in our case, applicant raised the issue in a motion to strike, thereby allowing opposer the opportunity to establish excusable neglect. Opposer then

cites to *International Flora Techs., Ltd. v. Desert Whale Jojoba Co., Inc.*, 2010 WL 985363 (TTAB February 23, 2010, Cancellation No. 92048102). Similarly, in that case, respondent therein objected in its trial brief to the timeliness of the petitioner's brief. The Board's decision to accept that petitioner's late brief was predicated, at least in part, on possible confusion created by respondent itself (i.e., the party raising the objection) when respondent sought to close the rebuttal testimony period on a Saturday. Both of the cited cases differ from the case at hand. The issue of the instant opposer's late brief was raised by way of a motion to strike, and there is no question as to the last day of the rebuttal testimony period. In view thereof, the cited cases are not persuasive. Moreover, although a party may cite to non-precedential decisions, they are not binding on the Board. *In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1151 n.7 (TTAB 2011).

Opposer's sole excuse for filing the late reply is a docketing error. An attorney's docketing error is considered wholly within an attorney's control and thus does not generally constitute excusable neglect. See *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1852 (TTAB 2000); TBMP § 509.01(b)(1) (3d ed. rev.2 2013). In view thereof, the motion to strike may be granted on this basis alone.

Even if the Board were to find excusable neglect in this case (which it does not), opposer's initial reply brief was over the twenty-five page limit set forth in Trademark Rule 2.128(b). The parts of the brief that fall within the length limit include the table of contents and table of authorities. Trademark Rule 2.128(b). The rule is clear and unambiguous. In view of the rule, opposer's initial reply brief was twenty-seven pages long. The mis-counting of pages was wholly within opposer's control. While Trademark Rule 2.128(b) allows a party to file a longer brief with "prior leave," no prior leave was sought by opposer. It is noted that an appropriate-length brief was filed on July 3, 2013, along with the opposer's brief in opposition to the motion to strike; however, the appropriate-length brief was provided twenty-six days after the reply brief deadline and is also, necessarily, predicated on opposer's calendaring error. The Board does not find excusable neglect to accept the later-filed, but shorter, reply brief. *See Baron Philippe de Rothschild S.A., supra.* In view thereof, the cross-motion to accept the later-filed reply is denied.

Opposer is correct to point out that the Board prefers to have the benefit of the parties' briefs at final decision. It is noted, however, that opposer's main brief

is of record and is unchallenged; therefore, the Board will have the benefit of opposer's main brief.

In view of the above, applicant's motion to strike is **granted**, and opposer's cross-motion to file a late reply brief is **denied**. See *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1435 n.4 (TTAB 2012) ("Where a brief exceeds the page limit, the Board generally will not consider the brief."); *Boswell v. Mavety Media Group Ltd.*, 52 USPQ2d 1600, 1604 n.4 (TTAB 1999) (late reply brief not considered where opposer failed to show excusable neglect and brief was over length); *Baron Philippe de Rothschild S.A.*, *supra* (docketing error not excusable neglect); and, generally, TBMP §§ 509.01(b)(1) and 801.03 (3d ed. rev.2 2013).

Proceedings are resumed, and applicant's request for an oral hearing (filed May 23, 2013) is noted. The Board will contact the parties to determine a mutually convenient time for the hearing. Once the hearing is set, the Board will provide written notice thereof. See Trademark Rule 2.129(a), and TBMP § 802.03 (3d ed. rev.2 2013).