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

Proceeding	92057023
Party	Defendant John "Giovanni" Aragona
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Date	05/18/2015
Attachments	R Reply.pdf(143811 bytes)

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

In the matter of Trademark Registration No. 4,220,686
Mark: GIOVANNI'S ALOHA FOODS
Registration date: October 9, 2012

In the matter of Trademark Registration No. 4,224,400
Mark: GIOVANNI'S SCAMPI MARINADE
Registration date: October 16, 2012

In the matter of Trademark Registration No. 4,232,569
Mark: GIOVANNI'S ORIGINAL WHITE SHRIMP TRUCK
Registration date: October 30, 2012

In the matter of Trademark Registration No. 4,248,595
Mark: GIOVANNI'S HOT & SPICY WE REALLY MEAN IT! SAUCE
Registration date: November 27, 2012

LuckyU Enterprises, Inc., dba	:	
Giovanni's	:	
Original White Shrimp Truck	:	
	:	
Petitioner,	:	
	:	
v.	:	Cancellation No. 92057023
	:	
John "Giovanni" Aragona	:	
	:	
Registrant.	:	

REGISTANT'S REPLY TO PETITIONER'S RESPONSE TO MOTION TO EXTEND

I. FACTS

As of December 2, 2014, the Cancellation calendar set Plaintiff's 15-day Rebuttal Period to end on February 17, 2015, Petitioner's trial brief due on April 18, 2015, and Registrant's trial brief due on May 18, 2015.

On April 21st, a storm in the metro Atlanta area produced quarter sized hail, lightning, and flooding. During this event undersigned counsel's office experienced several power surges, which resulted in damage to electronic equipment and total loss of data, including Registrant's trial brief and relevant case files. This data loss has required Registrant's reconstruction two years worth of case files, months worth of work on a brief, and thousands of documents that were exchanged by the parties during discovery.

On April 22nd, prior to the expiration of the time for filing its trial brief, Registrant moved for an extension of the brief's due date. On April 28th, Petitioner filed a Response to Registrant's Motion to Extend, requesting "the Trademark Trial and Appeal Board (TTAB) Order the immediate filing of Registrant's late filed brief, or by April 30th, 2015. Despite the fact that Petitioner is well aware of Registrant's correct correspondence address, Petitioner serviced its Response via a non-existent e-mail address and never mailed a hardcopy (See incorrect Jamienpitts@jpnlawfirm.com email address at TTABVUE Doc. 51 at 5). On May 11, 2015 Petitioner's requested April 30th deadline for Registrant was ordered by decision of Board Paralegal. This was seven days prior to the day that this reply brief would have been due.

II. ARUGMENT

Pursuant to the Board's order of December 2, 2014, Registrant's brief on the case was due May 18, 2015. As Registrant moved for an extension prior to the expiration of the time for filing its trial brief, it only had to establish "good cause" for the requested extension. Fed. R. Civ. P. 6(b)(1)(A); TBMP § 509. Generally, "the Board is liberal in granting extensions of time before the period to act has elapsed, so long as the moving party has not been guilty of

negligence or bad faith and the privilege of extensions is not abused.” *American Vitamin Products Inc. v. Dow Brands Inc.*, 22 USPQ2d 1313, 1315 (TTAB 1992). The storm and resulting electrical damage and data loss meet the “good cause” standard for Registrant’s requested extension.

Even if construed as a motion to reopen, Registrant has met its burden. The Board considers the following in determining whether a party's neglect is excusable: (1) the prejudice to the non-moving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the moving party, and (4) whether the moving party had acted in good faith. *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993), followed by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).

With regard to the first *Pioneer* factor, there is no measurable prejudice to Petitioner should the Board reopen Registrant’s time to submit its trial brief. Petitioner has made no showing of lost evidence or unavailable witnesses and will bear no greater cost in defending this matter than it would have if Registrant had timely filed its brief. *See HGK Industries, Inc. v. Perma-Pipe, Inc.*, 49 USPQ2d 1156 (TTAB 1998). Mere delay, without more, has not been found to constitute prejudice. *See Pratt v. Philbrook*, 109 F.3d, 18, 22 (1st Cir. 1997); *Paolo Associates Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1094 (Comm’r 1990). The absence of prejudice is a factor that should weigh in favor of Registrant.

As to the second *Pioneer* factor, the length of Registrant’s delay is minimal and allowing Registrant to file its brief would not cause a delay in this consolidated proceeding. The delay in

the instant proceedings is much shorter and the impact on Board proceedings far less significant than that discussed in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), wherein the motion to reopen at issue had been filed three and one-half months after the close of the relevant testimony period (*Pumpkin*, 43 USPQ2d at 1584), or than that discussed in *Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701 (TTAB 2002), wherein a motion to reopen the testimony period was denied where plaintiff claimed to not have received defendant's answer, and waited eleven months to file a motion to reopen. Additionally, the adverse impact on this proceeding attributable to Registrant's delay is less significant than the adverse impact that would result from the Board not having the benefit of Registrant's brief when this case is taken up for consideration at final hearing. Since these cases will require weighing of the submitted evidence and issuance of a decision on the merits, it is in the Board's interest for the panel of judges considering the cases at final hearing to have the benefit of Registrant's brief and, if Petitioner chooses to file one, its responsive trial brief. Accordingly, the second Pioneer factor weighs in favor of allowing Registrant to file its brief.

As to the third factor, the reason for delay was beyond Registrant's control. As stated above, the storm and resulting electrical damage and data loss were beyond Registrant's control, this event was unforeseeable and likely unpreventable.

With respect to factor four, there is no evidence of bad faith or willful conduct on the part of Registrant. Specifically, Registrant quickly communicated with Petitioner and filed a motion to extend once the need for additional time became apparent. As Registrant has acted in good faith and without any intention to delay this action unduly, this Pioneer factor also weighs in favor of Registrant.

III. CONCLUSION

For the foregoing reasons, Registrant respectfully requests that the time for filing its trial period be extended, or alternatively re-opened, and leave be granted for Registrant to file its trial brief.

Date: May 17, 2015

Respectfully submitted,

s/Jamie N. Pitts
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing REGISTANT'S REPLY TO PETITIONER'S
RESPONSE TO MOTION TO EXTEND was served on

May 18th 2015

to Petitioner's counsel via first class mail as follows:

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s/Jamie N. Pitts

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