

ESTTA Tracking number: **ESTTA676904**

Filing date: **06/08/2015**

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

Proceeding	92057023
Party	Plaintiff LuckyU Enterprises, Inc., dba Giovanni's Original White Shrimp Truck
Correspondence Address	JENNIFER FRASER NOVAK DRUCE CONNOLLY BOVE + QUIGG LLP 1875 EYE STREET NW, ELEVENTH FLOOR WASHINGTON, DC 20006 UNITED STATES trademark@novakdruce.com, jennifer.fraser@novakdruce.com, daniel.mullarkey@novakdruce.com, breanne.staley-ashe@novakdruce.com, tm-docket@novakdruce.com
Submission	Other Motions/Papers
Filer's Name	Daniel P. Mullarkey
Filer's e-mail	daniel.mullarkey@novakdruce.com, tmdocket@novakdruce.com
Signature	/Daniel P. Mullarkey/
Date	06/08/2015
Attachments	Petitioner's Motion to Strike Registrant's Request for an Extension of Time and Petitioner's Opposition to Registrant's Alleged Motion to Reopen the Briefing Period with service.pdf(346482 bytes)

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

In the matter of Trademark Trial and Appeal Board

Cancellation No. 92057023

Registration Nos: 4,220,686 - GIOVANNI'S ALOHA FOODS
 4,224,400 - GIOVANNI'S SCAMPI MARINADE
 4,232,469 - GIOVANNI'S ORIGINAL WHITE SHRIMP TRUCK
 4,248,595 - GIOVANNI'S HOT & SPICY WE REALLY MEAN IT! SAUCE

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

**PETITIONER'S MOTION TO STRIKE REGISTRANT'S REQUEST FOR AN
EXTENSION OF TIME AND PETITIONER'S OPPOSITION TO REGISTRANT'S
ALLEGED MOTION TO REOPEN THE BRIEFING PERIOD¹**

Petitioner hereby moves to strike Registrant's Reply To Petitioner's Response To Motion To Extend as improper and untimely and to the extent the Reply can be construed as a Motion to Re-Open Registrant's briefing period, Petitioner Opposes same. The Board ordered Registrant to file his Brief on April 30, 2015 and Registrant did not make his request for an extension of time until May 18, 2015 or 17 days later, so Registrant's request for a further extension of time is moot. Thus, Registrant needs to show his neglect is excusable to re-open his briefing period and Registrant has not made any such showing and cannot satisfy this burden because it is

¹ Petitioner spoke with USPTO Paralegal Karl Kochersperger who advised that Registrant's "Reply" should be treated as a Request for Extension of Time or a Motion to Reopen the Briefing Period.

inexcusable.

BACKGROUND

On April 21, 2015, Registrant requested an extension of time to file Registrant's Trial Brief, due that day according to Registrant,² and requested 3-5 extra days in which to file Registrant's brief. When Registrant failed to file Registrant's Trial Brief in that timeframe, Petitioner filed a Request to Order the Immediate Filing of Registrant's Late-Filed Brief or to End the Briefing Period. The Board granted Petitioner's Request and ordered Registrant to file his brief by April 30, 2015. Registrant did not file the brief by April 30, 2015 and instead filed a "Reply" on May 18, 2015 requesting an extension of time or otherwise to re-open the briefing period.³ Contrary to Registrant's position, a "Reply" would never have been due because the Board already decided the Request and issued an Order. While Petitioner was suspicious of the new litany of excuses from Registrant, out of a spirit of cooperation, Petitioner had previously agreed to Registrant's request seeking a relatively short 3-5 day extension. When the brief was not filed in that timeframe, Petitioner requested that the Board order the brief be filed because Petitioner cannot continue to be prejudiced by repeated delays and it is trying to resolve the issue of ownership of the registrations as soon as practicable. The Reply filed by Registrant is a further delaying tactic, is improper under the rules and because Registrant failed to comply with his own requested extension of time, the time to file his brief is now closed and the merits of this matter should be ready for review by the Board.

² Registrant implies in his Reply that his brief was actually due later, but Registrant acknowledged the April 21, 2015 due date as agreed upon by the parties when the last consented request for extension of time was filed on December 2, 2014, which is indicated by Registrant in TTAB document #50. See also Exhibits G and H attached to TTAB document #51. Registrant specifically requested "an order extending the due date to file Registrant's Trial Brief, which is due today April 21, 2015, by three to five days."

³ Considering the Board had decided the Motion, the captioned "Reply" is improper. However, regardless of the caption, under any standard, Registrant's request must fail.

A. Registrant's Meritless "Service" Argument

Registrant's Reply makes several "service" related assertions, which belies the fact that counsel for Registrant received the documents, and counsel does not assert otherwise in her Reply. Registrant already unsuccessfully tried an "improper service" excuse in his Opposition to Petitioner's Motion for Extension of Time, (TTAB document #11), and the Board found the argument meritless. See Order dated May 27, 2015, granting Petitioner's extension of time request (TTAB document #13 at FN 2). Registrant's current service argument is also meritless considering Registrant boldly asserts that Petitioner never mailed a hardcopy, despite the Certificate of Service attesting to the mailing. Registrant also argues that the courtesy copy sent via email was improper because the certificate of service transposes the "n" and "p" in counsel's email address. However, it is noteworthy counsel does not contend that the courtesy copy was not received because counsel cannot; it was sent to her correct email address. See Exhibit A. Petitioner also sent its Request to Order the Immediate Filing of Registrant's Late-Filed Brief or End the Briefing Period to the correspondence address of record, as indicated on the Certificate of Service; however, Petitioner's counsel received a phone call from an attorney ("Person") occupying a suite near to Registrant's counsel claiming that the Person received the document, and that the Person promptly shredded the document upon receipt.⁴ Once Petitioner received this phone call, as a courtesy, Petitioner sent another email to Registrant's counsel providing another copy of the document. See Exhibit B. Counsel has not complained about any problems receiving email from Petitioner's counsel over the course of the proceeding and counsel never replied to any of the courtesy emails. Petitioner complied with all service requirements and took

⁴ It is not clear to Petitioner why the Person who allegedly received the document in the mail would open mail not intended for her, would not deliver it to an address of a suite roughly two doors away, would shred a publicly filed document not marked confidential, and yet took the time to call Petitioner's counsel.

the extra measure of sending follow up emails providing the filed paper and thus Registrant's service argument is without merit.

B. Motion To Extend Is Improper And Untimely And Should Be Stricken

Registrant requested a 3-5 day extension to file his brief on April 21, 2015. On May 11, 2015, the Board granted the extension and ordered that the brief be filed April 30, 2015. The brief was not filed by that date and it has yet to be filed. Thus the time to act had expired and Registrant should not be afforded the "good cause" standard related to a Motion to Extend.⁵

C. Registrant Has Not Met His Burden To Show Excusable Neglect And His Request To Reopen The Briefing Period Should Be Denied

Registrant's Brief was due April 30th, as ordered by the court, a full three days longer than Registrant's initial 3-5 day request for an extension of time to file the brief. Moreover, Petitioner filed its trial brief on March 16, 2015, 84 days ago, and Registrant has yet to file his brief or even indicate when he will be able to file his brief. Registrant is required to show specific facts explaining the reason for the delay and showing the failure to act during the allotted time is the result of excusable neglect. *See Pumpkin Ltd. v. Seed Corps.*, 43 USPQ2d 1582 (TTAB 1997). Registrant has not made any such showing. Additionally, Registrant has not provided any date in which he will be able to file his brief and the length of delay is a factor to be considered. Fed. R. Civ. P. Rule 6(b); Trademark Board Manual of Procedure (TBMP) Section 509. The brief has yet to be filed and now Registrant has taken even more time since

⁵ To the extent Registrant now contends his brief was due May 18, 2015, this is contrary to the agreement between the parties as set forth December 2, 2014 and time and again in the period following. This is most notably evidenced by the March 16, 2015 date Petitioner filed its Trial Brief. See also Exhibit C that claims Registrant filed the Consented To Motion To Extend The Trial Period, when in fact Registrant filed a form consent motion that was not agreed to between the parties; see also Exhibit D that evidences both parties acknowledgment of Registrant's error and Registrant's purported undertaking to correct the error.

April 30, more than the initial time allotted for Respondents under typical scheduling in the first place.

1. Registrant's "excuse" does not amount to excusable neglect

As best as Petitioner can tell, Registrant contends that a hail storm resulted in electrical damage to Registrant's counsel's computer equipment and counsel has lost all of the documents that will be relied upon in drafting a brief that was nearly completed considering the storm took place on the date the initial brief was understood to be due. Registrant's "motion" at page 2 states that Registrant's trial brief and relevant files were totally lost including "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." This is the only reason given as to why Registrant has failed to provide his brief.

While the nature of Registrant's excuse certainly appears out of his control, we are not persuaded that Registrant's files were lost and thousands of documents that were exchanged by the parties during discovery are no longer available to Registrant. First, Registrant has not requested any documents from Petitioner and Petitioner has a long history of accommodating Registrant's requests in this case. See TTAB Document #51. Second, Registrant already filed all of his evidence with the TTAB, including documents and testimony that Registrant intends to rely on and most of this information is publically available through the TTAB webpage. Finally, the brief was due on the date of the alleged storm, April 21, 2015, and counsel should be able to recreate at least some of the nearly final brief and have had it filed within the past 48 days. Registrant has not provided any details of why this is not possible such as why Apple ® could not repair the computer and why she did not contact counsel or use the TTAB records and thus this very outdated excuse is not sufficient to explain the delay and neglect. For all of these

reasons, Registrant's reason for delay should be given little, if any weight. *See Pumpkin Ltd. v. Seed Corps.*, 43 USPQ2d 1582 (TTAB 1997).

2. *The other Excusable Neglect factors favor petitioner*

The other factors related to excusable neglect also favor Petitioner. Contrary to Registrant's contention, the continued delay by Registrant severely prejudices Petitioner. This matter has been ongoing and fully litigated for over two years and almost all of this delay can be attributed to Registrant's actions during this proceeding. See TTAB document #51 for a full recitation of Registrant's pattern of delay and strange and improper filings and issues. The latest "excuse" is just one in a long line of excuses. By failing to provide a date certain when Registrant will be able to serve his brief, Registrant is further prolonging this proceeding. Petitioner has expended substantial resources pursuing this matter. Moreover, Petitioner is anxiously awaiting a determination that it is the proper owner of the trademarks and consumers are being confused. Further delays continue to increase cost and prejudice Petitioner.

Registrant's delay currently stands at thirty-four days and Registrant has failed to indicate when he expects to be able to file his brief. A Respondent is normally given 30-days to respond to an Opening Trial Brief. It has now been eighty-four days since Petitioner filed its brief and at least forty-eight days since Registrant's Brief was initially due. Registrant has now had two separate 30-day periods to respond to Petitioner's trial brief. In other words, Registrant has had more than twice the amount of time a Respondent is entitled to under the rules. The length of delay is significant.

Finally, Registrant has not acted in good faith. This latest "Reply" is just another example of Registrant's bad faith during this proceeding. This bad faith conduct was first revealed during the discovery process when Registrant failed to consent to Petitioner's request to

extend discovery two-weeks to accommodate Registrant. See TTAB Order document #13 at FN2. As the Board observed, Registrant made a meritless service argument despite actually receiving the documents, just like in the current request. This is an ongoing pattern of bad faith. As a further attempt to delay and interpose unnecessary confusion, Registrant now seems to imply that his deadline was May 18, 2015 despite the parties' clear agreement and understanding otherwise, as well as a Board order that issued in the meantime. Registrant's own failure to properly file the agreed motion to extend in December of 2014 should not be further rewarded because such conduct is additional evidence of Registrant's bad faith in this proceeding. See Exhibits C and D. Petitioner has been extremely accommodating to Registrant throughout the proceeding who admittedly does not appear regularly before the Board (See TTAB document #51), but Board and Petitioner's resources should not be needlessly and endlessly consumed by Registrant's bad faith and inability to follow the Rules.

CONCLUSION

Petitioner respectfully requests the Board strike Registrant's Reply or otherwise deny Registrant's alleged Motion to Extend Time and/or Registrant's alleged Motion to Reopen the Briefing Period and that the Board review the merits of the case based on Petitioner's Brief.

Respectfully submitted,

Date: June 8, 2015

/s/ Daniel P. Mullarkey
Jennifer Fraser
Daniel P. Mullarkey
Novak Druce Connolly Bove + Quigg, LLP
1875 Eye Street, NW
Eleventh Floor
Washington, DC 20006
Jennifer.fraser@novakdruce.com
Daniel.mullarkey@novakdruce.com
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June 2015 a true and correct copy of the foregoing
**PETITIONER'S MOTION TO STRIKE REGISTRANT'S REQUEST FOR AN
EXTENSION OF TIME AND PETITIONER'S OPPOSITION TO REGISTRANT'S
ALLEGED MOTION TO REOPEN THE BRIEFING PERIOD**

on Respondent's Counsel, Jamie N. Pitts, The Law Office of Jamie N. Pitts, Esq., 887 W.
Marietta Street, NW, Ste. M-105, Atlanta, GA 30318, via First Class Mail, with a courtesy copy
serviced via e-mail to Jamienpitts@jnplawfirm.com.

s/Daniel Mullarkey/
Daniel Mullarkey

EXHIBIT A

Reply Reply All Forward       



Paper Filed with the TTAB

Daniel Mullarkey

To: [Jamie Pitts \[jamienspitts@jnplawfirm.com\]](mailto:jamienspitts@jnplawfirm.com)

Cc: [Jennifer Fraser](#)

Attachments:  [ttabvue-92057023-CAN-51.pdf \(244 KB\)](#) [Open as Web Page]

Wednesday, April 29, 2015 9:34 AM

- You replied on 5/7/2015 4:05 PM.

Jamie,

Please find enclosed a courtesy copy of the paper we filed with the TTAB. Please also let us know when we can expect your trial brief, you said you were filing it last night but we have not yet seen it.

Best regards,

Dan



EXHIBIT B

RE: Paper Filed with the TTAB

Daniel Mullarkey

To: [Jamie Pitts \[jamienspitts@jnplawfirm.com\]](mailto:jamienspitts@jnplawfirm.com)
Cc: [Jennifer Fraser](#)
Attachments:  [ttabvue-92057023-CAN-51.pdf \(244 KB\)](#) [Open as Web Page]

Thursday, May 07, 2015 4:05 PM

Jamie,

We received notification that the mailed version of the attached document went undelivered to the address of record. We note the service address was correct as mailed, so we are not going to resend the document. Please confirm receipt of the attached.

Best regards,

Dan

From: Daniel Mullarkey
Sent: Wednesday, April 29, 2015 9:35 AM
To: 'Jamie Pitts'
Cc: Jennifer Fraser
Subject: Paper Filed with the TTAB

Jamie,

Please find enclosed a courtesy copy of the paper we filed with the TTAB. Please also let us know when we can expect your trial brief, you said you were filing it last night but we have not yet seen it.

Best regards,

Dan



EXHIBIT C

Daniel Mullarkey

From: jamienpitts@gmail.com on behalf of Jamie Pitts <jamienpitts@jnplawfirm.com>
Sent: Tuesday, December 02, 2014 11:43 AM
To: Daniel Mullarkey; Jennifer Fraser
Subject: Courtesy Copies Attached
Attachments: CONSENTED TO MOTION TO EXTEND THE TRIAL PERIOD (12-2-14).pdf; Notice of Subpoena Sonson.pdf; SONSON SUBPOENA TO TESTIFY AT A DEPOSITION.pdf; Notice Aragona 12-5.pdf

Dan and Jennifer,

Please find the following courtesy copies attached:

1. AMENDED NOTICE OF DEPOSITION (for Mr. Aragona's Deposition dated Dec. 5th)
2. NOTICE OF SUBPOENA TO TESTIFY AT A DEPOSITION (Mr. Sonson)
3. SUBPOENA TO TESTIFY AT A DEPOSITION (Mr. Sonson)
4. CONSENTED TO MOTION TO EXTEND THE TRIAL PERIOD filed December 2nd 2014

Please let me know at some point today if there's any issue with the Dec. 5th date in the attached Amended Notice of Mr. Aragona's Deposition as we tentatively scheduled last week. As I told Dan yesterday, Mr. Aragona is available on the 5th and 6th of December and also possibly the 11th of December as well. Mr. Aragona is confirming his availability on the 11th today, I will follow up with you immediately after I hear back from him. At this point I still haven't been able to confirm Saccoccio's availability on the 3rd for his short deposition. I will let you know immediately if I hear anything back from him today, otherwise his testimony may need to be taken on a date that doesn't sync as well with your travel plans. We are both working to avoid this if at all possible. Please feel free to call me if you would like to discuss any of the above, or otherwise.

Best Regards,

Jamie

LAW OFFICE OF JAMIE N. PITTS, ESQ. PA

WWW.JNPLAWFIRM.COM

C 941-893-7751

F 855-224-7819



**** Licensed to Practice Law in Florida ****

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Registrant respectfully requests that the Board enter an order granting the Consented To Motion to Extend the Trial Period and/or taking any other appropriate action the Board deems just and proper.

Date: December 2, 2014

Respectfully submitted,

s/Jamie N. Pitts

Jamie N. Pitts

Florida Bar No. 72632

The Law Office of Jamie N. Pitts, Esq.

887 W Marietta Street, NW

Ste. M-105

Atlanta, GA 30318

(941) 893-7751– telephone

(855) 224-7819– facsimile

Email: jamienpitts@jnplawfirm.com

Counsel for Registrant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **CONSENTED TO MOTION TO EXTEND THE TRIAL PERIOD** was served on December 2, 2014 to Petitioner's counsel via U.S. Mail with a courtesy copy sent via email as follows:

Jennifer Fraser
NOVAK DRUCE CONNOLLY BOVE & QUIGG LLP
1875 Eye Street, N.W.
Eleventh Floor
Washington, D.C. 20006

Jennifer.fraser@novakdruce.com
Daniel.mullarkey@novakdruce.com

By: /s/ Jamie N. Pitts

Jamie N. Pitts

EXHIBIT D

Daniel Mullarkey

From: jamienpitts@gmail.com on behalf of Jamie Pitts <jamienpitts@jnplawfirm.com>
Sent: Tuesday, February 03, 2015 3:21 PM
To: Daniel Mullarkey
Subject: Re: LuckyU v. Aragona, Schedule Clarification

Follow Up Flag: Follow up
Due By: Wednesday, February 04, 2015 4:00 PM
Flag Status: Completed

Dan,

I will do so today. Do you know which form would apply to correct the dates? I called the paralegal assigned to our case several weeks ago to find out what I needed to, but I never heard back from him.

I have spoken to my client several times regarding our discussion last week, and he is interested in further exploring settlement options. However, he feels that he needs an offer from your client before he can make any decisions. Please feel free to call me if you would like to discuss.

Best Regards,

Jamie

LAW OFFICE OF JAMIE N. PITTS, ESQ. PA

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C 941-893-7751

F 855-224-7819



**** Licensed to Practice Law in Florida ****

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On Mon, Feb 2, 2015 at 5:27 PM, Daniel Mullarkey <daniel.mullarkey@novakdruce.com> wrote:

Jamie,

We discussed earlier that you would clarify with the TTAB the schedule for the LuckyU case after the TTAB issued the attached Order. We note that the TTAB issued a subsequent order, but it is without much substance and is unclear which schedule the TTAB is operating under.

Can you please clarify and submit an updated schedule to us to ensure that we are all operating off of the same schedule and also ensure that the TTAB has the pertinent dates for the schedule moving forward.

Best regards,

Daniel P. Mullarkey

Senior Associate | Novak Druce Connolly Bove + Quigg LLP

1875 Eye Street, NW | Eleventh Floor | Washington, DC 20006

t: [202.380.1178](tel:202.380.1178) | f: [202.293.6229](tel:202.293.6229) | e: daniel.mullarkey@novakdruce.com | w: www.novakdruce.com

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