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

Proceeding	92061629
Party	Plaintiff StrongVolt, Inc.
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Date	06/02/2016
Attachments	Strongvolt Opposition to Motion to Dismiss.pdf(171857 bytes) Exhibit A - Rivera Declaration.pdf(317641 bytes) Exhibit B - Westbury Declaration.pdf(65872 bytes) Exhibit C - USPS DMM.pdf(519285 bytes)

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

STRONGVOLT, INC.,

Petitioner,

v.

MATEY MICHAEL GHOMESHI,

Respondent.

Cancellation No.: 92061629

Regarding Registration No.: 3,798,681

PETITIONER’S OPPOSITION TO RESPONDENT’S MOTION TO DISMISS

Pursuant to Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) Section 502, Petitioner StrongVolt, Inc. (“StrongVolt”) hereby requests that the Trademark Trial and Appeal Board (“Board”) deny Respondent Matey Michael Ghomeshi’s (“Ghomeshi”) Motion to Dismiss on the following grounds: (1) Ghomeshi’s Motion to Dismiss is untimely, (2) Ghomeshi waived his 12(b) defenses, and (3) StrongVolt timely served Ghomeshi.

INTRODUCTION

StrongVolt filed its Petition for Cancellation of Registration No. 3,798,681 (“Petition”) on June 5, 2015 via the Board’s Electronic System for Trademark Trials and Appeals (“ESTTA”). On that same day, StrongVolt served its Petition on Ghomeshi via first-class mail and electronically to the e-mail address listed in the correspondence section of the registration. StrongVolt included a Certificate of Service in both its paper copy served on Ghomeshi and its ESTTA-filed Petition. *See* Petition at p. 4. Through his counsel of record, Ghomeshi timely filed his answer to the Petition on July 14, 2015 (“Answer”), but did not raise any 12(b) defenses. Eleven months after StrongVolt filed and served its Petition on Ghomeshi, he now

files the present Motion to Dismiss claiming that he was not timely served because StrongVolt allegedly hand delivered the Petition to his P.O. Box on June 25, 2015.

DISCUSSION

I. Ghomeshi's Motion to Dismiss is Untimely.

Ghomeshi's Motion to Dismiss is untimely because he filed the instant motion well after he filed his responsive pleading on July 14, 2015. A motion made on any of the grounds enumerated in Rule 12(b) must be made *before pleading* if a responsive pleading is allowed. Fed. R. Civ. P. 12(b) (emphasis added); *Aetna Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470, 1474 (9th Cir. 1988).

Here, a responsive pleading was allowed, and through his counsel of record, Ghomeshi timely filed his Answer to StrongVolt's Petition on July 14, 2015. A motion to dismiss must have been filed prior to Ghomeshi filing his Answer to StrongVolt's Petition. Ghomeshi did not file a motion to dismiss before he filed his Answer and therefore, this instant motion is untimely and must be denied by the Board.

II. Ghomeshi Waived His 12(b) Defenses.

Ghomeshi waived his 12(b) defenses because he did not file a preanswer motion and he failed to raise any of the 12(b) defenses in his answer. Insufficiency of service of process is waived if omitted in a preanswer Rule 12 motion, or if no Rule 12 preanswer is made, if not included in the answer. Fed. R. Civ. P. 12(h)(1); *Resolution Trust Corp. v. Starkey*, 41 F.3d 1018, 1021 (5th Cir. 1995).

Ghomeshi did not file a preanswer motion, but instead, through his counsel of record, filed an Answer on July 14, 2015. In his Answer, Ghomeshi asserted several affirmative defenses, but omitted the defense based upon insufficiency of service of process. Accordingly,

Ghomeshi waived his opportunity to assert that the Petition was not timely served. Therefore the Board must deny Ghomeshi's Motion to Dismiss.

III. StrongVolt's Petition was Timely Served.

a. StrongVolt Has Established Prima Facie Evidence that Ghomeshi was Timely Served.

A statement signed by an authorized representative, attached to or appearing on the original paper when filed, clearly stating the date and manner in which service was made will be accepted as prima facie proof of service. 37 CFR § 2.119(a). Service of papers may be made by first-class mail. 37 CFR § 2.119(b)(5).

On June 5, 2015, StrongVolt filed the Petition with the ESTTA. The Petition included a Certificate of Service signed by Meilani Rivera that clearly indicated the Petition was served on Ghomeshi via email and first-class mail. *See* Petition at p. 4. As required and as indicated in the Certificate of Service attached to the Petition, Ms. Rivera served a copy of the Petition on Ghomeshi via first-class mail by dropping off the envelope containing a copy of the Petition in the designated mail drop box in the mail room at our firm. *See* Exhibit A, Declaration of Meilani Rivera ("Rivera Declaration") at ¶ 2. The envelope was addressed to Ghomeshi and designated to be sent via first-class mail. *See* Rivera Declaration at ¶ 2. The firm's standard practice is to post all outgoing mail on the same day it is received. *See* Exhibit B, Declaration of Randall Westbury ("Westbury Declaration") at ¶ 4. On a daily basis, all of the firm's outgoing mail is picked up at 5:30 pm and dropped off at the Post Office before 7:00 pm. *See* Westbury Declaration at ¶ 5. Thus, StrongVolt has established prima facie evidence that it properly served Ghomeshi on June 5, 2015.

b. Ghomeshi's Allegations Cannot Be Taken as Valid Because the United States Postal Service Policies Prohibit Hand Delivery of Mail to a Post Office Box.

Ghomeshi alleges in his Motion to Dismiss that he was not timely served because “[t]he Petition for Cancellation was hand delivered and placed in Respondent’s PO Box address on June 25, 2015.” *See* Motion to Dismiss at p. 2. Ghomeshi further alleges that “[t]he Petitioner’s envelope does **not** have any postage **nor** USPS postmark imprinted on the envelope.” *Id.* In his Declaration, Ghomeshi admits that he received a “copy of the Petition for Cancellation from Petitioner, Strongvolt, Inc., which was placed in my address of record at PO Box 95, Ontario, CA 91762 on June 25, 2015.” *See* Motion to Dismiss, Exhibit A at ¶ 3.

Despite Ghomeshi’s claim, the Petition could not have been “hand delivered and placed” in his PO Box without any postage or postmark because it violates the United States Postal Service policies (USPS). *See* Exhibit C, Domestic Mail Manual, Chapter 508, 4.3.2 (“[o]nly mail and official USPS notices may be placed into a PO box”). The fact that Ghomeshi admits he received the Petition in his PO Box demonstrates that the original envelope must have been sent through first-class mail. The Petition would not have been delivered otherwise because the USPS and its employees may *only* place mail and official USPS notices in a PO Box. It is unclear what envelope Ghomeshi uses to support his allegations that he was not timely served, or why he raises this issue eleven months into the proceeding. What is clear is that Ghomeshi’s allegations cannot be taken as valid because it defies long-standing USPS policies and procedures. Thus, the Board must deny this motion. As a side note, a courtesy copy of the Petition was also sent to Ghomeshi on the same date via electronic mail to mg@mobileblackbox.com, and a receipt was received indicating the electronic mail was read. *See* Rivera Declaration at ¶ 2.

IV. Conclusion

Based on the foregoing, StrongVolt respectfully requests that the Board **DENY** Ghomeshi's Motion to Dismiss.

DATED: June 2, 2016

Respectfully Submitted,

HIGGS, FLETCHER & MACK LLP



By: _____
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Justine K. Wong, Esq.
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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

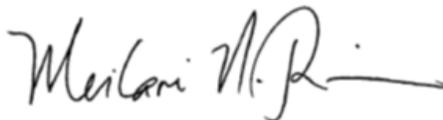
I hereby certify that a true and complete copy of the foregoing PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS was served on June 2, 2016 to Registrant Matey Michael Ghomeshi via first class mail to:

Matey Michael Ghomeshi
Mobile Black Box
P.O. Box 95
Ontario, CA 91762-8095

With a courtesy copy sent via email to mg@mobileblackbox.com.

Dated: June 2, 2016

By:

A handwritten signature in black ink, appearing to read "Meilani N. Rivera", written over a horizontal line.

Meilani N. Rivera, Paralegal

EXHIBIT A

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

STRONGVOLT, INC.,

Petitioner,

v.

MATEY MICHAEL GHOMESHI,

Respondent.

Cancellation No.: 92061629

Regarding Registration No.: 3,798,681

DECLARATION OF MEILANI RIVERA

I, Meilani Rivera, declare as follows:

1. I am a paralegal at Higgs Fletcher & Mack LLP, and work with Charles F. Reidelbach, Esq., attorney for Petitioner StrongVolt, Inc. Except as to those facts which I am informed are true, I have personal knowledge of the facts contained within this declaration, and, if called upon as a witness, I could and would testify competently thereto.

2. On June 5, 2015, I electronically filed the Petition for Cancellation (“Petition”) of Registration No. 3,798,681 with the Trademark Trial and Appeal Board (TTAB). As required and as indicated in the Certificate of Service attached to the Petition, I served a copy of the Petition to Registrant Matey Michael Ghomeshi (“Ghomeshi”) via first class mail by dropping off the envelope containing a copy of the Petition in the designated mail drop box in the mail room at our firm. The envelope was addressed to Ghomeshi and designated to be sent via first-class mail. A courtesy copy of the Petition was also sent to Ghomeshi on the same date via electronic mail to mg@mobileblackbox.com, and I received a “read receipt” confirming that it was delivered and received. *See Exhibit A.*

The undersigned, being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

Executed this 1st day of June, 2016, at San Diego, California

A handwritten signature in black ink, appearing to read "Meilani M. Rivera", with a horizontal line extending to the right from the end of the signature.

MEILANI RIVERA

EXHIBIT A

To Declaration of Meilani Rivera

Rivera, Meilani N.

From: M. Ghomeshi <mg@mobileblackbox.com>
Sent: Saturday, June 06, 2015 11:36 AM
To: Riveram@higgslaw.com
Subject: Read: Petition for Cancellation of MOBILEBLACKBOX and Design, Our Ref. 110794-00002 [IWOV-WORKSITE.FID710352]
Attachments: receipt.txt

Your message

To: mg@mobileblackbox.com
Subject: Petition for Cancellation of MOBILEBLACKBOX and Design, Our Ref. 110794-00002 [IWOV-WORKSITE.FID710352]
Sent: 6/5/2015 4:59 PM

was read on 6/6/2015 11:35 AM.

EXHIBIT B

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

STRONGVOLT, INC.,

Petitioner,

v.

MATEY MICHAEL GHOMESHI,

Respondent.

Cancellation No.: 92061629

Regarding Registration No.: 3,798,681

DECLARATION OF RANDAL WESTBURY

I, Randal Westbury, declare as follows:

1. I am the Business Services Manager at Higgs Fletcher & Mack LLP (the "Firm"), and work with Charles F. Reidelbach, Esq., attorney for Petitioner StrongVolt, Inc. Except as to those facts which I am informed are true, I have personal knowledge of the facts contained within this declaration, and, if called upon as a witness, I could and would testify competently thereto.

2. I am the supervisor responsible for all mail and postal services within the Firm. I have 22 years of experience in mail services.

3. Based upon my education, training, experience and expertise with the Firm's mail services, I am intimately familiar with the Firm's procedures, operations, and the rules and regulations of the United States Postal Service (USPS).

4. The Firm uses a HASLER IN750 Mail Machine to meter all outgoing postage. It is standard business practice for the Firm to post all outgoing mail the same day it is received.

5. It is also standard business practice for a contractor to collect the Firm's outgoing mail by 5:30 pm daily. The contractor delivers all of the Firm's outgoing mail to the Carmel

Mountain Post Office. The Carmel Mountain Post Office has a Business Mail Entry Unit that is only open to contract vendors. The Firm's contractor has an agreement with the USPS that requires the Carmel Mountain Post Office to accept the Firm's outgoing mail by 7:00 pm daily.

The undersigned, being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

Executed this 1 day of June, 2016, at San Diego, California

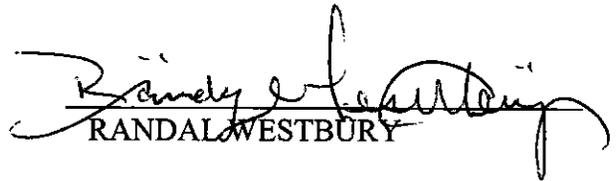

RANDAL WESTBURY

EXHIBIT C



Mailing Standards of the United States Postal Service, Domestic Mail Manual

April 10, 2016

The *Mailing Standards of the United States Postal Service, Domestic Mail Manual* (DMM) provides the United States Postal Service's official prices and standards for all domestic mailing services. Many commercial mailers find it helpful to reference these standards as they prepare and enter mailings.

For household mailers who need information about retail products and services, the Postal Service offers A Customers Guide to Mailing. New business mailers can start with Business Mail 101, which provides an overview of business mail and takes mailers through the decisions they will make when designing a mailing. Both references are updated and available on the Postal Explorer Web site at pe.usps.com. Postal Explorer also provides helpful search features, mailing tools, and price calculators to make mailing easy.

Summary of Changes

The DMM is updated frequently on Postal Explorer at pe.usps.com. Revisions are published in the Summary of Changes by effective date. Mailing standards in the DMM are revised by notices in the *Postal Bulletin* or the *Federal Register*.

Availability

The updated DMM in PDF and HTML formats can be accessed on the Postal Explorer Web site at pe.usps.com or the Postal Explorer CD-ROM. The public can obtain a copy of the Postal Explorer CD-ROM by ordering it through their local Post Office; postal employees can request a copy by sending an email to postalexplorer@usps.gov.

How to Use This Book

The DMM is organized around four basic concepts - shape of mail, class of mail service, mailing method, and topic. Retail, also known as single-piece, is located at the front of the book and commercial or business mail is found in subsequent chapters. The convenient fly-out menus in the left frame provide quick access to the section needed. Quick Service Guides provide a two-page overview for specific mail classification and preparation and can be found on the Postal Explorer Web site with direct links to the DMM.

Comments

Contact your local Post Office, business mail entry office, or the Pricing and Classification Service Center (PCSC) with comments or questions about the USPS mailing standards (see DMM [608.8.4](#) for addresses and telephone numbers of business mail entry offices and the PCSC).

Lizbeth J. Dobbins
Manager
Product Classification

4.0 Post Office Box Service

4.1 Basic Information for PO Box Service

4.1.1 Purpose

Post Office Box (PO Box) service is a premium service offered for a fee (See [Notice 123—Price List](#)) to any customer and for no fee to customers who are not eligible for carrier delivery (also see [4.5.2](#)). The service allows a customer to obtain mail during the hours the box lobby is open or access is otherwise available and is provided only through receptacles owned or operated by the USPS or its agents. PO Box service does not include alternate means of delivery established to replace or extend carrier delivery service. A postmaster (or designee) and a box customer may not make any agreement that contravenes the regulations on PO Box service or its fees. Competitive PO Box service (see [4.5.4](#)) is available in designated postal locations and offers service enhancements for PO Box customers.

4.1.2 Definition

Post Office Box, PO Box, or the # symbol when a Post Office street address is used as allowed under [4.5.4](#), designates this service in an address. Competitive PO Box service is available for customers located within the service area of a competitive mailbox service provider. Market-Dominant PO Box service is available to serve customers not served by a nearby competitor. Box customer applies only to the person who signs the application as an individual or to the organization on whose behalf an individual signs the application.

4.1.3 Box Size

There are five box sizes and availability of sizes varies by facility. A customer is assigned a box size based on the customer's needs and the availability of boxes. The postmaster may require a customer to use a larger size box if the customer's mail volume increases beyond the capacity of the present box. The fees for boxes increase with box size. The following chart describes approximate box capacities and frontal dimensions.

BOX SIZE	CAPACITY (Cubic Inches)	WIDTH AND HEIGHT (Inches)
1	Under 296	3 by 5.5
2	296 through 499	5 by 5.5
3	500 through 999	11 by 5.5
4	1,000 through 1,999	11 by 11
5	2,000 or more	22.5 by 12

4.1.4 Number Assignment

A number is assigned to each PO box. Mail intended for delivery through a box must show the assigned PO box number in the address immediately above the city, state, and ZIP Code.

4.1.5 Box Availability

When no box of the appropriate size is available, the postmaster may handle the application for box service in one or more of the following ways:

- a. Refer the customer to another postal facility with available capacity.



508.4.1.6

- b. Place the customer's name on a waiting list for box service.
- c. Provide general delivery service until an appropriate size box becomes available.
- d. Offer a smaller or larger box, or caller service, at its applicable fee.

4.1.6 Unavailable Box

Online customers cannot apply for a box that is not available but can place themselves on a waiting list for the box. Customers must pay the correct fee for the service they receive, regardless of the box size applied for.

4.1.7 Service Period

PO Box service is available in 3-, 6- or two 6-month (semi-annual) prepaid periods. The 3-month option requires establishing an automatic recurring renewal payment available online or at select post offices with automatic recurring payment functionality. The 3-month option is not available at Post Office locations on the semi-annual (April/October) payment schedule.

4.1.8 Limitation on Service

The postmaster may require a box customer to use caller service under [5.0](#) based on the volume of mail received, or the level of service requested by the customer, or the availability of boxes. A customer required to use caller service in this manner may submit a written request to the postmaster for a new determination not more than semiannually. Existing box customers will not be allowed to use additional boxes at Post Offices having a waiting list for PO Boxes.

4.2 Service

4.2.1 Application

A customer may apply for PO Box service by completing a Form 1093 at a Post Office or online and presenting it to any postal retail facility. When the application is presented, the applicants (including both spouses or any other individual listed but minors) each must present two items of valid, current identification; one item must contain a photograph of the applicant and the other must contain sufficient information to confirm the applicant's identity. Furnishing false information or refusing to furnish required information may be sufficient reason for denial of the application or discontinuance of service. When any information required on Form 1093 changes, the box customer must update the application. Application procedures are as follows:

- a. In all cases:
 - 1. Spouses may complete and sign one Form 1093.
 - 2. Other adult persons, employees or other representatives of organizations, or minors under a parent or guardian, who receive mail in the PO box, or additional box users authorized to pick up mail from the box, must be listed on Form 1093.
 - 3. Customers applying for Competitive PO Box services must also complete and sign a Customer Agreement when selecting any of the service enhancements described in [4.5.4](#).

4. Minors (a person under 18 years of age) may be provided with PO Box service, unless the minor's parent or guardian submits a written objection to the appropriate postmaster, but are ineligible to apply for PO Box service online.
 5. Acceptable forms of photo identification are: valid driver's license or state non-driver's identification card; from a U.S. State, U.S. armed forces, U.S. government, university located in the U.S., or corporate identification card of a corporation located in the United States; or U.S. passport, U.S. alien registration card, or U.S. certificate of naturalization. Acceptable forms of other, non-photo identification are: current lease, mortgage, or deed of trust; voter or vehicle registration card; or home or vehicle insurance policy.
- b. Under these additional conditions when applying online:
1. An applicant searches for and selects a box and the service time period.
 2. The applicant must complete all required items on the online Form 1093, and read the Privacy Act statement.
 3. The applicant must complete the payment information.
 4. The applicant must present an unsigned printout of the online Form 1093 in person to the Post Office and, upon approval, receive the box number and keys or lock combination.

4.2.2 Transferring Service

PO box service may be transferred, without payment of an additional fee, to any box of the same size and fee group at a different facility of the same Post Office. To transfer service, the box customer must submit a new application to either facility. A box customer may transfer service no more than once in any semiannual payment period and must submit a completed Form 3575 at the time of transfer.

4.3 Conditions of Use

4.3.1 Mail Receipt

In accordance with the standards in 4.2, any individual box customer or organization may receive through the box any mail properly addressed to the box number.

4.3.2 Mail Only

Only mail and official USPS notices may be placed into a PO box.

4.3.3 Accumulation and Overflow of Mail

A box customer must remove mail promptly from the box. If mail will not be removed from the box for more than 30 days and an overflow condition is probable, the customer must make prior arrangements with the postmaster. When mail for a customer's PO Box exceeds the capacity of the box on 12 of any 20 consecutive business days (excluding Saturdays, Sundays, and national holidays), the box is in an overflow condition. Customers whose box is in an overflow condition must use caller service, change to a larger box, or use one or more additional boxes to which mail will be addressed.



4.3.4 Unlawful Activity

A PO box may not be used for, or in connection with, a scheme or enterprise that violates any federal, state, or local law; breaches an agreement with a federal, state, or local agency whereby the box customer has agreed to discontinue a specified activity; or violates or attempts to evade any order of a court or administrative body.

4.3.5 Forwarding

A PO box may not be used when the primary purpose is to have the USPS forward or transfer mail to another address free of charge.

4.3.6 Address Change

Customers may file change-of-address orders as follows:

- a. Organizations. Only the box customer or authorized representatives of the organization listed on the Form 1093 may file change-of-address orders. The organization is responsible for forwarding mail to other persons receiving mail at the box.
- b. Residential box customers, Fee Groups 1 through 7 and 30 through 44. Only the box customer listed on the Form 1093 may file change-of-address orders, and is responsible for forwarding mail to other persons receiving mail at the box.
- c. Residential box customers, Fee Group E. The box customer or any other person listed on the Form 1093 may file an individual change-of-address order. Only the box customer may file a change-of-address order for the entire family.

4.4 Basis of Fees and Payment

4.4.1 General

PO Box fees are based on the box size (see [4.1.3](#)) and the fee group to which the box's 5-digit ZIP Code is assigned.

4.4.2 Fee Changes

A change in PO Box service fees applicable to a 5-digit ZIP Code can arise from a general fee change. In addition, the USPS may assign a fee group to a new ZIP Code, may reassign one or more 5-digit ZIP Codes to the next higher or lower fee group if fee group assignments were in error, or may regroup 5-digit ZIP Codes. Except when boxes from two or more ZIP Codes are being merged into one location, a ZIP Code may be moved only into the next higher or lower fee group. If boxes in two or more ZIP Codes merge, the fee group will be that of the receiving location, even if one of the fee groups changes by more than one level. No ZIP Code may be moved into a different fee group more than once a calendar year. A change in Post Office Box service fees takes effect on the date of the action that caused the change unless an official announcement specifies another date. If PO Box service fees are increased, no customer must pay the new price until the end of the current service period, and no retroactive adjustment will be made for a payment received before the date of the change. The fee charged is that in effect on the date of payment.