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

Proceeding	92052940
Party	Defendant Smith Abrasives, Inc.
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Date	09/25/2012
Attachments	Smith's.Surreply.TTAB Brief.pdf.pdf (4 pages)(95431 bytes)

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

In the matter of Trademark Registration Nos. 3,617,203; 3,951,563; 3,881,712

Mark: EDGEWARE

Registration dates: May 5, 2009; April 26, 2011; November 23, 2010

Edgecraft Corporation	:	
	:	
Petitioner,	:	
	:	Cancellation No. 92052940
v.	:	Cancellation No. 92054092
	:	Cancellation No. 92054104
	:	
Smith Abrasives, Inc.	:	
	:	
Respondent.	:	

**SURREPLY BRIEF IN OPPOSITION TO PETITIONER’S ATTEMPT TO STRIKE
RESPONDENT’S BRIEF BASED ON DATE OF FILING**

Respondent Smith Abrasives, Inc. (“Smith’s”) asks this court to deny the attempt by Petitioner Edgecraft Corporation (“Petitioner”) to strike Smith’s brief due to an alleged late filing. Smith’s asserts that its brief was timely filed pursuant to Trademark Rules 2.128 and 2.196. In the alternative, if this Board determines that Smith’s brief was untimely, the delay was not the result of bad faith, Petitioner suffered no prejudice from the delay, and Smith’s prays this Board will not cancel or strike its brief.

A. Smith’s Brief Was Timely Filed

Trademark Rule 2.128(a)(1) states that a respondent’s brief is due “thirty days after the due date of the first brief.” Trademark R. 2.128(a)(1). Thus, in order to determine the due date of a respondent’s brief, the due date of a petitioner’s brief must first be calculated. A petitioner’s brief is due “sixty days after the date set for the close of rebuttal testimony;” however, when the

due date for a petitioner's brief "falls on a Saturday, Sunday, or Federal holiday," the due date is moved to the following "day that is not a Saturday, Sunday, or a Federal holiday." Trademark R. 2.128, 2.196. In this case, the original due date of Petitioner's brief was August 4, 2012; however, because August 4, 2012, was on a Saturday, the due date of Petitioner's brief was moved, pursuant to the Trademark Rules, to the following Monday, August 6, 2012.

Petitioner's brief suggests that Rule 2.196, which allows a petitioner to file his brief on the next non-holiday weekday following the due date of its brief, does not actually change the due date of petitioner's brief for purposes of calculating the due date of a respondent's brief. That interpretation of the Trademark Rule goes against the Rule's plain meaning. Surely a brief is due when it is required to be filed. The Federal Rules of Civil Procedure also suggest that the due date is moved where it would fall on a Saturday or Sunday, stating where "the last day [of a time period] is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday." Fed. R. Civ. P. 6(a)((1)(C). "Except where otherwise provided, and wherever applicable and appropriate, procedure and practice in inter partes proceedings shall be governed by the Federal Rules of Civil Procedure." Trademark R. 2.116. Here, the Trademark Rule does not explain whether the due date is moved when it falls on a weekend. Accordingly, the Federal Rule for calculating due dates controls, and the due date is extended where it falls on a weekend.

In addition to the support found in the Federal Rules of Civil Procedure, Petitioner's requested reading of the Rule would give a respondent less than thirty days to read and respond to a petitioner's brief, as its brief would be due before thirty days passed from the time that respondent had access to a petitioner's brief. Smith's believes this interpretation of the Rule is in error.

Petitioner's brief was due and filed on Monday August 6, 2012. Smith's brief was then due thirty days following August 6, 2012, on September 5, 2012. Smith's brief was filed on September 5, 2012. Accordingly, Smith's brief was timely, and Petitioner's attempt to cancel Smith's brief is without merit.

B. Any Error Was Not the Result of Bad Faith

Even if the Board decides that Smith's response brief was filed one day late, the Board should not strike the brief. This Board has consistently refused to strike untimely briefs where the delay was not "within the realm of bad faith." *Nestle Prepared Foods Co. v. V & V Enters. Inc.*, 2011 WL 1060725, *2 (TTAB Mar. 10, 2011). In *Nestle*, a party filed its brief five days late because it incorrectly calculated the time for filing. *Id.* at 1. This Board excused the late filing because it was not done in bad faith, but was instead due to a miscalculation and because the delay of only five days had not prejudiced the other party. *Id.* at *2. Similarly, in *Chamberlain Group, Inc. v. Lynx Industries, Inc.*, 2007 WL 4438613, at *2 (TTAB Dec. 14, 2007), this Board accepted as timely late briefs where the parties had miscalculated the due dates of the briefs. The Board noted "it benefits the Board in its ability to make a just determination of the case to have the briefs of both parties of record." *Id.* at 3.

In this case, if Petitioner's interpretation of the procedural rules is correct, Smith's brief was filed merely one day late. Petitioner has *not* argued that it was prejudiced by this delay. Additionally, any delay was based on a miscalculation of the due date and was not the result of bad faith on the part of Smith's. Accordingly, Smith's requests that this Board, in its discretion, accept Smith's brief as timely.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Smith Abrasives, Inc.'s Surreply Brief in Opposition to Petitioner's Attempt to Strike Respondent's Brief Based on Date of Filing* was sent to the following persons via U.S. Mail with a courtesy copy by electronic mail on this 25th day of September, 2012:

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