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

Proceeding	92062895
Party	Plaintiff Uptime Institute, LLC
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Signature	/Fritz L Schweitzer III/
Date	01/17/2018
Attachments	Reply ISO Motion to Strike.pdf(163133 bytes)

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

UPTIME INSTITUTE, LLC	:	
	:	
Petitioner,	:	
	:	Cancellation Nos. 92,062,895 and
v.	:	92,062,912 (consolidated)
	:	
SWITCH, LTD.	:	
	:	
Registrant.	:	

PETITIONER’S REPLY IN SUPPORT OF PETITIONER’S MOTION TO STRIKE

Petitioner Uptime Institute, LLC (“Uptime”) hereby submits this Reply in Support of its Motion to Strike. This Reply is required to address incorrect statements made by Registrant Switch, Ltd. (“Switch”) in its Opposition to Uptime’s Motion to Strike (“Opposition”) (28 TTABVUE).

I. SUMMARY

Uptime timely filed and served its Response to Switch’s Motion for Protective Order (“Response”) (24 TTABVUE) on November 20, 2017, by electronic mail. (Schweitzer Decl., Par. 3). Switch’s Reply was due on December 11, 2017.¹ However, Switch filed its Reply on December 14, 2017 (25 TTABVUE). Therefore, Switch’s Reply is untimely, and the Rules do not allow for an enlargement of time for a reply. 37 C.F.R. 2.127(a)

¹ Switch’s Reply was due 20 days after service of Uptime’s Response, plus one day to avoid Sunday December 10, 2017. TBMP §§502.02(b) and 112.

Further, Switch did not serve its Reply on Uptime when filed on December 14, 2017. Switch purportedly later served the Reply on January 5, 2018, by U.S. mail. (27 TTABVUE). However, the parties have an agreement for service by electronic mail and, to date, counsel for Uptime has not received service of the Reply by mail. (Schweitzer Decl., Pars. 4-6).

II. REGISTRANT IS NOT ENTITLED TO AN ENLARGEMENT OF TIME

Switch incorrectly asserts that it is entitled to a 5-day enlargement of its reply period and that its Reply was therefore due on December 15, 2017 (Opposition, Pg. 4). Switch contends: (A) The parties have an agreement for service by mail, and (B) TBMP § 113.05 provides an additional 5 days for service by mail (Opposition, Pg. 4). However, both assertions are incorrect.

First, Switch's assertion that the parties have an agreement for service by mail is false. Switch points to March 2016 correspondence regarding service by mail. (Opposition, Pg. 4). However, Switch fails to mention that the parties have a subsequent written agreement in effect since April 2017 for service by email. (Schweitzer Decl., Par. 7 and Exhibit A, wherein counsel for Switch confirmed "*Yes, we are amenable to electronic service in this matter.*"). Switch also fails to mention that, since that subsequent agreement, the parties have engaged in service by email. (Schweitzer Decl., Par. 8). Therefore, Uptime's Response was properly served by email.

Second, regarding the additional 5 days, Switch ignores the fact that Uptime served its Response by electronic mail and misstates the rules regarding service by U.S. mail. The Rules clearly state that response periods are not enlarged by service by U.S. mail. Specifically, the Rules state:

Whenever a party to an inter partes proceeding before the Board is required to take some action within a prescribed period of time after the service of a submission upon that party by another party to the proceeding, and the submission is served by first-class mail, Priority Mail Express®, or overnight courier, the date of mailing or of delivery to the

overnight courier will be considered the date of service. The time for taking action is no longer enlarged by 5 days.

TBMP § 113.05 (emphasis added)

Switch apparently relies on an old version of TBMP § 113.05 in an attempt to claim an additional 5 days². However, Switch is aware of and simultaneously relies on the current version of TBMP § 502.02(b) which provides an (already enlarged) period of 20 days for a Reply³. (Opposition, Pg. 4). Switch should not be permitted to apply old Rules regarding service by mail, but even if it were, Switch's Reply would still be untimely because under the old Rules the Reply would have been due on the same day⁴.

Lastly, Switch contends that its failure to timely file a Reply has not prejudiced Uptime and that it will be prejudiced if the Reply is not considered. However, prejudice is not a basis for enlarging the time for a reply. The Rules clearly provide that "The time for filing a reply brief will not be extended or reopened." 37 C.F.R. 2.127(a).

Therefore, Switch is not entitled to an enlargement of time for its Reply.

² The prior version of the Rules provided an additional 5 days for service by mail (TBMP § 113.05 (2016)) whereas the current version expressly does not (TBMP § 113.05 (2017)).

³ The current version of the Rules provides a period of 20 days for a reply (TBMP § 502.2(b) (2017)), whereas the prior version provided 15 days (TBMP § 502.2(b) (2016)).

⁴ Under the old Rules (and assuming service by mail) Switch's Reply would have been due 15 days after service of Uptime's Response, plus 5 days for service by mail, plus one day to avoid Sunday December 10, 2017. TBMP §§502.02(b), 113.05 and 112 (2016).

III. CONCLUSION

For the foregoing reasons, Uptime respectfully requests that Board strike Switch's Reply.

Respectfully submitted,

January 17, 2018

/s/ Fritz L. Schweitzer III
Fritz L. Schweitzer III
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ATTORNEYS FOR PETITIONER

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

UPTIME INSTITUTE, LLC	:	
	:	
Petitioner,	:	
	:	Cancellation Nos. 92,062,895 and
v.	:	92,062,912 (consolidated)
	:	
SWITCH, LTD.	:	
	:	
Registrant.	:	

**DECLARATION OF FRITZ L. SCHWEITZER III IN SUPPORT OF PETITIONER’S
MOTION TO STRIKE REGISTRANT’S REPLY**

I, FRITZ L. SCHWEITZER III, Esq. declare as follows:

1. I am an attorney at the law firm of St. Onge Steward Johnston & Reens, LLC (“St. Onge”) and represent Petitioner, Uptime Institute, LLC, (“Uptime”) in the captioned matter. I am familiar with the facts stated herein and, if called to testify, would competently testify thereto.

2. I submit this declaration in connection with Uptime’s Motion to Strike Registrant Switch, Ltd.’s (“Switch”) Reply in Support of its Motion for Protective Order Preventing the Deposition of Rob Roy (“Reply”).

3. Uptime timely filed and served its Response to Switch’s Motion for Protective Order (“Response”) (24 TTABVUE) on November 20, 2017, by electronic mail (email).

4. Switch did not serve its Reply (25 TTABVUE) in support of its Motion for Protective Order when filed on December 14, 2017.

5. Switch purportedly later served the Reply on January 5, 2018, by U.S. mail. (27 TTABVUE).

6. As of this date, counsel for Uptime has not received service of Switch's Reply by mail.

7. Attached as Exhibit A is a true and complete copy of email correspondence dated April 25, 2017, between myself and counsel for Switch, confirming an agreement in this proceeding for service by email.

8. Since the agreement in April 2017 regarding service by email, the parties have engaged in service by email.

I declare under penalty of perjury that the foregoing is true and correct.

January 17, 2018

/s/ Fritz L. Schweitzer III
fschweitzer3@ssjr.com

Exhibit A

Schweitzer, Fritz L. III

From: Jim Boyle <jboyle@nevadafirm.com>
Sent: Tuesday, April 25, 2017 6:21 PM
To: Schweitzer, Fritz L. III; Bryce Earl; Sean Story
Cc: Voloshchuk, Tatyana; Corea, Andy I.; SSJR Litigation; Renee Hoban
Subject: RE: Uptime Institute, LLC v. Switch, Ltd. (Pet. to Cancel TIER 5 and TIER "ELITE") SSJR File 06085-N0039A

Fritz—

Yes, we are amenable to electronic service in this matter. Please direct all such service to these email addresses:

jboyle@nevadafirm.com <mailto:jboyle@nevadafirm.com> (James D. Boyle) bearl@nevadafirm.com <mailto:bearl@nevadafirm.com> (Bryce K. Earl) sstory@nevadafirm.com <mailto:ssstory@nevadafirm.com> (Sean E. Story) tiplit@nevadafirm.com <mailto:tiplit@nevadafirm.com> rhoban@nevadafirm.com <mailto:rhoban@nevadafirm.com> (Renee Hoban – my assistant)

Best,

Jim

James D. Boyle
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From: Schweitzer, Fritz L. III [mailto:fschweitzer3@ssjr.com]
Sent: Tuesday, April 25, 2017 8:31 AM
To: Jim Boyle; Bryce Earl; Sean Story
Cc: Voloshchuk, Tatyana; Corea, Andy I.; SSJR Litigation
Subject: RE: Uptime Institute, LLC v. Switch, Ltd. (Pet. to Cancel TIER 5 and TIER "ELITE") SSJR File 06085-N0039A

Jim,

This is to confirm our agreement in our call yesterday to proceed with service by email only, going forward in this matter.

Please confirm your agreement and confirm the email addresses that you would like to include.

On our side please include the following:

fshweitzer3@ssjr.com <mailto:fshweitzer3@ssjr.com> (Fritz L. Schweitzer III) acorea@ssjr.com <mailto:acorea@ssjr.com> (Andy I. Corea) tvoloshchuk@ssjr.com <mailto:tvoloshchuk@ssjr.com> (Tatyana Voloshchuk) litigation@ssjr.com <mailto:litigation@ssjr.com>

Best regards,

Fritz Schweitzer III

Partner

St. Onge Steward Johnston & Reens LLC

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CERTIFICATE OF SERVICE

This is to certify that on this date, a true copy of the foregoing **PETITIONER'S REPLY IN SUPPORT OF PETITIONER'S MOTION TO STRIKE** and **DECLARATION OF FRITZ L. SCHWEITZER III IN SUPPORT OF PETITIONER'S MOTION TO STRIKE REGISTRANT'S REPLY** were served by electronic mail on counsel for Switch as follows:

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January 17, 2018
Date:

/s/ Jessica L. White