UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CRYE PRECISION LLC,
Petitioner,

v.

FIRSTSPEAR, LLC,
Patent Owner.

IPR2019-01152 – U.S. Pat. No. 9,974,379
IPR2019-01153 – U.S. Pat. No. 9,565,922

PETITIONER'S MOTION UNDER 42.5(c)(3)

PETITIONER'S UPDATED EXHIBIT LIST

Exhibit No.	Description
1001	U.S. Patent No. 9,974,379 ("'379 patent")
1002	File history of U.S. Patent No. 9,974,379 ("'379 FH")
1003	Declaration of Dr. Christopher M. Pastore ("Ex. 1003-Pastore")
1004	U.S. Patent No. 9,173,436 ("Crye-436")
1005	U.S. Patent App. Pub. No. 2013/0312149 ("Asher-149")
1006	U.S. Patent No. 5,724,707 ("Kirk-707")
1007	U.S. Patent Publication No. 2009/0277936
1008	U.S. Patent No. 7,200,871
1009	U.S. Patent No. 5,789,327
1010	Technical Manual - Operator's Manual for Modular Lightweight Load-Carrying Equipment (MOLLE) II, Department of the Army, November 2, 2009
1011	U.S. Patent Application Publication No. 2008/0318017
1012	Drawing of UBFA (58) of Crye-436 showing an example of slits (80) to total surface area ratio
1013	U.S. Patent No. 3,891,996
1014	Ballistic Resistance of Body Armor, NIJ Standard-0101.06, July 2008, NCJ 223054
1015	U.S. Patent No. 5,692,237 ("Bennett-237")
1016	U.S. Patent No. 8,132,495
1017	Declaration of Heath J. Briggs

Exhibit No.	Description
1018	Declaration of Colleen Sphar
1019	Motion Filed Notice, IPR2019-01152
1020	Motion Filed Notice, IPR2019-01153
1021	December 20, 2019 Email from Colleen Sphar to counsel for Patentee serving Motions for Reconsideration in IPR Nos. 2019-01152 and -01153
1022	December 20, 2019 Email from Heath Briggs providing copies of Motions for Reconsideration in IPR Nos. 2019-01152 and -01153
1023	March 25, 2020 Email from Heath Briggs regarding decision denying Requests for Rehearing in IPR Nos. 2019-01169 and -01170
1024	April 9, 2020 Email from Heath Briggs to counsel for Patentee regarding filing error
1025	April 10, 2020 Email from Heath Briggs to counsel for Patentee regarding motion filing receipts
1026	April 10, 2020 Email from Heath Briggs to the Board regarding filing error
1027	December 20, 2019 Request for Rehearing in IPR2019-01152
1028	December 20, 2019 Request for Rehearing in IPR2019-01153

I. REQUESTED RELIEF AND AUTHORIZATION FOR MOTION

Petitioner Crye Precision LLC ("Crye") respectfully moves for authorization to accept the filing of a Request for Rehearing (Ex. 1027-28, the "Requests") in each of IPRs 2019-01152 and -01153 ("the present IPRs") pursuant to 37 C.F.R. § 42.5(c)(3). As discussed below, good cause and the interests of justice support accepting these filings.

II. FACTUAL OVERVIEW

The parties are involved in four IPRs – the two at issue here and IPRs 2019-01169 and -01170 ("the other IPRs"), in which FirstSpear LLC (the "Patentee") challenged one of Crye's patents.

On November 22, 2019, the Board declined to institute trial in the present IPRs. (*See* Paper 8 (present IPRs).) The deadline to file requests for rehearing was December 20, 2019. 37 C.F.R. § 42.71(d)(1). And, on December 20, 2019, Petitioner timely filed its Requests. As discussed below, Mr. Heath Briggs (Crye's Lead Counsel) received filing receipts for the two filings and, therefore, believed the filings had been properly submitted.

On December 9, 2019, the Board declined to institute trial in the other IPRs, and Patentee filed requests for rehearing on December 16, 2019. (*See* Papers 15-16 (the other IPRs).)

On March 25, 2020, the Board denied Patentee's requests for rehearing in the other IPRs. Given Patentee had filed its rehearing requests four days prior to the instant ones, Mr. Briggs believed that the Board in the present IPRs would issue its decisions within a week or so. (Ex. 1017 at ¶6; Ex. 1023.) However, on April 9, 2020, Mr. Briggs became aware that its Requests were not reflected in the E2E docket. Mr. Briggs investigated further and took immediate remedial action. (Ex. 1017 at ¶¶7-8.) Specifically, the next day (April 10), Crye informed the Board of the issue and requested that the docket be updated to reflect the filings. (*Id.*) On April 16, 2020, the Board conducted a call with the parties and authorized Crye to file the instant motion. (*See* Paper 9 (present IPRs).)

III. ARGUMENT

Under 37 C.F.R. § 42.5(c)(3), late filings are permitted upon a showing of good cause or in the interests of justice. Both justify accepting Crye's filings here.

Good cause exists because Crye (1) filed the Requests in a timely manner (Ex. 1017 at ¶¶1-5; Ex. 1018 at ¶¶1-6); (2) served Patentee's counsel with the Requests (Ex. 1017 at ¶5, Ex. 1021); (3) reviewed the filing receipts and reasonably concluded that its filing was successfully completed (Ex. 1017 at ¶4); and (4) was unaware of any potential filing error until April 9, 2020 (*id.* at ¶7-9). Mr. Briggs is counsel in over 70 IPRs, and he and his experienced paralegal, Ms. Sphar, followed the

procedures previously used to successfully complete hundreds of filings with the Board. (Ex. 1017 at ¶¶1-5; Ex. 1018 at ¶¶1-6; Ex. 1021.)

After the Requests were filed, Mr. Briggs reviewed the filing receipts and service email, and reasonably concluded that Crye's filings were completed successfully. (Ex. 1017 at ¶4.) As shown below, the filing receipts differentiate between a "motion" (highlighted yellow) and a "document" (highlighted green), and indicate that a motion was filed on December 20, 2019:

Motion Filed Notice

THERE WERE NO DOCUMENTS SUBMITTED WITH THIS REQUEST

AIA Review No.:	IPR2019-01152
Petitioner:	Crye Precision LLC of Brooklyn, NY
Patent Owner:	FIRSTSPEAR, LLC
Patent No.:	9974379
Motion Filing Party:	Petitioner
Motion Type:	Motion
Motion Filing Date:	12/20/2019
Submitted By:	Heath Briggs, briggsh@gtlaw.com

The motion and related document(s), if any, have been filed.

(Ex. 1019; *see also* Ex. 1020.) Thus, while the receipts indicate that "THERE WERE NO DOCUMENTS SUBMITTED WITH THIS REQUEST," Crye's counsel reasonably believed that this indication merely reflected the fact that no supporting documents/exhibits were filed along with the motion, and was unware that a motion could be filed and a filing receipt generated without the motion being accepted by the E2E system. (Ex. 1017 at ¶4, 9.) Several other experienced practitioners have

come to the same conclusion. *Expedia, Inc. v. IBM Corp.*, IPR2018-01743, Paper 10 at 4; *Magellan Midstream Partners L.P. v. Sunoco Partners Mktg. & Terminals, L.P.*, IPR2019-00024, Paper 12 at 4-5.

Upon learning that its Requests were not reflected in E2E, Crye's counsel promptly investigated the issue, notified opposing counsel, and obtained permission from the Board to file this motion. (Ex. 1017 at ¶¶7-8; Exs. 1024-26.) Given that Crye's counsel believed that the Requests had been filed, as reflected in the filing receipts and service email, and its immediate remedial action upon discovering the absence of the filings in the E2E system, good cause exists to accept the filing of the Requests, as confirmed by many similarly situated cases. *Expedia*, IPR2018-01743, Paper 13 at 1 (May 6, 2019 (finding good cause and the interests of justice supported granting petitioner's motion for acceptance of a rehearing filing after an attempted timely filing was followed by a filing receipt and service of the request on the opposing party); *see also Magellan*, IPR2019-00024, Paper 15 at 2-3 (May 3, 2019); *T-Mobile, Inc. v. Barkan Wireless Access Techs., L.P.*, IPR2017-01099, Paper 46 at 2-3 (Dec. 21, 2018); *Valeo N. Am., Inc. v. Schaeffler Techs. AG*, IPR2016-00502, Paper 46 at 2 (Aug. 27, 2017); *H&S Mfg. Co., Inc. v. Oxbo Int'l Corp.*, IPR2016-00926, Paper 8 at 2-3 (Dec. 7, 2016) (collectively, granting late filings of rehearing requests in similar scenarios).

As in the decisions referenced above, Crye's counsel clearly attempted to file papers via E2E in a timely manner, received receipts confirming the filing in the typical manner, and had no reason to believe a filing error occurred. Unlike the decisions referenced above, Crye was not notified of any errors in its attempted filing—in each of the above cases, the filing party was notified (typically within a few days or weeks) of a filing error. Here, Crye first learned of a potential filing error on April 9, 2020 and took immediate remedial action. (*See* Exs. 1024-26; 1017 at ¶¶7-8.) Thus, good cause exists to accept the filing of Crye's Requests. *See, e.g.*, *T-Mobile*, IPR2017-01099, Paper 46 at 2-3 (Dec. 21, 2018) (excusing late filing where error was inadvertent, and the record showed that "an attempt, albeit unsuccessful, was made to timely file the rehearing request").

The interests of justice are also served by granting Crye's motion. Indeed, in the few cases where the Board has refused to consider a late filing, it has done so only after alerting the filing party to the error and providing the party with a chance to correct the error. *ZTE (USA) Inc. v. Fundamental Innovation Sys. Int'l LLC*, IPR2018-00274, Paper 23 at (Nov. 15, 2018) (expunging late-filed rehearing request where petitioner was alerted by the Board to a filing error and did not file a motion for extension of time under 37 C.F.R. §42.5); *see also Nuna Baby Essentials, Inc. v. Britax Child Safety, Inc.*, IPR2018-01683, Paper 11 at 5 (Dec. 18, 2018) (denying petitioner's request to file exhibits supporting a petition after ignoring re-filing

deadlines provided by the Board). Here, the PTAB did not notify Petitioner of a deficient filing. It would be inequitable to deny Crye's Requests on these facts, particularly given that Crye did not ignore any notices or deadlines (as the filing party did in, e.g., *Nuna Baby* and *ZTE*), and Crye immediately took remedial action upon discovering that its filings were not correctly received. Accordingly, the interests of justice are also served by granting this motion.

Patentee opposes Crye's motion. However, Patentee's opposition is not based on any legitimate prejudice—Patentee was served with the Requests on December 20, 2019, immediately after they were filed. Patentee's only apparent argument in opposition is that there would be a "cloud over its patents" if Petitioner's Requests are considered. Nothing will change if the Board grants Crye's motion –a "cloud" existed in Patentee's mind on April 9, 2020, prior to Crye's discovery of a filing error, and that same cloud will continue to exist if the Board grants Crye's motion. There is also no undue prejudice to the Patentee by granting this motion as it will not impact any deadlines. *Expedia*, IPR2018-01743, Paper 13.

Petitioner, therefore, respectfully requests that the filing of its Requests in these IPRs be excused for good cause and in the interests of justice under 42.5(c)(e). Crye further requests that the Board expeditiously review and rule on the Requests.

Dated: April 22, 2020

By: */s/ Heath J. Briggs*

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2020, a copy of this Motion Under 42.5(c)(3) has been served in its entirety via electronic mail by emailing Patent Owner's lead and backup counsel at:

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Respectfully submitted,

GREENBERG TRAURIG, LLP

Date: April 22, 2020

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