

**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

Lykos

Mailed: April 18, 2005

Opposition No. 91123765

Central Mfg. Co.

V.

Paramount Parks, Inc.

Angela Lykos, Interlocutory Attorney

This case now comes up for consideration of opposer's motion (filed April 7, 2005) to compel the attendance of three corporate officers of applicant for discovery depositions. The motion is fully briefed.¹

Opposer seeks to compel the attendance of the following two witnesses for discovery depositions: (1) Mr. Al Weber, Jr., the President and Chief Executive Officer of applicant,

¹ Applicant, in its response brief, requested that the Board resolve this discovery dispute by telephone conference. Notwithstanding opposer's objection thereto, the need for a telephone conference is obviated inasmuch as the motion to compel has been fully briefed by both parties in writing, and the Board is promptly ruling on the motion.

Opposer has submitted a reply brief which the Board has considered because it clarifies the issues herein. Consideration of a reply brief is discretionary on the part of the Board. See Trademark Rule 2.127(a).

and (2) Mr. P. Michael Koontz, the Chief Financial Officer of applicant. Opposer contends that it spoke with counsel for applicant on March 30, 2005 who responded that said witnesses would not be produced.

In support of its motion to compel, opposer has submitted copies of each respective notice of deposition served March 25, 2005, and scheduled to take place April 28, 2005.

In opposition to opposer's motion to compel, applicant maintains that contrary to opposer's assertion, applicant did not state that it would refuse to produce the requested witnesses but rather that it needed additional time to provide responses and/or objections to the noticed depositions; that applicant can now confirm that none of the noticed witnesses have any relevant knowledge or information with respect to the trademark applications or trademark use at issue in this litigation; but that nonetheless, applicant will make available for deposition a corporate representative with knowledge of the relevant facts to this proceeding on the date and location requested by opposer. Applicant also objects to opposer's notices of deposition on the grounds that they constitute "sheer harassment" of applicant.

Applicant has submitted with its responsive brief the affidavit of Lacy H. Koonce, III, applicant's counsel; and the affidavits of Mr. Weber and Mr. Koontz, each attesting that he

has "no knowledge or information of the trademark applications that are the subject of this opposition, or of the trademark use by Paramount of the mark HYPERSONIC, other than the fact that Paramount operates a theme park ride in Virginia called Hypersonic XLC Xtreme Launch Coaster."

As a threshold matter, we find that opposer has made a good-faith effort to resolve this discovery dispute prior to seeking Board intervention. See Trademark Rule 2.120(e).

Although applicant has not filed a cross-motion for protective order in response to opposer's motion to compel, due to the particular circumstances involved in this case, a discussion of the standards governing this type of motion is relevant here.

The scope of discovery in a Board proceeding is governed by Fed. R Civ. P. 26(b), which provides that a party is entitled to discovery regarding any matter, not privileged, which is relevant to the subject matter of the proceeding, and which appears reasonably calculated to lead to the discovery of admissible evidence. See TBMP § 402. Consistent with that rule, a party is permitted to take the discovery deposition of "any person." See TBMP § 404.03 et seq.

Although the rules contemplate liberal discovery, the right to discovery is not unlimited. Both the Trademark Rules and the Federal Rules of Civil Procedure grant the Board discretion to

manage the discovery process in order to balance the requesting party's need for information against any injury that may result from discovery abuse. See TBMP § 402.02, citing *Micro Motion Inc. v. Kane Steel Co.*, 894 F.2d 1318, 13 USPQ2d 1696 (Fed. Cir. 1990).

Fed. R. Civ. P. 26 allows the Board to limit discovery if it determines that the discovery sought is obtainable from other sources that are more convenient and less burdensome or duplicative. Trademark Rule 2.120(f) also provides that upon motion by a party from whom a discovery deposition is sought, and for good cause shown, the Board may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, undue burden or expense, including one or more of the types of orders provided by clauses (1) through (8), inclusive, of Fed. R. Civ. P. 26(c). Among the types of discovery orders that may be entered, the Board has the discretion to enter a protective order that a discovery deposition not be had. See Fed. R. Civ. P. 26(c)(1). The party seeking a protective order bears the burden to show good cause. To establish good cause, the movant must submit "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." However, a protective order that prohibits the taking of a deposition altogether is rarely granted in the absence of extraordinary circumstances.

See 8 Charles A. Wright, Arthur R. Miller & Richard L. Cooper, *Federal Practice and Procedure*, § 2037 (2d ed. 1994).

The Board articulated its standard for the imposition of a protective order prohibiting the taking of depositions of high-level employees or officers in *FMR Corp. v. Alliant Partners*, 51 USPQ2d 1759 (TTAB 1999). When a party seeks to depose a very high-level official of a large corporation, and that official (or corporation) files a motion for protective order to prohibit the deposition, the movant must demonstrate through an affidavit or other evidence that the official has no direct knowledge of the relevant facts or that there are other persons with equal or greater knowledge of the relevant facts. If the movant meets this initial burden, then the burden shifts to the party seeking the deposition to show that the official has unique or superior personal knowledge of relevant facts. If the party seeking the deposition does not satisfy this showing, then the Board will grant the motion for protective order and require the party seeking the deposition to attempt to obtain discovery through less intrusive methods.

Applying this standard to opposer's motion to compel, we find that applicant has demonstrated that Mr. Weber and Mr. Koontz have no direct knowledge of the relevant facts and that there are other persons with equal or greater knowledge of the relevant facts. Thus, applicant has a valid basis for

contending that opposer must take the depositions of other corporate representatives instead.

Accordingly, opposer's motion to compel is denied to the extent that applicant is not required to produce for discovery depositions Mr. Weber and Mr. Koontz; however, opposer's motion to compel is granted to the extent that applicant is required to identify and produce a corporate representative (or representatives) as a witness (or witnesses) prepared to testify on the subjects listed in opposer's notice of deposition ("the subjects listed in the Notice of Opposition") on the day and location requested by opposer: April 28, 2005, at the law offices of applicant's counsel, David Wright Tremaine, LLP, 1633 Broadway, New York, NY 10019, commencing at 11 a.m..

Trial dates remain as set in the Board's March 15, 2005 order.