

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

In the Matter of:

Application Serial No.: 78/164,521

Filed: September 16, 2002

For the Mark: XOCOLATE

Opposer's Reference No.: BSSO 7 00013

SONAFI S.A.,

Opposer,

v.

RANDY JUDD,

Applicant.

Opposition No. 91/159,665

BOX TTAB - NO FEE
Commissioner for Trademarks
P. O. Box 1451
Alexandria, VA 22313-1451

OPPOSER'S MOTION THAT DEPOSITION OF MR. JUDD, IF TAKEN, BE TAKEN ORALLY

Opposer hereby moves for the testimony deposition of Judd not to be taken by written deposition now sought by Applicant. (Exhibit A). If taken at all, it should be taken orally. Applicant has served a motion to take his personal testimony by written deposition which includes over one hundred and thirty questions. Applicant's motion is vexatious, voluminous, and harassment. Indeed, seeking such multifaceted written testimony is egregious and the motion should be denied.

Applicant's written questions are not "brief." Applicant has proposed one hundred and thirty one questions for the written testimony of himself. This is extensive questioning that will require significant preparation time and cost which is contrary to the basis of allowing written direct examination. Further, many of the questions include introduction of documents that, on their faces, have no discernable meaning thus making necessary cross examination impossible. It will not be until Applicant answers these prepared written questions that Opposer could determine proper cross examination for these documents.

Applicant's written questions include many open ended and leading questions of himself that do not allow for proper cross examination by written testimony. Opposer cannot properly prepare cross examination without knowing the responses to these questions. As the Board knows, the purpose of depositions is to confront the deponent and ask questions based on the responses; not based on the attorney's prepared questions. By requiring cross examination to be drafted based only on the attorney's questions, due process is denied.

Applicant's written questions are directed to Applicant. While written questions may be appropriate for formal gathering of short testimony from third parties scattered about large geographic regions, they are not appropriate for introducing Applicant's own testimony. Judd is Applicant and Opposer needs to be allowed to confront this witness to ensure due process and proper testimony for the Board to decide this opposition.

The harm of requiring Opposer to cross examine Applicant in writing far outweighs any possible harm to Applicant if he presents his testimony by oral examination. In fact, due to the nature of the questions and the number of questions, the cost of performing written examination would be greater than the cost of an oral examination.

Opposer respectfully submits that Applicant's motion to take written testimony of himself is unjust and is contrary to the basis for allowing written testimony. Further, Applicant's motion includes over one hundred and thirty questions each of which require cross examination to take place after the witness has responded to the direct examination. Requiring Opposer to draft its cross examination before the Applicant has answered his prepared and scripted direct examination prevents due process and is

improper. Accordingly, Opposer moves for Applicant's motion to be denied and that any testimony of Judd's be taken, if at all, by oral examination. In addition, Opposer, by separate motion, also asks that all trial dates including those relating to Judd's testimony be suspended until the Board has ruled on this motion to oppose written testimony.

Respectfully submitted,

FAY SHARPE LLP

By 

Gregory S. Vickers
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1100 Superior Avenue
Seventh Floor
Cleveland, OH 44114
(216) 861-5582

CERTIFICATE OF MAILING

I hereby certify that this correspondence (and any item referred to herein as being attached or enclosed) is (are) being deposited with the United States Postal Service as First Class Mail, addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451, BOX TTAB - NO FEE on 2-6-07.

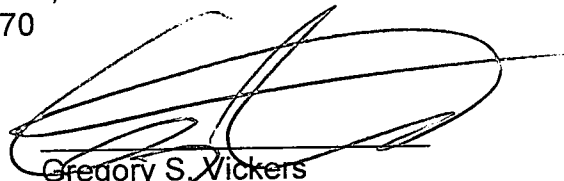

Rita M. Sulic

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPPOSER'S MOTION THAT DEPOSITION OF MR. JUDD, IF TAKEN, BE TAKEN ORALLY was served on Applicant, Randy Judd, by first class mail, postage prepaid, to the attorneys for Applicant at the address below on the date indicated below:

Peter M. de Jonge
Jason R. Jones
THORPE NORTH AND WESTERN, LLP
8180 South 700 East, Suite 200
Sandy, Utah 84070

Date: 2/6/07


Gregory S. Vickers

Mark: XOCOLATE
U.S. Trademark Application Serial No. 78/164,521

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**APPLICANT'S WRITTEN QUESTIONS FOR THE
TESTIMONIAL DEPOSITION OF RANDY JUDD**

Applicant Randy Judd hereby propounds the following written questions to the following
witness:

Randy Judd
863 East 700 South
Salt Lake City, UT 84102

WRITTEN QUESTIONS FOR RANDY JUDD:

1. Please state your full name for the record.
2. Please state your title or position with Xocolate, LLC.
3. Are you the founder of Xocolate, LLC?
4. When did you form Xocolate, LLC?
5. For what business purpose did you form Xocolate, LLC?
6. What products does Xocolate, LLC sell?
7. Has Xocolate, LLC sold such products continuously since its inception?



8. Did you personally sell such products prior to the inception of Xocolate, LLC?
9. Please state the exact or approximate date of the first sale of a product using the XOCOLATE mark by either you or Xocolate, LLC.
10. Please describe the circumstances surrounding this sale.
11. Does Xocolate, LLC currently license the right to use the XOCOLATE mark from you?
12. Has Xocolate, LLC licensed the right to use the XOCOLATE mark from you at all times since its inception?
13. Did you come up with the idea to use the mark XOCOLATE?
14. Approximately when did you come up with the idea to use XOCOLATE?
15. Please describe the steps you took to put the XOCOLATE mark to use.
16. Please state the exact or approximate times that such steps were taken.
17. Please state the proper pronunciation of the XOCOLATE mark.
18. Please describe the nature of the goods and/or services sold under the XOCOLATE mark.
19. Please describe the typical channels of trade for XOCOLATE products.
20. Please describe the types of customers that typically purchase XOCOLATE products.
21. Please ask the court reporter to mark Applicant's Exhibit A (which is Bates stamped 000000 through 000030).
22. Do you recognize Applicant's Exhibit A?
23. What do you recognize it to be?
24. What is the name of the company to which Applicant's Exhibit A pertains?
25. What is your understanding as to the nature of the business performed by this company?
26. What is the date printed on the bottom of each page (except the first page) of Applicant's Exhibit A?

27. When did you first receive Applicant's Exhibit A?
28. Did you contact this company?
29. Why did you contact this company?
30. Please state the exact or approximate time that you contacted this company?
31. Did you enter into a business relationship with this company?
32. When did you enter a business relationship with this company?
33. Did you execute Applicant's Exhibit A?
34. If so, when did you execute Applicant's Exhibit A?
35. Have you been able to locate the executed original or copy?
36. Please describe the circumstances surrounding this business relationship?
37. Did this business relationship involve the XOCOLATE mark?
38. Please describe how the XOCOLATE mark was involved.
39. Please ask the court reporter to mark Applicant's Exhibit B (which is Bates stamped 000031 through 000040).
40. Do you recognize the materials of Applicant's Exhibit B?
41. Please go through each of these materials and, referring to them by the Bates number printed thereon, please describe what each document is and the time frames therefore.
42. Did you work with a graphic artist or designer to prepare these materials?
43. If so, when did you work with the graphic artist or designer?
44. Please explain the circumstances regarding your work with the graphic artist or designer.
45. Do any of these documents show your final logo?
46. Which ones?
47. When was this logo finalized?

48. Please ask the court reporter to mark Applicant's Exhibit C (which is Bates stamped 000041 through 000043).
49. Do you recognize Applicant's Exhibit C?
50. What do you recognize it to be?
51. Please describe the circumstances surrounding Applicant's Exhibit C.
52. When was Applicant's Exhibit C prepared?
53. Please ask the court reporter to mark Applicant's Exhibit D (which is Bates stamped 000050, 000072 through 000074).
54. Do you recognize Applicant's Exhibit D?
55. What do you recognize it to be?
56. Despite the discrepancy in Bates numbers, do you recognize this to be one continuous brochure?
57. Are the products depicted thereon sold in connection with the XOCOLATE mark?
58. Is Applicant's Exhibit D representative of the nature of the products sold in connection with the XOCOLATE mark?
59. Please ask the court reporter to mark Applicant's Exhibit E (which is Bates stamped 000052 and 000075).
60. Do you recognize Applicant's Exhibit E?
61. What do you recognize it to be?
62. Despite the discrepancy in Bates numbers, do you recognize this to be one continuous brochure?
63. Are the products depicted thereon sold in connection with the XOCOLATE mark?

64. Is Applicant's Exhibit E representative of the nature of the products sold in connection with the XOCOLATE mark?
65. When was Applicant's Exhibit E created?
66. When was Applicant's Exhibit E used?
67. Please ask the court reporter to mark Applicant's Exhibit F (which is Bates stamped 000053 through 000054).
68. Do you recognize Applicant's Exhibit F?
69. What do you recognize it to be?
70. Are the products depicted thereon sold in connection with the XOCOLATE mark?
71. Is Applicant's Exhibit F representative of the nature of the products sold in connection with the XOCOLATE mark?
72. When was Applicant's Exhibit F created?
73. When was Applicant's Exhibit F used?
74. Please ask the court reporter to mark Applicant's Exhibit G (which is Bates stamped 000055).
75. Do you recognize Applicant's Exhibit G?
76. What do you recognize it to be?
77. Are the products depicted thereon sold in connection with the XOCOLATE mark?
78. Is Applicant's Exhibit G representative of the nature of the products sold in connection with the XOCOLATE mark?
79. When was Applicant's Exhibit G created?
80. When was Applicant's Exhibit G used?

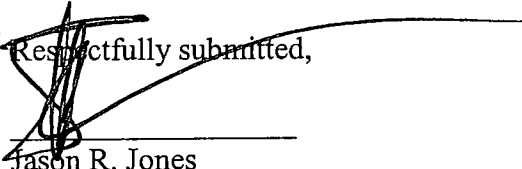
81. Please ask the court reporter to mark Applicant's Exhibit H (which is Bates stamped 000056).
82. Do you recognize Applicant's Exhibit H?
83. What do you recognize it to be?
84. Are the products depicted thereon sold in connection with the XOCOLATE mark?
85. Is Applicant's Exhibit H representative of the nature of the products sold in connection with the XOCOLATE mark?
86. When was Applicant's Exhibit H created?
87. For what purpose was Applicant's Exhibit H created?
88. Please describe the circumstances involving the creation of Applicant's Exhibit H.
89. Please ask the court reporter to mark Applicant's Exhibit I (which is Bates stamped 000059, 000076 through 000078).
90. Do you recognize Applicant's Exhibit I?
91. What do you recognize it to be?
92. Despite the discrepancy in Bates numbers, do you recognize this to be one continuous brochure?
93. Are the products depicted thereon sold in connection with the XOCOLATE mark?
94. Is Applicant's Exhibit I representative of the nature of the products sold in connection with the XOCOLATE mark?
95. When was Applicant's Exhibit I created?
96. When was Applicant's Exhibit I used?
97. Please ask the court reporter to mark Applicant's Exhibit J (which is Bates stamped 000058).

98. Do you recognize Applicant's Exhibit J?
99. What do you recognize it to be?
100. Did you print Applicant's Exhibit J?
101. From which website did you print Applicant's Exhibit J?
102. When did you print Applicant's Exhibit J?
103. Who is the current owner of the domain xocolate.com?
104. When did you acquire this domain name?
105. For what purpose did you acquire this domain name?
106. Who is the listed Registrant of xocolate.com on Applicant's Exhibit J?
107. Is this accurate?
108. When does Applicant's Exhibit J state that xocolate.com was created?
109. Is that date accurate as to when you registered the xocolate.com?
110. Please ask the court reporter to mark Applicant's Exhibit K (which is Bates stamped 000060 through 000071).
111. Do you recognize Applicant's Exhibit K?
112. What do you recognize it to be?
113. Did you print Applicant's Exhibit K?
114. From which website did you print Applicant's Exhibit K?
115. When did you print Applicant's Exhibit K?
116. Is this website representative of the nature of products sold in connection with the XOCOLATE mark?
117. Please ask the court reporter to mark Applicant's Exhibit L (which is Bates stamped 000051).

118. Do you recognize Applicant's Exhibit L?
119. What do you recognize it to be?
120. Please explain the circumstances surrounding this letter.
121. Were you involved with the preparation of this letter?
122. Please explain how you were involved.
123. Do you know whether this letter was sent?
124. Please explain how you know.
125. When was this letter sent?
126. To whom was this letter sent?
127. Who is Robert Goldstein?
128. Who is Cambria Judd?
129. Is there an original executed letter?
130. Is Applicant's Exhibit L a true and correct copy of the original?
131. Was this letter sent in connection with the marketing of XOCOLATE branded products?

END OF WRITTEN QUESTIONS

The foregoing written questions have been submitted to Opposer's counsel as part of
APPLICANT'S NOTICE OF TAKING TESTIMONIAL DEPOSITION UPON WRITTEN
QUESTIONS on this 24th day of January, 2007.

Respectfully submitted,

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