

JACK F. SCHERER, P. C.
ATTORNEY AT LAW

99 PARK AVENUE
3RD FLOOR
NEW YORK, N.Y. 10016
TEL. (212) 421-7140
FAX (212) 421-7148
EMAIL: jscherer@jfsny.com

November 13, 2010

OF COUNSEL
AHMED MASSOUD
LISA PASHKOFF

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

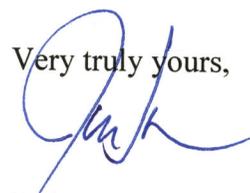
Re: Opposition No. 91189474

77/571, 759

Gentlemen:

Enclosed please find Opposer's opposition to Applicants' Motion to Quash The Notice of Taking Trial Testimony. Please acknowledge receipt on the copy of the letter enclosed herewith, and return the copy to the undersigned in the stamped self-addressed envelop.

Very truly yours,



Jack F. Scherer

Enclosure



11-17-2010

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

-----X
CHERYL COOLEY,

Opposer,

Opposition No.: 91189474

BERNADETTE COOPER and JOYCE IRBY

Applicants.
-----X

**OPPOSER'S OPPOSITION TO APPLICANTS' MOTION TO QUASH
THE NOTICE OF TAKING TRIAL TESTIMONY**

Oposer, Cheryl Cooley, by and through her undersigned attorney submits this opposition to Applicants' Motion to Quash Opposer's Notice of Taking Trial Testimony pursuant to 37 CFR § 2.120 and TMBP § 521 (the "Motion").

1. TMBP § 521 sets forth various grounds for quashing a notice to take deposition which grounds include whether or not the notice was timely served.
2. The Notice of Taking the Trial Testimony of Opposer, Cheryl Cooley ("Notice") was mailed to Applicants' attorney on October 20, 2010. Annexed hereto to as **Exhibit 1** is a true copy of the Notice.
3. Almost simultaneously with the mailing of the Notice, on October 20, 2010, your deponent also sent to Applicants' attorney an e-mail which *inter alia* advised Applicants' attorney that Opposer's testimony would be taken on November 1, 2010, at the Marriott Courtyard in Old Pasadena, California. As of October 20, 2010, Applicants

had actual notice of the date, time and place of the taking of Opposer's trial testimony. A true copy of this e-mail is attached as **Exhibit 2**.

4. Thereafter, on October 29, 2010, your deponent again informed Applicants' attorney, by e-mail, of the date, time and place of the taking of Opposer's testimony. Annexed as **Exhibit 3** is a true copy of this e-mail. Based on the foregoing exhibits, Applicants' attorney knew that your deponent would be physically present in Pasadena, CA to take Opposer's trial testimony.

5. In the third full paragraph of the Motion, Applicants attorney acknowledges that the trial testimony would be taken in Pasadena. Therein, Applicants' attorney certifies that the Motion was served on October 27, 2010, by mail and by e-mail. Annexed hereto as **Exhibit 4** is a true copy of the Motion and Certificate of Service.

However, the envelop containing the Motion is postmarked "Orlando FL, 28 Oct 10 PM". Annexed hereto as **Exhibit 5** is a true copy of the post-marked envelop. Additionally, I never received any e-mail from Applicants' attorney containing the Motion on either October 27 or October 28, 2010, or for that matter on any other date.

6. The purpose of pre-trial disclosures is to furnish the other side with all of the relevant information. By February 4, 2010, Opposer and Applicants' attorney had exchanged the Notice of Opposition; the Answer thereto; Applicants' Request for Interrogatories and answers thereto; and Applicants' Request for Admissions and answers thereto. Thereafter, Applicants answered Opposer's Request for Interrogatories. On February 4, 2010, Applicants had all of the relevant facts.

7. On November 1, 2010, Applicants' attorney sent an e-mail to the undersigned's office in response to the October 29, 2010, e-mail, while your deponent

was at the Marriott Courtyard preparing to take the trial testimony of Opposer. Annexed as **Exhibit 6** is a true copy of this e-mail and, at its tail, your deponent's October 29 e-mail to Applicants' attorney.

8. In this response, Applicants' attorney stated that she would like to participate in the taking of Opposer's testimony by telephone and asked for the "call in" number. Your deponent did not see the response of Applicants' attorney until November 3, 2010, after your deponent's return from California.

9. Since October 20, 2010, Applicants' attorney knew that your deponent, whose office is in New York, would be taking Opposer's testimony in Pasadena. Had Applicants' attorney telephoned your deponent at the Marriott Courtyard, I would have arranged for Applicants' attorney to participate in the taking of Opposer's trial testimony. Had she telephoned or e-mailed your deponent on October 27, October 28, or October 29, 2010, asking for an adjournment, I would have accommodated her.

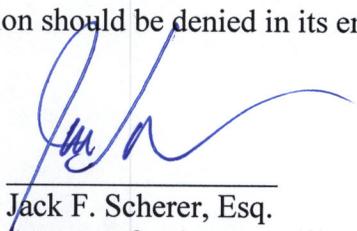
10. On November 1, 2010, Grace Chung, an authorized California real time reporter, swore Opposer in; and once sworn in, your deponent took Opposer's trial testimony. Opposer was the only person whose testimony was taken.

11. At the time of the taking of Opposer's trial testimony, your deponent had no knowledge or information concerning any action taken by The United States Patent and Trademark Office in connection with the Motion. The notice suspending all proceedings pending disposition of the Motion was not mailed until November 1, 2010, although the notice states "Date of Mailing-October 28, 2010". Annexed hereto as **Exhibit 7** is a true copy of this notice and transmittal envelop showing a November 1, 2010, post mark.

12. The Motion is moot as Opposer's trial testimony has been taken. Opposer will be sorely prejudiced if the trial testimony of November 1, 2010, is prohibited from being used, as Opposer will not be able to sustain its opposition.

By virtue of the foregoing, Applicants' Motion should be denied in its entirety.

Dated: New York, New York
November 13, 2010



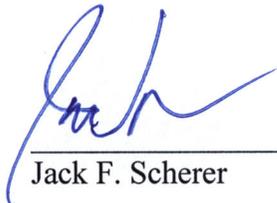
Jack F. Scherer, Esq.
Attorney for Opposer
99 Park Avenue
3rd Floor
New York, NY 10016
(212) 421-7140
(212) 421-7148 (fax)

To: Jamie R. Shelden, Esq.
Attorney for Applicants
1760 Suite F, PMB No. 220
Airline Highway
Hollister, CA 95023
(858) 777-5545 (office and fax)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Opposition to the Motion to Quash the Notice of Taking Trial Testimony is being served upon Applicants by depositing a copy of same on November 13, 2010, in the United States mail, first class postage prepaid, addressed as follows:

Jamie R. Shelden, Esq.
1760 Suite F, PMB No. 220
Airline Highway
Hollister, CA 95023



Jack F. Scherer



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

-----X
CHERYL COOLEY,

Opposer,

Opposition No.: 91189474

BERNADETTE COOPER and JOYCE IRBY

Applicants.
-----X

NOTICE OF TAKING TRIAL TESTIMONY

TO: Jamie Shelden, Esq.
1760 Suite F
PMB No. 220
Airline Highway
Hollister, CA 95023

YOU ARE HEREBY NOTIFIED that I shall, on behalf of Cheryl Cooley, Opposer, commence the taking of testimony upon oral examination, at 10:00 in the forenoon of November 1, 2010, at Marriott Courtyard, Old Pasadena, CA. in the above action, in accordance with the Federal Rules of Civil Procedure and the Trademark Rules of Practice of the United States Patent and Trademark Office, before a Notary Public, duly authorized to administer oaths in the State of California, or any other qualified Notary Public.

The name and address of the witness whose testimony will be taken is:

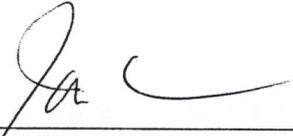
CHERYL COOLEY, Opposer
5807 Pickford Street
Los Angeles, CA 90019

and such other witnesses as may be called.

The examination will continue from day to day until completed.

You are invited to attend for the purpose of cross examination.

Dated: October 20, 2010
New York, New York



Jack F. Scherer

CERTIFICATE OF SERVICE,

A copy of the within Notice of Taking Trial Testimony has been duly served by first class mail on the attorney for the Applicants, Jamie Shelden, Esq., 1760 Suite F, PMB 220, Airline Highway, Hollister, CA 95023, this 20th day of October, 2010.



Jack F. Scherer



11/3/2010

Jack Scherer

From: Jack Scherer [jscherer@jfsny.com]
Sent: Wednesday, October 20, 2010 12:26 PM
To: 'Jamie Shelden'
Subject: Cheryl Cooley, Opposer

Jamie:

On August 25, 2010, the Trademark Trial and Appeal Board mailed its decision concerning your application to dismiss and Opposer's response and cross application for leave to take Opposer's trial testimony. The decision granted Opposer time in which to take Opposer's trial testimony as well as permitting Opposer to serve pretrial disclosures upon Applicants within 30 days of the date of mailing of the decision. Opposer's Second Set of Interrogatories ("Second Set") was mailed to you on Sept 14, 2010, well within the 30 day period. Applicants' response to the Second Set is unacceptable, in light of the August 25 decision.

I will be taking the trial testimony of Opposer and such other witnesses as may be called starting at 10 a.m. and continuing. The place of the exam is the Marriott Courtyard in Old Pasadena, California. You are welcome to attend. I am mailing today, the Notice of Taking Trial Testimony.

Jack



Jack Scherer

From: Jack Scherer [jscherer@jfsny.com]

Sent: Friday, October 29, 2010 12:17 PM

To: 'Jamie Shelden'

Jamie:

Follow up to my earlier e-mail and the Notice of Taking Trial Testimony, please be advised that when you arrive at the Marriott Courtyard, 180 North Fair Oaks, Pasadena, please ask, at reception, for my room number, as I will be taking the testimony of Cheryl Cooley in my hotel room.

If you have any questions, please call.

Jack

11/3/2010



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

| | | |
|-----------------------|---|--------------------------|
| Cheryl Cooley, |) | |
| |) | Opposition no.: 91189474 |
| Opposer, |) | |
| |) | Mark: KLYMAXX |
| v. |) | |
| |) | Serial no.: 77/571,759 |
| |) | |
| Bernadette Cooper and |) | |
| Joyce Irby, |) | |
| |) | |
| Applicants. |) | |

Motion to Quash Plaintiff's Notice of Taking Trial Testimony

Applicants, Bernadette Cooper and Joyce Irby, by and through their undersigned attorney hereby submit this Motion to Quash Plaintiff's Notice of Taking Trial Testimony pursuant to 37 CFR § 2.120 and TMBP §521:

Opposer was required under the Board's ruling on August 25, 2010 to serve its pretrial disclosures on Applicants within 30 days of the mailing date of the Board's order denying Applicant's Motion to Dismiss, or by September 25, 2010. No pretrial disclosures have been served on Applicants to date.

On October 20, 2010, Plaintiff's counsel mailed its notice of intent to take the deposition of Cheryl Cooley at 10am on November 1, 2010 in Old Pasadena, California. The notice was received by Applicant's counsel on October 25, 2010, seven days before the scheduled date of the deposition.

This notice is not reasonable because Plaintiff did not serve on Applicants, its pretrial disclosures prior to the September 21, 2010 deadline or at all, to date. Allowing

Ms. Cooley's deposition to proceed as scheduled will impose an undue burden on Applicants and prejudice their defense. Applicants' counsel does not have adequate time to prepare for cross examination of Ms. Cooley even assuming, for the sake of argument, that counsel is available on November 1, 2010 to travel to Pasadena and attend the deposition. Had Applicants' counsel been served with pretrial disclosures by Plaintiff, counsel would have been prepared for the taking of depositions and might have been prepared to attend the deposition even on such short notice. However, no pretrial disclosures were served, as required by the Board.

Therefore, Applicant respectfully requests that the Board quash Opposer's untimely Notice of Taking Deposition of Cheryl Cooley.

Respectfully submitted,

Date: October 27, 2010

By: Jamie Shelden

Jamie R. Shelden, Esq.
Law Office of Jamie Shelden
1760 Suite F, PMB 220, Airline Highway
Hollister, CA 95023
(858) 777-5545 (office and fax)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing:

MOTION TO QUASH PLAINTIFF'S NOTICE OF TAKING TRIAL TESTIMONY

is being served upon Opposer by depositing a copy of the same in the United States mail, first class postage prepaid, addressed as follows and by email to jscherer@jfsny.com:

Jack F. Sherer
99 Park Avenue, 3rd Floor
New York, NY 10016

Jamie Shelden
Jamie R. Shelden





ORLANDO FL 328
28 OCT 10PM 6 T

 Just Trademarks™
201-A McCray Street, Suite 305
Hollister, CA 95023-4094

Jack F. Sherer
99 Park Avenue, 3rd Floor
New York, NY 10016

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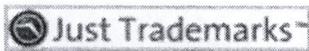
Jack Scherer

From: Jamie Shelden [justtrademarks@gmail.com]
Sent: Monday, November 01, 2010 9:32 AM
To: jscherer@jfsny.com
Subject: Re:

Dear Jack,

I would like to attend the deposition via phone. Please let me have your call in number.

Best,
Jamie



1760 Suite F, PMB No. 220
Airline Highway
Hollister, CA 95023
(858) 777-5545 (office and fax)
(831) 261-5444 (mobile)

This email is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message.

On 10/29/10 9:17 AM, "Jack Scherer" <jscherer@jfsny.com> wrote:

Jamie:

Follow up to my earlier e-mail and the Notice of Taking Trial Testimony, please be advised that when you arrive at the Marriott Courtyard, 180 North Fair Oaks, Pasadena, please ask, at reception, for my room number, as I will be taking the testimony of Cheryl Cooley in my hotel room.

If you have any questions, please call.

Jack



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

Mailed: October 28, 2010

Opposition No. 91189474

Cheryl Cooley

v.

Bernadette Cooper and Joyce
Irby

George C. Pologeorgis, Interlocutory Attorney:

Proceedings herein are suspended pending disposition of applicants' motion to quash opposer's notice of taking trial testimony filed on October 28, 2010. Any paper filed during the pendency of this motion which is not relevant thereto will be given no consideration. See Trademark Rule 2.127(d).

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