

ESTTA Tracking number: **ESTTA564621**

Filing date: **10/11/2013**

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

Proceeding	91194974
Party	Plaintiff Promark Brands Inc. and H.J. Heinz Company
Correspondence Address	ANGELA R GOTT JONES DAY 901 LAKESIDE AVENUE CLEVELAND, OH 44114-1190 UNITED STATES tfraelich@jonesday.com, agott@jonesday.com, pcyngier@jonesday.com
Submission	Reply in Support of Motion
Filer's Name	Timothy P. Fraelich
Filer's e-mail	tfraelich@jonesday.com, agott@jonesday.com, pcyngier@jonesday.com
Signature	/Timothy P. Fraelich/
Date	10/11/2013
Attachments	Reply in Support of Opposers' Motion to Strike Applicant's Trial Brief.pdf(216935 bytes) Declaration.pdf(131263 bytes)

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

PROMARK BRANDS INC. and
H. J. HEINZ COMPANY,

Opposers,

vs.

GFA BRANDS, INC.,

Applicant.

**Opposition No. 91194974 (Parent)
and Opposition No. 91196358**

U.S. Trademark Application 77/864,305
For the Mark **SMART BALANCE**

U.S. Trademark Application 77/864,268
For the Mark **SMART BALANCE**

**REPLY IN SUPPORT OF OPPOSERS’
MOTION TO STRIKE APPLICANT’S TRIAL BRIEF**

Opposers ProMark Brands Inc. and H. J. Heinz Company (collectively, “Heinz”) have moved to strike the Trial Brief submitted by Applicant GFA Brands, Inc. (“GFA”) on the basis that it was not timely filed. In opposing Heinz’s Motion, GFA admits that its brief was filed six days late, but contends that its negligence in meeting the deadline should be excused by the Board.

In order to deny Heinz’s Motion, the Board would need to forgive not one, but **two** separate instances of untimeliness concerning GFA’s Trial Brief. First, the Board would need to excuse GFA’s purported misunderstanding of the applicable rules, which it asserts caused it to believe that its Trial Brief was due on September 16, 2013. Then, the Board would need to excuse GFA’s failure to meet even that untimely deadline. Heinz respectfully submits that the Board should hold GFA’s counsel accountable for its conduct—conduct that was entirely within its control.

None of GFA’s proffered explanations for its failure to meet the deadline rise to the level of excusable neglect. Moreover, as discussed below, the conduct at issue here is yet another example of GFA’s counsel’s persistent disregard of the rules. For the reasons set forth below and in Heinz’s Motion to Strike, Heinz respectfully submits that the Board should grant Heinz’s Motion to Strike, finding GFA’s counsel’s negligent conduct inexcusable.

I. ARGUMENT

A. GFA's Failure To Timely File Its Trial Brief Does Not Amount To Excusable Neglect

GFA argues in its response to Heinz's Motion that its conduct was the result of excusable neglect under Federal Rule of Civil Procedure 6(b) and the relevant *Pioneer* factors. (TTABVUE Doc. No. 95 at 3.) Under the *Pioneer* factors, the determination of whether GFA's neglect is excusable should take into account: "[1] the danger of prejudice to [Heinz], [2] the length of the delay and its potential impact on [the] proceedings, [3] the reason for the delay, including whether it was within the reasonable control of [GFA], and [4] whether [GFA] acted in good faith." *See Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993), as discussed and adopted by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 U.S.P.Q.2d 1582, 1586 (T.T.A.B. 1997). As the Board has observed, "several courts have stated that the third *Pioneer* factor, namely the reason for the delay and whether it was within the reasonable control of the movant, might be considered the most important factor in a particular case." *See Poly John Enterprises Corp. v. 1-800-Toilets Inc.*, 61 U.S.P.Q.2d 1860, 1861 (T.T.A.B. 2002). Here, the excuses proffered by GFA to explain why its brief was late were wholly within its control and do not rise to a level of "excusable neglect" that would warrant denial of Heinz's Motion.

1. GFA's Purported Misunderstanding Of The Rules

Although GFA's counsel argues that it misunderstood Trademark Rule 2.119(c), the plain language of the rule clearly states that the 5-day enlargement after service by mail applies "[w]henver a party is required to take some action *within a prescribed period after . . . service* of a paper upon the party by another party" 37 C.F.R. § 2.119(c) (emphasis added). The due date for filing a responsive trial brief, however, is triggered not from the date of service, but from "*the due date* of the first brief." 37 C.F.R. § 2.128(a)(1) (emphasis added); *see also* TBMP § 801.02(b). If there were any doubt, the Trademark Trial and Appeal Board Manual of Procedure (the "TBMP") expressly provides that "the 5-

day enlargement is not applicable to 37 C.F.R. § 2.128 which sets the time for filing the briefs on the case.” TBMP § 113.05.

Misunderstanding of a rule cannot constitute excusable neglect. *See Poly John*, 61 U.S.P.Q.2d at 1861-62; *Panda Security, S.L. v. Panda Core Technology, Inc.*, Opp. No. 91191921, 2011 WL 2161070, at *2 (T.T.A.B. May 18, 2011). The professed misunderstanding of GFA’s counsel regarding the application of the 5-day enlargement after service by mail are belied by the clear requirements, unequivocally set forth in Trademark Rule 2.128(a)(1) and in TBMP Sections 801.02(b) and 113.05, concerning the filing of a responsive trial brief. When faced with the same argument put forth by another applicant, the Board itself recognized that Trademark Rule 2.119(c) *is unambiguous*, and held that the misunderstanding of Trademark Rule 2.119(c) *does not constitute excusable neglect*. *Panda Security*, 2011 WL 2161070, at *2 (granting opposer’s motion to strike applicant’s summary judgment opposition brief, filed three days late, as untimely). The same holding is warranted here.

In addition, GFA’s counsel’s purported misunderstanding of the rules should be regarded with scepticism in view of the fact that both of the lead attorneys of record representing GFA hold themselves out as having extensive experience in matters before the Board. (*See* TTABVUE Doc. No. 94 Exs. B and C.) *Cf. Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 U.S.P.Q.2d 1848, 1852 (T.T.A.B. 2000) (finding that applicant’s counsel had not shown excusable neglect for its failure to respond timely to opposers’ motion for judgment based on a misreading of the applicable rules, given that “counsel ha[d] presented himself, in declarations filed herein, as an experienced practitioner before the Board”). This is not a case in which the defaulting party was unrepresented and unfamiliar with the applicable rules. Nor is it a case in which the defaulting party was represented by inexperienced counsel. To the contrary, GFA is represented in this proceeding by a well-regarded law firm with a national reputation, and by attorneys who loudly proclaim themselves to be experienced Board practitioners. (*See* TTABVUE Doc. No. 94 Exs. B and C.)

For the foregoing reasons alone, Heinz submits that its Motion to Strike GFA’s Trial Brief should be granted and that no consideration should be given to GFA’s brief by the Board.

2. GFA's "Unexpected Problems"

Even if the Board were inclined to overlook GFA's counsel's purported misunderstanding of the applicable rules, GFA's brief was still untimely filed.¹ The reason proffered by GFA's counsel for the additional delay should not be condoned by the Board. Specifically, GFA argues that "several unexpected problems" arose "in connection with e-filing GFA Brands' brief," causing it to be filed after the extended deadline that it believed to apply.² (TTABVUE Doc. No. 95 at 2.)

A review of the cited paragraphs of the Wilbert Declaration (¶¶ 7-8), however, reveals that the "unexpected problems" GFA's counsel encountered were caused by nothing more than GFA's counsel's failure to adequately prepare to meet the deadline. The Wilbert Declaration indicates that GFA's counsel "divided responsibilities for various sections" of the brief. (TTABVUE Doc. No. 95, Wilbert Decl. at ¶ 7.) But "[c]oordinating and compiling the end results of everyone's contributions took more time than anticipated." (*Id.*, emphasis added.) Furthermore, GFA's counsel experienced "problems in formatting and unifying the formatting" of the brief. Of course, the lack of coordination between GFA's three attorneys cannot serve as a basis for excusable neglect. These issues were entirely within the control of GFA's counsel and were not based upon difficulties such as unexpected issues with the Board's e-filing system. (*Id.*, emphasis added.)

Indeed, the TBMP contains an entire section entitled "Plan Ahead." TBMP § 110.09(a). In the section, the Board "strongly encourages" users to plan ahead, noting that "unexpected problems can

¹ GFA's counsel contends that Heinz's counsel's September 18 email clarified that Heinz's Motion "was not based on GFA's brief being an additional ten minutes late." (TTABVUE Doc. No. 95, at 2-3.) To the contrary, Heinz's counsel informed GFA's counsel only that Heinz would not have moved to strike GFA's brief if it "had merely been 10 minutes late, or even several hours late." (*Id.* at Ex. B.) As explained to GFA's counsel, Heinz moved to strike GFA's brief because it was *six days late*, to Heinz's obvious prejudice and GFA's advantage. (*Id.*)

² GFA's counsel also asserts that "Heinz received service [of GFA's Trial Brief] by First Class Mail and a courtesy copy by e-mail before midnight Central Time on September 16." (TTABVUE Doc. No. 95, at 2.) However, the Wilbert Declaration indicates that the service copy of the brief was deposited with the U.S. Postal Service between 11:20 p.m. and midnight on September 16 (*id.* at Wilbert Decl., ¶8), so Heinz certainly did not receive service by First Class Mail on that date. Furthermore, although the time Heinz received a courtesy copy of the brief is irrelevant to whether the brief was timely filed with the Board, Heinz notes that neither it, nor its counsel are located in the Central Time Zone.

occur” when using the Board’s e-filing system. *Id.* Even so, the Board cautions that e-filers “should not anticipate that the Board will extend a deadline because it was not possible to file a paper by ESTTA on the due date.” *Id.* That said, GFA’s counsel’s “unexpected problems” are not even of the type the Board warns about in the TBMP. Rather, GFA’s counsel’s problems stemmed from GFA’s counsel’s failure to plan ahead and to afford sufficient time for the multiple attorneys working on the brief to put their work together and file it by the deadline. GFA’s counsel is correct in stating that such conduct was negligent, but nothing about that negligence was excusable.

B. GFA’s Habitual Disregard Of The Rules

GFA’s counsel argues that it realized its “mistake” within hours of receipt of Heinz’s Motion to Strike, and that it sent an email apology to Heinz’s counsel that day offering to “cure” its error by extending the deadline for Heinz’s Reply Brief. (TTABVUE Doc. No. 95 at 2-3.) Heinz, however, rejected GFA’s proposal and diligently proceeded with preparing and filing its Reply Brief in the time provided under the rules—which was significantly less time due to GFA’s failure to meet its own deadline. Were the circumstances different, Heinz’s response might have been different as well. However, GFA’s failure to timely file its Trial Brief cannot be dismissed as an isolated incident of misconduct by GFA’s counsel. To the contrary, Heinz’s experience with GFA’s counsel’s since the date this proceeding was filed reflects a habitual disregard of the rules governing this proceeding by GFA’s counsel (not to mention a lack of even the most basic measures of professional courtesy at times).

As the Board is aware, the parties have been engaged in a dispute concerning GFA’s expert disclosures since March, 2012. (*See, e.g.*, TTABVUE Doc. No. 26.) That dispute centers on GFA’s election not to make any opening expert disclosures and its subsequent inability to timely disclose its so-called rebuttal experts, ultimately requiring more than three times the amount of time provided in the rules to submit its rebuttal expert disclosures. (*See* TTABVUE Doc. No. 82, App’x A “Opposers’ Evidentiary Objections,” setting forth in detail the procedural posture of GFA’s expert disclosures.) Heinz’s evidentiary objections to GFA’s untimely and improper expert opinions and the testimony related thereto have been fully briefed. In its response to the objections, GFA’s counsel admitted what Heinz has

argued all along—that GFA seeks to introduce the report and testimony of its expert Mr. Johnson *not as a rebuttal expert*, but as a case-in-chief expert, despite the fact that GFA failed to disclose any case-in-chief experts by the expert disclosure deadline, in direct violation of the requirements set forth in TBMP § 401.03, 37 C.F.R. § 2.120(a)(2), and Federal Rule of Civil Procedure 26(a)(2).

What the Board may not yet be aware of, however, is that GFA’s counsel repeatedly violated the Federal Rules of Civil Procedure during the testimony depositions taken in the trial periods of this proceeding.

The testimony depositions of GFA witnesses Leon Kaplan and William Shanks, for example, were attended by Angela Gott on behalf of Heinz, and David Cross on behalf of GFA. Ms. Gott is an associate with Jones Day, and graduated from law school in 2007. Mr. Cross is a senior partner at Quarles & Brady and purports to be an expert in Board proceedings. Mr. Cross’s online professional biography indicates that he has been practicing law for 33 years.

Mr. Cross lost his composure and was decidedly hostile during Ms. Gott’s examinations of Dr. Kaplan and Mr. Shanks. The following excerpt from Mr. Shanks’ deposition provides some idea of the manner in which Mr. Cross expressed his “objections”:

- MS. GOTT: The manufacturer’s exclusive product, in your opinion, would every food product in the grocery store be their competitors?
- MR. SHANKS: It could be by virtue of the beauty of the label or anything else. I mean yeah, I don’t know. I don’t market the product. So I only know what happens to me when I go into a grocery store and I’m hungry.
- MR. CROSS: If it’s not clear, he is being offered solely to show the results of the investigation. He’s not an expert in marketing or consumer behavior. You’re completely wasting all of our time. I don’t know why you persist in this line of questioning.**
- MS. GOTT: Counsel, I’m merely trying to figure out the extent of his investigation and what these photographs are serving to do in this case.
- MR. CROSS: Please move it along. We all have planes to catch. We are all billing our clients ridiculous sums to listen to you going through this line of questioning.**
- MS. GOTT: Mr. Shanks, if you’ll turn to Shanks Exhibit 11, please. In the upper right-hand corner there is a number, if you turn to page GFA043152.

MR. SHANKS: Okay.

MS. GOTT: This page shows a photo of a Glaceau Smart water product; is that correct?

MR. SHANKS: That's correct.

MS. GOTT: You did not purchase this product, did you?

MR. SHANKS: Me personally?

MS. GOTT: You, personally, did not purchase this product?

MR. SHANKS: No.

MS. GOTT: To your knowledge, is water offered for sale in the same section as a grocery store as frozen meals?

MR. CROSS: **This is absurd. Could you move on, please? We will stipulate that none of these products, except for the one that I think is involving ice cream, are sold in the frozen food section of the grocery store.**

If you want the TTAB to read this, which is solely argument portion of the transcript, that's your choice, but I am tired of it. I think it's a complete waste of time.

You're being abusive to us and the witness by going through this and I wish you would move on.

(Shanks Tr. 41:4-43:11, emphasis added.)

The Federal Rules of Civil Procedure require that objections raised during a deposition be “nonargumentative.” Fed. R. Civ. P. 30(c)(2). “Nonargumentative” means just that—no argument. *See Specht v. Google, Inc.*, 268 F.R.D. 596, 598 (N.D. Ill. 2010) (“Objections that are argumentative or that suggest an answer to a witness are called ‘speaking objections’ and are improper under Rule 30(c)(2).”). Although the form in which objections must be stated varies somewhat from court to court, anything that impedes that information flow in a deposition is generally viewed as improper. *See, e.g.*, Fed. R. Civ. P. 30(d) Advisory Committee Notes ¶ 16 (1993) (“Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy”); *Luangisa v. Interface Operations*, No. 2:11-cv-00951-RCJ-CWH, 2011 WL 6029880, at *7 (D. Nev. Dec. 5, 2011) (recognizing widespread judicial criticism of “‘Rambo litigation tactics’ designed to interfere with or prevent the elicitation of meaningful testimony and disrupt the orderly flow of a deposition”). Mr. Cross’s repeated, argumentative

speaking objections and the insults hurled at Heinz's counsel were uncalled for and constituted a violation of the Federal Rules.

Mr. Cross was similarly abusive and combative to Heinz's counsel during the testimony deposition of Heinz's expert witness Barry Sabol. Heinz was represented at Dr. Sabol's deposition by Kevin Meacham, an associate with Jones Day and a 2008 law school graduate. The following is an excerpt from the transcript:

MR. CROSS: For example, in your case when you were being questioned by counsel, you said that you wanted to select people most likely to be confused - -

MR. MEACHAM: Objection. Mischaracterizes - -

MR. CROSS: - - when you conducted your study, correct?

MR. MEACHAM: Objection. Mischaracterizes testimony.

DR. SABOL: No, that's not what I meant, and that's not what I said.

MR. CROSS: Well, the record will reflect exactly what you said.

MR. MEACHAM: Objection.

MR. CROSS: But the way you stated and the way you selected your sample indeed was intended to select people most likely to be confused - -

MR. MEACHAM: Objection. Argumentative.

MR. CROSS: - - isn't that true?

MR. CROSS: Wait until I'm done with my question before you interrupt me.

MR. MEACHAM: Counsel, you interrupted his response after your last question.

MR. CROSS: He was done.

MR. MEACHAM: He was not done. He was going to say - - he was going to respond further.

MR. CROSS: Are you going to tell him what he was going to say?

MR. MEACHAM: No, I'm not going to tell him.

MR. CROSS: Good.

MR. CROSS: Are you going to retract the testimony that you gave previously?

DR. SABOL: No.

MR. CROSS: All right. Then it stands.

(Sabol Tr. 96:8-97:21.)

Mr. Cross's abusive litigation tactics and his offensive and inflammatory remarks during the depositions in this proceeding violated both the spirit and letter of the applicable rules. The above excerpts provide just a few examples. Heinz is submitting herewith the Declaration of Angela R. Gott, which sets forth additional information regarding GFA's counsel's conduct during the testimony depositions of Dr. Kaplan and Mr. Shanks.

C. Public Policy Dictates That GFA's Trial Brief Be Stricken

GFA's counsel's abusive behavior during the testimony depositions in this proceeding (in violation of Fed. R. Civ. P. 30(c)(2)), the clearly untimely disclosure of GFA's case-in-chief expert (in violation of Fed. R. Civ. P. 26(a)(2) and Trademark Rule 2.120(a)(2)), and the acknowledged late submission of GFA's Trial Brief (in violation of Trademark Rule 2.128) all beg the question: Why do attorneys that advertise themselves as experts on Board practice and procedure believe that they may ignore these rules with impunity? Unfortunately, the most likely answer is that there have been other instances in the past in which their failures to adhere to the rules have been excused and overlooked by other tribunals.

In proceedings such as this one, where one party assiduously observes the applicable rules and the other party repeatedly ignores them, *the prejudice to the observant party is manifest*. Indeed, Heinz worked diligently and conscientiously to file its Reply Brief within the schedule set by the Board, even though it had 40% less time to do so because of GFA's late filing. In contrast, GFA had 120% of the time to prepare and file its Trial Brief than permitted by the plain language of the rules.

GFA's counsel cites cases in its response to Heinz's Motion in which the Board has excused trial briefs filed one day late, two days late, and five days late. Here, GFA admits that its Trial Brief was filed *six days late* and asks the Board to overlook its tardiness. But where would GFA draw the line? Why not overlook a trial brief filed ten days late? Or fourteen days late? Why not excuse a trial brief that is thirty days late, as long as the party submitting it is "acting in good faith" and in accordance with what it

believes to be the requirement of the rules? Under the standard posited by GFA, any prejudice to the other party could be instantaneously cured by providing the other party an extension of the reply deadline. In other words, a non-observant party's failure to meet applicable filing deadlines would be excused automatically, as a matter of course.

But such a standard is nonsensical. GFA would have the Board find that a six day "grace period" is appropriate despite the fact that its counsel acted negligently in failing to timely file its Trial Brief. However, Heinz respectfully asserts (and does not believe it to be a controversial assertion) that the more appropriate approach would be to merely apply the plain, unambiguous language of the applicable rules.

GFA's Trial Brief was due on September 11, 2013, and GFA filed its brief on September 17, 2013, *six days late*. These facts are uncontested. Moreover, GFA has failed to establish that its failure to timely meet the deadline resulted from excusable neglect. Thus, GFA's brief should not be considered by the Board.

II. CONCLUSION

For all of the foregoing reasons, Heinz respectfully requests that the Board strike and refuse to consider GFA's untimely Trial Brief.

Respectfully submitted,

Dated: October 11, 2013

By: /Timothy P. Fraelich/

Timothy P. Fraelich
Angela R. Gott
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
(216) 586-3939 (phone)
(216) 579-0212 (fax)
tfraelich@jonesday.com
agott@jonesday.com

*Attorneys for Opposers
ProMark Brands Inc. and H. J. Heinz Company*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent by First Class U.S. Mail, postage prepaid, with a courtesy copy via email, on this 11th day of October, 2013, to Counsel for Applicant:

David R. Cross
Marta S. Levine
Johanna M. Wilbert
QUARLES & BRADY LLP
411 East Wisconsin Avenue, Suite 2040
Milwaukee, Wisconsin 53202-4497

david.cross@quarles.com
marta.levine@quarles.com
johanna.wilbert@quarles.com

/Angela R. Gott/

Attorney for Opposers

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

PROMARK BRANDS INC. and
H. J. HEINZ COMPANY,

Opposers,

vs.

GFA BRANDS, INC.,

Applicant.

**Opposition No. 91194974 (Parent)
and Opposition No. 91196358**

U.S. Trademark Application 77/864,305
For the Mark **SMART BALANCE**

U.S. Trademark Application 77/864,268
For the Mark **SMART BALANCE**

**DECLARATION OF ANGELA R. GOTT IN SUPPORT OF OPPOSERS’
MOTION TO STRIKE APPLICANT’S TRIAL BRIEF**

I, ANGELA R. GOTT, declare the following under penalty of perjury under the laws of the United States:

1. I am an attorney at the law firm of Jones Day and one of the lawyers representing Opposers ProMark Brands Inc. and H. J. Heinz Company (collectively, “Heinz”) in the above-captioned proceeding. I submit this declaration in support of Heinz’s Motion to Strike Applicant’s Trial Brief (TTABVUE Doc. No. 94).

2. I am a 2007 graduate of The University of Akron School of Law and was admitted to the bar by the Supreme Court of the State of Ohio that same year. I have been practicing law for six years.

3. On April 23, 2013, I attended the testimony depositions of Leon Kaplan and William Shanks on behalf of Heinz. Dr. Kaplan and Mr. Shanks were offered as trial witnesses by Applicant GFA Brands, Inc. (“GFA”). David Cross, one of the lead attorneys of record for GFA, attended the depositions on behalf of GFA.

4. During the deposition of Dr. Kaplan, I questioned Dr. Kaplan about a case cited in his expert report to support his assertion that Weight Watchers had been criticized in the past for conducting a likelihood of confusion survey with an under inclusive universe. (Kaplan Tr. 106:20-108:21.) Dr. Kaplan was surprised and confused when I showed him the opinion and pointed out that the court had actually criticized Weight Watchers for conducting a survey with an *over inclusive* universe. (*Id.* at

108:22-111:7.) Mr. Cross immediately went into a tirade, insinuating that I was trying to mislead Dr. Kaplan. (*Id.* at 111:8-112:5.) Mr. Cross argued that I was not treating Dr. Kaplan fairly when I showed Dr. Kaplan a copy of the opinion with the Federal Supplement pinpoint citations rather than the U.S.P.Q. pinpoint citations, despite the fact that Dr. Kaplan’s own report referred to both the Federal Supplement reporter citation and the U.S.P.Q. reporter citation¹. (*Id.*) Shortly thereafter, Mr. Cross bitingly remarked to Dr. Kaplan that I had “decided . . . to give [him] a West version of this opinion. So those pages don’t match up conveniently.” (*Id.* at 112:6-113:6.)

5. Dr. Kaplan’s deposition was resumed after a short lunch break. I offered Dr. Kaplan the same opinion with the U.S.P.Q. reporter pinpoint citations as Exhibit 2. (Kaplan Tr. 113:16-114:2.) When I asked Dr. Kaplan about the criticism of the court in the opinion, Mr. Cross interjected, again without articulating a specific objection, arguing that my questioning was “absurd and wasteful.” (*Id.* at 116:25-118:20.)

6. Mr. Cross’s remarks during Dr. Kaplan’s deposition were antagonistic and offensive. However, Mr. Cross also lost his composure and was decidedly hostile during Mr. Shanks’ deposition.

7. To put things in perspective, Mr. Shanks’ deposition began at 2:19 p.m., shortly after the conclusion of Dr. Kaplan’s deposition. (Shanks Tr. at 1.) Mr. Cross completed his direct examination at 2:45 p.m. (*id.* at 26:6), and I began my cross examination at 2:52 p.m. (*id.* at 26:8). Mr. Shanks’ deposition concluded at 3:41 p.m. (*Id.* at 55:5.)

8. Although the depositions of Dr. Kaplan, GFA’s rebuttal expert witness, and Mr. Shanks, GFA’s private investigator, were scheduled back-to-back on April 23, Mr. Cross apparently had not planned for a full day of depositions and was very animated about missing his flight home that afternoon. During my 43 minutes on the record (we took a 6 minute break near the end), Mr. Cross proclaimed that “[w]e all have planes to catch.” (Shanks Tr. 41:13-42:4; 42:22-43:11.) And, toward the end of my

¹ I offered the opinion with the Federal Supplement reporter pinpoint citations to Dr. Kaplan as Exhibit 1 during his testimony deposition because the U.S.P.Q. citation in his report, “19 U.S.P.Q.2nd 291,” is not the correct citation for the opinion that was at issue.

examination, he demanded to know whether I was “intentionally trying to make [him] late for [his] flight.” Mr. Cross then commanded that I “Move on.” (*Id.* at 53:8-53:12). In fact, he berated me to “move on” no fewer than nine times during Mr. Shanks’s deposition. (*Id.* at 41:24-42:4; 42:22-43:11; 52:14-17; 52:25-53:1; 53:12; 53:22-23; 54:4; 54:23-25.)

9. In the course of my brief examination of Mr. Shanks, Mr. Cross called my questions “absurd,” and accused me of “completely wasting all of our time” and “being abusive to [GFA] and the witness.” (Shanks Tr. 41:13-42:4; 42:22-43:11; 54:4.)

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

Executed in Cleveland, Ohio on October 11, 2013.

/Angela R. Gott/
Angela R. Gott
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
(216) 586-3939 (phone)
(216) 579-0212 (fax)
agott@jonesday.com