TTAB

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

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

CATERPILLAR INC.,	)	
	)	
Petitioner,	)	
v.	)	Cancellation No. 41,776
	)	
PAVE TECH, INC.,	)	
	)	
Registrant.	)	

Certificate of Mailing
I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Trademarks, 2900 Crystal Drive, Arlington Virginia 22202-3514 on April 30, 2004.

MOTION FOR EXTENSION OF DISCOVERY AND TESTIMONY PERIODS

Petitioner, Caterpillar Inc., moves the Board pursuant to Rule 2.120 of the Trademark Rules of Practice for a 60 day extension of the discovery deadline and all subsequent deadlines for the trial periods. In support of this motion, Caterpillar hereby states as follows:

1. On April 21, 2004, Pave Tech served three notices of depositions on Caterpillar for the last three days before discovery closes on May 5, 2004. The depositions noticed were for the following persons: Terry G. Sharp on May 3, 2004 in Eden Prairie, Minnesota; Gene Bolmarcich on May 4, 2004 in Peoria, Illinois, and Caterpillar's 30(b)(6) witnesses on May 5, 2004 in Peoria, Illinois. Exhibit A, Pave Tech Notices of Depositions. In the e-mail accompanying the notices of depositions, Pave Tech's counsel indicated that Pave Tech was open to "alterations in the deposition times and places." Exhibit B, April 21, 2004 E-mail from Rebecca Bishop.

2. On April 22nd, Caterpillar's counsel responded to Pave Tech's e-mail stating that both of Caterpillar's attorneys would be out of the office from May 1st to May 7th and that the

05-03-2004
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #77

depositions would have to be rescheduled. In that same e-mail, Caterpillar's counsel stated the parties "would need to agree to extend the discovery period to schedule the depositions and further depositions on our end." Exhibit C, April 22, 2004 E-mail from Mary Innis.

3. On April 27, 2004, Caterpillar's counsel spoke with Pave Tech's attorney, Rebecca Bishop, regarding an extension of the discovery schedule, the additional depositions that Caterpillar intended to take, and a potential settlement. During that conversation, Caterpillar's counsel requested a 60 day extension of the discovery deadline for both of the parties to take the depositions they had requested. Ms. Bishop indicated that Pave Tech would be willing to agree to a 30 day extension of discovery but that she would have to ask her client before she could agree to a 60 day extension of discovery. Exhibit D, Declaration of Nerissa Coyle McGinn.

4. On April 28, 2004, Caterpillar sent Pave Tech a letter with a settlement proposal. In addition to the settlement proposal, the letter also attached two notices of depositions for Dale Sapkowiak on May 14, 2004 and Glen Wrobleski on May 12, 2004. Exhibit E, April 28, 2004 Letter from Nerissa McGinn and Caterpillar Notices of Depositions. These were the two depositions Caterpillar had referred to in its April 22, 2004 e-mail. Exhibit D, Declaration of Nerissa Coyle McGinn.

5. On April 29, 2004, Pave Tech's attorney reneged on its previous agreement to extend the discovery period and to reschedule the May 3-5 depositions. Pave Tech's counsel insisted on taking the depositions on May 3-5 unless Caterpillar would agree to a "unilateral" extension of time. The terms of this "unilateral" extension of time would allow Pave Tech to take its three deposition after the close of discovery, but would preclude Caterpillar from taking its two depositions. Exhibit D, Declaration of Nerissa Coyle McGinn.

6. Caterpillar argued that this proposal directly violated the oral agreement between the parties discussed on April 27th. Not surprisingly, Pave Tech's attorney denied that she had agreed to an extension of time claiming that she had stated that "I do not have a problem with the 30 day extension", not that her client did not have problem with the 30 day extension. *See also*, Exhibit F, April 29th letter from Pave Tech. Pave Tech did not deny that it had previously stated that it would be willing to reschedule the depositions. Exhibit D, Declaration of Nerissa Coyle McGinn.

7. Pave Tech's abrupt change of position is obviously an attempt to preclude Caterpillar from taking the depositions of Dale Sapkowiak and Glen Wrobleski, but to allow Pave Tech to continue with its discovery. This is a bad faith manipulation of the discovery process and the previous agreements between the parties. Caterpillar told Pave Tech within one day of receiving Pave Tech's notices of depositions that it would not be able to attend the depositions. Pave Tech had not only indicated that it would be willing to reschedule the depositions but also that it would extend the discovery period. However, now that Caterpillar has served two notices of depositions for Pave Tech employees, Pave Tech is suddenly refusing to reschedule the May 3-5 depositions and will not extend the discovery period.

8. Filed simultaneously with this motion is a motion for protective order requesting that Caterpillar not be required to attend the May 3-5 depositions and be allowed to reschedule the depositions after the Board has granted this extension of time. Exhibit G, Motion for Protective Order without Exhibits.

9. Caterpillar has requested this additional time for the Board to rule on Caterpillar's Motion for Protective Order. After the Board rules on Caterpillar's Motion for Protective Order and this extension of time, both parties intend to take the outstanding depositions. Moreover,

Caterpillar requested this extension of time in order that the parties have the opportunity to discuss Caterpillar's settlement proposal. This request is submitted in good faith, and not for purposes of delay.

For the reasons set forth herein, Petitioner respectfully requests that the Board grant Caterpillar's Request for Extension of Time.

Dated: April 30, 2004

LOEB & LOEB LLP

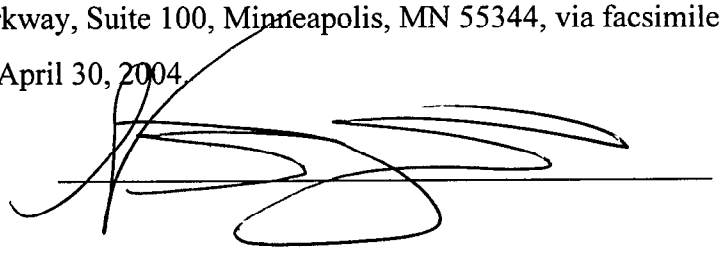
By: _____

Mary E. Innis
Nerissa Coyle McGinn
200 South Wacker Drive, Suite 3100
Chicago, Illinois 60606
Telephone: (312) 674-4780
Facsimile: (312) 674-4779

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Nerissa Coyle McGinn, hereby certify that I caused a copy of the foregoing **MOTION FOR EXTENSION OF DISCOVERY AND TESTIMONY PERIODS** to Michael J. O'Loughlin, Micheal J. O'Loughlin & Associates, P.A., 400 South 4th Street, 1012 Grain Exchange Building, Minneapolis, Minnesota 55415 and Rebecca Jo Bishop, Altera Law Group LLC, 6500 City West Parkway, Suite 100, Minneapolis, MN 55344, via facsimile and first class mail, postage prepaid on April 30, 2004.



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

A

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

CATERPILLAR INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cancellation No. 41,776
	)	
PAVE TECH, INC.,	)	
	)	
Registrant.	)	
	)	

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE that, on May 3, 2004, commencing at 9:30 a.m. and continuing until completed, Registrant, Pave Tech, Inc., will depose on oral examination Terry G. Sharp of Caterpillar Paving Products, Inc., a subsidiary of Caterpillar, Inc., located at 9401 85th Avenue North, Brooklyn Park, Minnesota 55445. The deposition will be held at the offices of Altera Law Group, LLP located at 6500 City West Parkway, Suite 100, Eden Prairie, MN 55344, or at such other place and time as counsel may agree. The deposition will take place pursuant to the Federal Rules of Civil Procedure before a notary public or before some other officer authorized by law to administer oaths by the laws of the United States or of the place where the examination is held, with such adjournments as to time and place as may be necessary. Counsel for Caterpillar is invited to attend and cross-examine.

Respectfully submitted,

PAVE TECH, INC.

By its attorneys,

Dated: April 21, 2004

Rebecca Jo Bishop (MN Bar No. 298,165)
Karen D. McDaniel (MN Bar No. 194,554)
ALTERA LAW GROUP
6500 City West Parkway

EXHIBIT
tabbies
A

Suite 100
Eden Prairie, MN 55344
Telephone: (952) 253-4100
Fax: (952) 912-0574

Michael J. O'Loughlin (MN Bar No. 81,607)
MICHAEL J. O'LOUGHLIN & ASSOC, P.A.
400 South 4th Street
1012 Grain Exchange Building
Minneapolis, MN 55415
Telephone: (612) 342-0351
Fax: (612) 342-2399

CERTIFICATE OF SERVICE

I, Rebecca J. Bishop, hereby certify that on this 21st day of April, 2004, a true and correct copy of the foregoing document, NOTICE OF DEPOSITION, was served via e-mail delivery and first class mail postage prepaid on:

Mary E. Innis
Nerissa Coyle McGinn
LOEB & LOEB LLP
200 South Wacker Drive
Suite 3100
Chicago, Illinois 60606
(312) 674-4780
minnis@loeb.com
nmcginn@loeb.com

Rebecca J. Bishop

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

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

CATERPILLAR INC.,	)	
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Petitioner,	)	
	)	
v.	)	Cancellation No. 41,776
	)	
PAVE TECH, INC.,	)	
	)	
Registrant.	)	
	)	

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE that, on May 4, 2004, commencing at 9:30 a.m. and continuing until completed, Registrant, Pave Tech, Inc., will depose on oral examination Gene Bolmarcich, Caterpillar's Senior Intellectual Property Attorney, Caterpillar, Inc. located at 100 Northeast Adams Street, Peoria, IL 61602. The deposition will be held at the offices of Howard & Howard Attorneys, P.C., One Technology Plaza, Suite 600, 211 Fulton Street, Peoria, Illinois 61602-1350, or at such other place and time as counsel may agree. The deposition will take place pursuant to the Federal Rules of Civil Procedure before a notary public or before some other officer authorized by law to administer oaths by the laws of the United States or of the place where the examination is held, with such adjournments as to time and place as may be necessary. Counsel for Caterpillar is invited to attend and cross-examine.

Respectfully submitted,

PAVE TECH, INC.

By its attorneys,

Dated: April 21, 2004

Rebecca Jo Bishop (MN Bar No. 298,165)
Karen D. McDaniel (MN Bar No. 194,554)
ALTERA LAW GROUP
6500 City West Parkway

Suite 100
Eden Prairie, MN 55344
Telephone: (952) 253-4100
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Michael J. O'Loughlin (MN Bar No. 81,607)
MICHAEL J. O'LOUGHLIN & ASSOC, P.A.
400 South 4th Street
1012 Grain Exchange Building
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Telephone: (612) 342-0351
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Mary E. Innis
Nerissa Coyle McGinn
LOEB & LOEB LLP
200 South Wacker Drive
Suite 3100
Chicago, Illinois 60606
(312) 674-4780
minnis@loeb.com
nmcginn@loeb.com

Rebecca J. Bishop

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In the Matter of Registration No. 2,684,138: PAVERCAT
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CATERPILLAR INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cancellation No. 41,776
	)	
PAVE TECH, INC.,	)	
	)	
Registrant.	)	
	)	

NOTICE OF RULE 30(b)(6) DEPOSITION

PLEASE TAKE NOTICE that, on May 5, 2004, commencing at 9:30 a.m. and continuing until completed, Registrant, Pave Tech, Inc., will depose on oral examination Caterpillar, Inc. ("Caterpillar") located at 100 Northeast Adams Street, Peoria, IL 61062, on the topics set forth in attached Schedule A. The deposition will be held at the offices of Howard & Howard Attorneys, P.C., One Technology Plaza, Suite 600, 211 Fulton Street, Peoria, Illinois 61602-1350, or at such other place and time as counsel may agree.

Caterpillar is instructed to designate one or more witnesses most familiar with each category who will testify about each category, on Caterpillar's behalf, pursuant to Federal Rule of Civil Procedure 30(b)(6). Caterpillar is requested to provide and have available all documents previously called for production by Registrant to the extent not previously produced, specifically including but not limited to item 18 in Schedule A.

The deposition will take place pursuant to the Federal Rules of Civil Procedure before a notary public or before some other officer authorized by law to administer oaths by the laws of the United States or of the place where the examination is held, with such adjournments as to

time and place as may be necessary. Counsel for Caterpillar is invited to attend and cross-examine.

Respectfully submitted,

PAVE TECH, INC.

By its attorneys,

Dated: April 21, 2004

Rebecca Jo Bishop (MN Bar No. 298,165)
Karen D. McDaniel (MN Bar No. 194,554)
ALTERA LAW GROUP
6500 City West Parkway
Suite 100
Eden Prairie, MN 55344
Telephone: (952) 253-4100
Fax: (952) 912-0574

Michael J. O'Loughlin (MN Bar No. 81,607)
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400 South 4th Street
1012 Grain Exchange Building
Minneapolis, MN 55415
Telephone: (612) 342-0351
Fax: (612) 342-2399

SCHEDULE A

1. The business of Petitioner, "Petitioner" hereinafter referring inclusively to Caterpillar, Inc., its predecessors in interest, any parent entities, its subsidiaries and related organizations and the officers, directors, employees, agents and representatives thereof, collectively referred to as "Petitioner";

2. The marks of Petitioner, hereinafter defined as those trademarks, service marks and design marks alleged in the Notice of Opposition, collectively referred to as "the Caterpillar marks";

3. Petitioner's efforts to seek federal trademark and/or service mark protection for the Caterpillar marks and the present status of each such registration and application for the Caterpillar marks.

4. The use in commerce of the Caterpillar marks;

5. The goods and services on which the Caterpillar marks are used;

6. The advertising, marketing and promotion of all of Petitioner's products or services sold in connection with the Caterpillar marks.

7. The marketplace in which Petitioner's goods and services under the Caterpillar marks are marketed and sold, including channels of trade, how sales are made, the purchase decision, and delivery of the goods or services;

8. The current, prior and potential customers of Petitioner who purchase goods or services sold under the Caterpillar marks;

9. Industry trade shows, conventions and seminars attended by Petitioner;

10. Memberships held by Petitioner in industry organizations;

11. Petitioner's Pneumatic Cat Lift machine;

12. Petitioner's compact equipment;

13. Petitioner's skid steer loader equipment;

14. Any of Petitioner's products or services that Petitioner contends is similar to or performs the functions of Registrant's PAVERCAT equipment;

15. The paving industry, including but not limited to asphalt paving, general information about the marketplace of the paving industry, Petitioner's goods and services under the Caterpillar marks offered in the paving industry and the like;

16. The landscaping industry, general information about the marketplace of the landscaping industry, Petitioner's goods and services under the Caterpillar marks offered in the landscaping industry and the like;

17. The segmental paver industry, general information about the marketplace of the segmental paver industry, Petitioner's involvement or promotional activities in the segmental paver industry, including goods or services offered under the Caterpillar marks used in connection with the segmental paver industry, and the like;

18. The development, placement and removal of content on Petitioner's web site;

19. Any research, survey, trademark search, test, poll, interview, study or investigation related to Registrant, the mark PAVERCAT, or the Caterpillar marks, or relating to third-party trademarks or service marks incorporating in whole or in part the word CAT, either as a free standing designation or joined with other terms in a composite expression;

20. Petitioner's knowledge of third-party use, registration or application to register names, marks or terms which are composed in whole or in part of the word CAT or are or may be confusingly similar to or dilutive of the Caterpillar marks or the mark PAVERCAT;

21. Any of Petitioner's prior or current assertions of trademark rights against third parties regarding the Caterpillar marks, including past or current enforcement actions, oppositions, cancellations, state or federal lawsuits, settlement agreements and the like;

22. Registrant's use of the PAVERCAT mark;

23. The factual basis for Petitioner's allegation that there is a likelihood of confusion, mistake or deception caused by the co-existence of the Caterpillar marks and Registrant's mark PAVERCAT;

24. The factual basis for Petitioner's allegation that the registration of the trademark PAVERCAT is and will continue to be damaging to Petitioner;

25. All claimed instances of actual confusion, if any, caused by the co-existence of the Caterpillar marks and Registrant's mark PAVERCAT;

26. Any facts on which Petitioner intends to rely to support a contention that Petitioner sells equipment that performs the same functions as Registrant's PAVERCAT equipment;

27. Any facts on which Petitioner intends to rely to support a contention that Petitioner sells equipment in the same channel of trade in which Registrant sells its PAVERCAT equipment;

28. Identification and authentication of all documents produced in response to Registrant's discovery requests.

CERTIFICATE OF SERVICE

I, Rebecca J. Bishop, hereby certify that on this 21st day of April, 2004, a true and correct copy of the foregoing document, NOTICE OF RULE 30(b)(6) DEPOSITION, was served via e-mail delivery and first class mail postage prepaid on:

Mary E. Innis
Nerissa Coyle McGinn
LOEB & LOEB LLP
200 South Wacker Drive
Suite 3100
Chicago, Illinois 60606
(312) 674-4780
minnis@loeb.com
nmcginn@loeb.com

Rebecca J. Bishop

B

-----Original Message-----
From: Rebecca Bishop [mailto:rbishop@alteralaw.com]
Sent: Wed Apr 21 11:40:51 2004
To: Mary Innis; Nerissa McGinn
Cc: Rebecca Bishop; minnlaw@mn.rr.com
Subject: Caterpellar v. Pave Tech Cancellation (Our Ref. 01000.0319-US-TA)

Ms. Innis and Ms. Coyle McGinn,

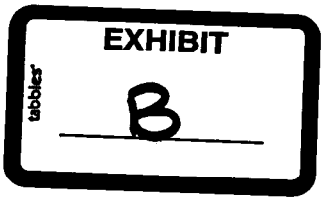
Good afternoon. Please find attached and served on you three Notices of Deposition by Pave Tech, Inc. in connection with the above-identified cancellation matter. I am also sending a copy via U.S. mail today. As stated in the notices, Pave Tech is open to discussing alterations in the deposition times and places, but did attempt to notice the deponents in the jurisdiction in which, to the best of our knowledge, they reside.

I intend to call one of you this afternoon to introduce myself and to discuss the notices further. If you have any questions before then, please do not hesitate to contact me at the information below.

Very truly yours,
Rebecca Bishop

ALTERA LAW GROUP
6500 City West Parkway
Suite 100
Eden Prairie, MN 55344-7704
952.253.4100 (direct)
952.912.0574 (fax)
RBishop@AlteraLaw.com
www.AlteraLaw.com

This message is meant to be read only by the recipient(s) listed above, and may contain confidential information and/or information protected by an ATTORNEY/CLIENT PRIVILEGE. If you have received this message in error, please delete all copies of this message and contact us at 952-253-4100. Thank you.



C

-----Original Message-----
From: Mary Innis
Sent: Thursday, April 22, 2004 3:18 PM
To: 'rbishop@alteralaw.com'
Subject: RE: Caterpellar v. Pave Tech Cancellation (Our Ref. 01000.0319-US-TA)

Ms. Bishop,
Please be advised that both Ms. McGinn and I are out of the office. I do know, however, that we will need to reschedule the depositions as both Nerissa and I are out of the office May 1-7. In addition, I believe that we will need to agree to extend the discovery period to schedule the depositions and further depositions on our end. We also might want to discuss some settlement options. I will call you today if I am able or tomorrow to discuss further.

Regards,
Mary Innis

-----Original Message-----
From: Rebecca Bishop [mailto:rbishop@alteralaw.com]
Sent: Wednesday, April 21, 2004 1:38 PM
To: Mary Innis; Nerissa McGinn
Cc: Rebecca Bishop; minnlaw@mn.rr.com
Subject: Caterpellar v. Pave Tech Cancellation (Our Ref. 01000.0319-US-TA)

Ms. Innis and Ms. Coyle McGinn,

Good afternoon. Please find attached and served on you three Notices of Deposition by Pave Tech, Inc. in connection with the above-identified cancellation matter. I am also sending a copy via U.S. mail today. As stated in the notices, Pave Tech is open to discussing alterations in the deposition times and places, but did attempt to notice the deponents in the jurisdiction in which, to the best of our knowledge, they reside.

I intend to call one of you this afternoon to introduce myself and to discuss the notices further. If you have any questions before then, please do not hesitate to contact me at the information below.

Very truly yours,
Rebecca Bishop

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www.AlteraLaw.com

This message is meant to be read only by the recipient(s) listed above, and may contain confidential information and/or information protected by an ATTORNEY/CLIENT PRIVILEGE. If you have received this message in error, please delete all copies of this message and contact us at 952-253-4100. Thank you.

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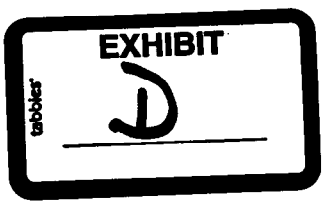
Petitioner,	)	
v.	)	Cancellation No. 41,776
	)	
PAVE TECH, INC.,	)	
	)	
Registrant.	)	

DECLARATION OF NERISSA COYLE MCGINN
IN SUPPORT OF CATERPILLAR'S
MOTION FOR EXTENSION

1. I am an attorney with Loeb & Loeb LLP, 200 South Wacker, Suite 3100, Chicago, Illinois 60606, counsel of Petitioner, Caterpillar Inc. ("Caterpillar"). I am one of the lawyers primarily responsible for the above captioned matter on Caterpillar's behalf. In such capacity, I submit this affidavit in support of Caterpillar's Motion for Extension of the Discovery and Testimony Periods. I have personal knowledge of the facts set forth herein and can testify competently hereto.

2. On April 21, 2004, Pave Tech served three notices of depositions on Caterpillar for the last three days before discovery closes on May 5, 2004. The depositions noticed were for the following persons: Terry G. Sharp on May 3, 2004 in Eden Prairie, Minnesota; Gene Bolmarcich on May 4, 2004 in Peoria, Illinois, and Caterpillar's 30(b)(6) witnesses on May 5, 2004 in Peoria, Illinois. Exhibit A, Pave Tech Notices of Depositions. In the e-mail accompanying the notices of depositions, Pave Tech's counsel indicated that Pave Tech was open to "alterations in the deposition times and places."



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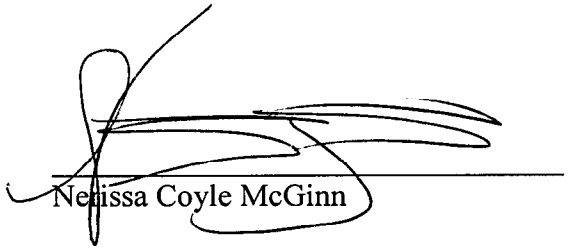
discovery, but would preclude Caterpillar from taking the two depositions that it had noticed up during the discovery period.

7. Caterpillar argued that this proposal directly violated the oral agreement between the parties discussed on April 27th. Not surprisingly, Pave Tech's attorney denied that she had agreed to an extension of time claiming that she had stated that "I do not have a problem with the 30 day extension", not that her client does not have problem with the 30 day extension. Pave Tech did not deny that it had previously stated that it would be willing to reschedule with depositions.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on the 30th day of April, 2004.

Date: April 30, 2004



Nelissa Coyle McGinn

LOEB&LOEB LLP

A LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

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SUITE 3100
CHICAGO, IL 60606-5867

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Direct Dial: 312-674-4784
e-mail: nmcginn@loeb.com

E

April 28, 2004

VIA FACSIMILE & U.S. MAIL

Michael J. O'Loughlin
Michael J. O'Loughlin & Associates, P.A.
400 South 4th Street
1012 Grain Exchange Building
Minneapolis, MN 55415

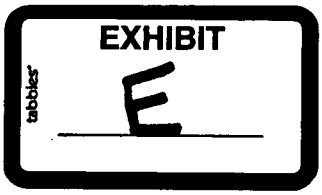
Rebecca Jo Bishop
Altera Law Group
6500 City West Parkway
Suite 100
Eden Pairie, MN 55322

Re: Caterpillar Inc. v. Pave Tech, Inc.

Dear Michael:

After reviewing the deposition testimony of Stephen Jones and Robert Cramer, Caterpillar believes that the deposition testimony establishes that there is a likelihood of confusion between the Caterpillar Marks and Pave Tech's PAVERCAT mark. The most damning of the evidence against Pave Tech is the fact that one of Pave Tech's 30(b)(6) witnesses admitted that there is a possibility of confusion between the two marks. In his deposition, Bob Cramer admitted that he believed there was a possibility that attendees at trade shows might mistakenly believe that the PAVERCAT product was somehow associated with Caterpillar. Cramer, p. 34-35.

In addition to this admission, Caterpillar also believes the deposition testimony demonstrates a likelihood of confusion between the PAVERCAT and the Caterpillar Marks because the marks, the products sold in connection with the marks, and the markets in which the products are sold are confusingly similar. First, the addition of the descriptor "paver" does not sufficiently distinguish the PAVERCAT mark from the Caterpillar Marks. The only difference between the CAT and PAVERCAT marks is the word "paver" which Pave Tech has admitted is generic for the type of brick used in segmental paving. Jones, p. 11, 16-17; Cramer, p. 47. The Board repeatedly has ruled that the combination of a descriptive or generic term such as "paver" with a famous mark such as the CAT mark does not adequately distinguish the challenged mark from the CAT mark. *Caterpillar Inc. v. Gehl Company*, 177 U.S.P.Q. 343 (TTAB 1973) (holding that Caterpillar's mark CAT and respondent's mark HYDRACAT were



confusingly similar); *Caterpillar v. Electric Carrior Corp.*, 201 U.S.P.Q. 778 (T.T.A.B. 1978) (sustaining Caterpillar's opposition against applicant's mark ELECTRICAT).

Moreover, Pave Tech has a family of marks which combine two generic terms such as the following:

1. PAVEREXTRACTOR – a tool used to extract pavers
2. PAVERCART – a cart used to transport pavers
3. PAVERADJUSTER – a tool used to adjust pavers.

Similar to Pave Tech's other marks, Caterpillar believes that the PAVERCAT mark is a combination of two terms being used descriptively. As admitted by Pave Tech, the term "paver" is descriptive of the type of bricks used in the segmental paving industry. Moreover, both Stephen Jones and Bob Cramer admitted that CAT is a well-known or famous brand name for heavy equipment. Cramer, p. 48; Jones, p. 42-43. Therefore, Pave Tech is using the term "cat" to intentionally trade on the goodwill of the Caterpillar Marks in connection with heavy equipment.

Second, the PAVERCAT and Caterpillar products are confusingly similar. Despite the fact that Pave Tech attempted to distinguish the PAVERCAT product from a Caterpillar skid steer loader, Bob Cramer admitted during his deposition that both a skid steer loader and a PAVERCAT perform some of the same functions – back dragging and moving pavers. Cramer, p. 47. Moreover, Pave Tech admitted that Pave Tech has used and continues to use skid steer loaders instead of the PAVERCAT product for installing segmental pavers and in demonstrations. Jones, p. 75; Cramer, p. 9-18.

Third, the PAVERCAT and Caterpillar products are sold in the same market. Pave Tech attempted to distinguish Caterpillar markets by claiming that the target market for the PAVERCAT is the small, niche segmental paver market. However, as admitted by Stephen Jones, this niche market is a subset of the general construction and landscaping markets – both of which are Caterpillar target markets. Jones, p. 71-72, In addition to this admission, it is clear from Bob Cramer's testimony that Caterpillar and Pave Tech's marketing efforts overlap. Bob Cramer, Pave Tech's

30(b)(6) witness on trade shows, admitted that Caterpillar and Pave Tech attended the same trade shows. Cramer, p. 34. The trade shows which both Caterpillar and Pave Tech attended include the following: the World of Concrete 2000 (which is the first trade show where Pave Tech first introduced the PAVERCAT); the World of Concrete 2001, the Green Industry Expo 2002, and the Green Industry Expo 2003. Cramer, p. 9-18, 23-24, 33, 39-40. Therefore, Caterpillar and Pave Tech's markets overlap.

Because the deposition testimony strongly supports Caterpillar's arguments that there is a likelihood of confusion between the marks, Caterpillar suggests settling this matter. Caterpillar has attached a proposed settlement agreement to this letter as Exhibit 1.

Caterpillar believes settling this matter before either party incurrs any additional discovery expenses will be best for both parties. In addition, Caterpillar believes that settlement in this action is particularly attractive for Pave Tech since it is no longer using the PAVERCAT mark and has no plans to use the PAVERCAT mark in the future. However, Caterpillar would be willing to discuss an appropriate phase out period if necessary.

If Pave Tech does not agree to the terms of the attached settlement agreement, Caterpillar intends to aggressively proceed with the outstanding discovery issues. This would include deposing both Glenn Wrobleski and Dale Sopkowiak. We have attached notices of deposition as Exhibit 2 for both of these witnesses with tentative dates for the depositions that we can discuss in the future. Caterpillar would like to conduct these depositions in early May if Pave Tech does not agree to settle this matter by that time.

Sincerely,

Nerissa McGinn
for Loeb & Loeb LLP

NCM:lp
40076000044
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SETTLEMENT AGREEMENT

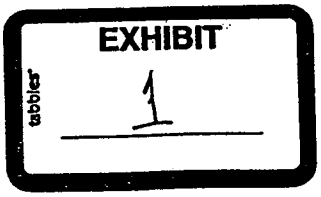
This Settlement Agreement ("Agreement) is made and entered into between Caterpillar Inc. ("Caterpillar), a Delaware corporation with its principal place of business in Peoria, Illinois and Pave Tech, Inc. ("Pave Tech"), a Minnesota corporation with its principal place of business in Prior Lake, Minnesota. This Agreement is effective as of the date of the last required signature below (the "Effective Date").

WHEREAS, Caterpillar is a Delaware corporation with business operations in many areas, including the development, manufacture, distribution, marketing and sale of earthmoving and construction equipment, repair and maintenance services thereof, and the distribution through licensees and otherwise of a wide variety of licensed merchandise including casual clothing, and promotional items, such as note pads, stationary portfolios, pencils, and pens.

WHEREAS, Caterpillar owns the CATERPILLAR and CAT marks and the CATERPILLAR and CAT design marks, for a variety of goods and services, including as a trademark for heavy equipment (the "Caterpillar Marks") and owns registrations for the marks in the United States Patent and Trademark Office, including U.S. Registration Nos. 277,416, 564,272, 1,579,437, and 2,448,848.

WHEREAS, Pave Tech is a Minnesota corporation located in Prior Lake, Minnesota.

WHEREAS, in 2000, subsequent to Caterpillar's use of the Caterpillar Marks,



Pave Tech adopted and began using the mark PAVERCAT in connection with the sale of machines and machine parts used to aid in the installation of segmental pavers.

WHEREAS, on January 28, 2000, Pave Tech filed an application to register the mark PAVERCAT for "machines and machine parts used to aid in the installation of segmental pavers." The application matured to registration on February 4, 2003.

WHEREAS, Caterpillar has objected to Pave Tech's use and petitioned to cancel Pave Tech's PAVERCAT registration (Reg. No. 2,684,138); and

WHEREAS, the parties desire the resolve and settle Caterpillar's objections and Cancellation No. 92,041,776.

NOW, THEREFORE, in consideration of the foregoing, the covenants and agreements set forth herein, and other good and valuable consideration, the receipt and sufficiency of which the parties hereby accept and acknowledge, the parties agree as follows:

1. Simultaneously with its execution of this Agreement, Pave Tech will execute the attached Surrender for Cancellation in the form attached hereto as Exhibit A and thereby irrevocably abandons its rights in and to Federal Registration No. 2,684,138 for the PAVERCAT mark together with the goodwill symbolized by and associated with the mark.

2. As of the Effective Date of this Agreement, Pave Tech shall permanently cease all use of PAVERCAT and shall not use or attempt to register any name or mark that a) is an imitation or simulation of any of Caterpillar's trademarks; b) includes the

word "CAT" or "KAT" or c) is likely to dilute the distinctiveness of any of the Caterpillar trademark or tarnish the goodwill associated with any of them.

3. Within seven (7) days after the Effective Date, Pave Tech shall supply Caterpillar's counsel all materials that bear the PAVERCAT mark for destruction and execute the affidavit attached as Exhibit B.

4. Each party shall bear its own costs and attorneys' fees incurred with respect to this action and with respect to this agreement except as described in Paragraph 12.

5. Waiver of any breach of this Agreement shall be ineffective unless in writing and signed by the Party having waived compliance and shall not be considered a waiver of any other breach.

6. This Agreement, along with its attachments, represents the entire understanding of the Parties with respect to the subjects covered by the Agreement, replaces any prior written or oral agreements, and may not be changed or modified except by a writing signed by both Parties.

7. This Agreement shall bind the Parties, their officers, directors, representatives, licensees, agents, successors, assigns, affiliates, subsidiaries, divisions, shareholders, and all parties in active concert of participation with any of them, and is effective worldwide.

8. Pave Tech shall maintain the terms of this Agreement and the circumstances leading up to and surrounding this Agreement in confidence and, except as

necessary to comply with a court order to secure legal advice, shall not disclose those terms and circumstances to others, without Caterpillar's prior, written consent.

9. The provisions of this Agreement are severable. If any provision of this Agreement is held invalid, illegal, or unenforceable, the remainder of the Agreement shall remain in full force and effect, provided the essential purposes of the Agreement are maintained.

10. The Agreement was negotiated and reviewed by each party's legal counsel and there will be no presumption for or against any party on the grounds that another party prepared the Agreement.

11. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Illinois without regard to choice of law principles.

12. In any action to enforce this Agreement, the prevailing Party shall be entitled to recover its actual attorneys' fees and costs in addition to any other remedy to which it is entitled.

13. This Agreement may be executed in counterparts. Signatures on separate originals shall constitute and be of the same effect as signatures on the same original.

14. The undersigned warrant that they have the authority to sign this Agreement on behalf of the Party for whom he or she has signed.

CATERPILLAR INC.

By:_____ Date: _____

Name:_____

Title:_____

PAVE TECH, INC.

By:_____ Date:_____

Name:_____

Title:_____

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

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

CATERPILLAR INC.,	)	
	)	
Petitioner,	)	
	)	Cancellation No. 41,776
v.	)	
	)	
PAVE TECH, INC.,	)	
	)	
Registrant.	)	
	)	
	)	

SURRENDER FOR CANCELLATION

Purusant to 37 C.F.R. 2.172, Respondent hereby surrenders for cancellation United States Registration No. 2,684,138 for all classes. Attached as Exhibit A is the original certificate of registration.

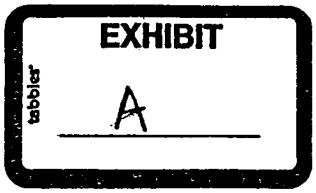
Respectfully submitted,

Dated: _____

PAVE TECH, INC.

By:_____
Michael J. O'Loughlin

Michael J. O'Loughlin
& Associates P.A.
400 South 4th Street
1012 Grain Exchange Building
Minneapolis, MN 55415
Tel. (612) 332-0351



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

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

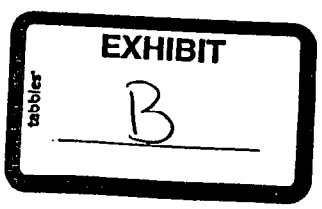
CATERPILLAR INC.,	)	
	)	
Petitioner,	)	
	)	Cancellation No. 41,776
v.	)	
	)	
PAVE TECH, INC.,	)	
	)	
Registrant.	)	
	)	
	)	

DECLARATION OF _____

1. My name is _____. I work for Pave Tech, Inc. ("Pave Tech") which is located in Prior Lake, Minnesota. I have personal knowledge of the facts set forth herein and can testify competently hereto.

2. Caterpillar, Inc. ("Caterpillar") and Pave Tech have agreed to resolve and settle Caterpillar's objections to Pave Tech's use of the PAVERCAT mark and Cancellation No. 41,766. Attached as Exhibit 1 is a copy of the signed Settlement Agreement between Caterpillar and Pave Tech.

3. Pave Tech has complied with Paragraph 1 of the attached Settlement Agreement by executing the Surrender of Cancellation attached as Exhibit A to the Settlement Agreement and thereby irrevocably abandoning its rights in and to Federal Registration No. 2,684,138, for the PAVERCAT Mark together with the goodwill symbolized by and associated with the mark.



4. Pave Tech has complied with Paragraph 2 of the attached Settlement Agreement by permanently ceasing all use of the PAVERCAT mark.

5. Pave Tech has complied with Paragraph 3 of the attached Settlement Agreement by supplying to Caterpillar's counsel all materials that bear the PAVERCAT mark for destruction and by sending Caterpillar's counsel a copy of this executed affidavit.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on the ___th of April, 2004.

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

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

CATERPILLAR INC.,	)	
	)	
Petitioner,	)	
	)	Cancellation No. 41,776
v.	)	
	)	
PAVE TECH, INC.,	)	
	)	
Registrant.	)	

NOTICE OF DEPOSITION

TO: Michael J. O'Loughlin
Michael J. O'Loughlin & Associates, P.A.
1012 Grain Exchange Building
400 South 4th Street
Minneapolis, MN 55415

On Wednesday, May 12, 2004, beginning at 9:30 am, Petitioner, Caterpillar Inc., will depose the person identified below before a court reporter or other person qualified to administer oaths. The depositions will take place at Brown and James Reporting, 312 E. Wisconsin Avenue, Suite 608, Milwaukee, WI 53202 and continue until completed. The deposition shall be recorded by means chosen by Petitioner. The deponent shall be the following:

1. Glen Wrobleski

Dated: April 28, 2004

LOEB & LOEB LLP

By:

Mary E. Innis
Nerissa Coyle McGinn
200 South Wacker Drive, Suite 3100
Chicago, Illinois 60606
Telephone: (312) 674-4780
Facsimile: (312) 674-4779

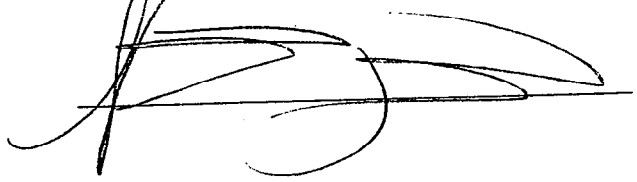
Attorneys for Petitioner

EXHIBIT
tabbies
2

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that true and correct copy of the foregoing **AMENDED NOTICE OF DEPOSITION** was served via facsimile and U.S. Mail on April 28, 2004 to the following counsel of record:

Michael J. O'Loughlin
Michael J. O'Loughlin & Associates, P.A.
1012 Grain Exchange Building
400 South 4th Street
Minneapolis, MN 55415



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

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

CATERPILLAR INC.,	)	
	)	
Petitioner,	)	
	)	Cancellation No. 41,776
v.	)	
	)	
PAVE TECH, INC.,	)	
	)	
Registrant.	)	

NOTICE OF DEPOSITION

TO: Michael J. O'Loughlin
Michael J. O'Loughlin & Associates, P.A.
1012 Grain Exchange Building
400 South 4th Street
Minneapolis, MN 55415

On Friday, May 14, 2004, beginning at 9:30 am, Petitioner, Caterpillar Inc., will depose the person identified below before a court reporter or other person qualified to administer oaths. The depositions will take place at Lindquist & Vennum P.L.L.P., 4200 IDS Center, 80 South 8th Street, Minneapolis, MN 55402 and continue until completed. The deposition shall be recorded by means chosen by Petitioner. The deponent shall be the following:

1. Dale Sapkowiak

Dated: April 28, 2004

LOEB & LOEB LLP

By:

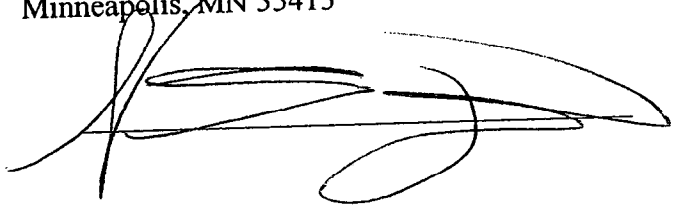
Mary E. Innis
Nerissa Coyle McGinn
200 South Wacker Drive, Suite 3100
Chicago, Illinois 60606
Telephone: (312) 674-4780
Facsimile: (312) 674-4779

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that true and correct copy of the foregoing **AMENDED NOTICE OF DEPOSITION** was served via facsimile and U.S. Mail on April 28, 2004 to the following counsel of record:

Michael J. O'Loughlin
Michael J. O'Loughlin & Associates, P.A.
1012 Grain Exchange Building
400 South 4th Street
Minneapolis, MN 55415



ALTERA

LAW GROUP LLC

Direct Dial: (952) 253-4124
E-Mail: rbishop@alteralaw.com

April 29, 2004

F

Mary E. Innis
Nerissa Coyle McGinn
Loeb & Loeb LLP
200 South Wacker Drive, Ste. 3100
Chicago, Illinois 60606

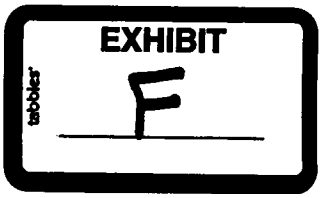
Re: Our Reference: 01000.0319-US-TA
Caterpellar v. Pave Tech Cancellation

Ms. Innis and Ms. Coyle McGinn:

This letter is to discuss the current issue between the parties in the above-identified matter and to memorialize the content of my telephone conversation with Ms. Coyle McGinn earlier today.

In sum, Caterpillar took two depositions of Pave Tech, Inc. in February of 2004. When Pave Tech noticed its depositions of Caterpillar, the details of which are set out below, Caterpillar indicated that the noticed dates pose a problem as its attorneys wish to attend a trademark conference. Pave Tech is willing to agree to a unilateral extension of time to accommodate Caterpillar's counsels' schedule, but is prepared to proceed with the depositions as noticed. At the same time, Caterpillar just noticed its *second* round of depositions to take place well outside of the discovery deadline, and requests that Pave Tech agree to an extension of time to allow for Caterpillar's depositions.

By way of background, I presented three deposition notices to you on April 21, 2004 for depositions to be held on May 3, 4 and 5, 2004. I note specifically that discovery in this matter is scheduled to close on May 5, 2004. Subsequently, Ms. Innis informed me by e-mail that those dates may pose a problem.



Intellectual Property Law
6500 City West Parkway, Suite 100
Minneapolis, MN 55344 USA

telephone: 952.253.4100
fax: 952.912.0574
e-mail: mail@alteralaw.com

Ms. Coyle McGinn and I were able to connect on April 27, 2004, at which time we discussed the possibility of an extension of the discovery deadline, and if an extension were agreed upon, whether it would be 30 or 60 days in duration. At no time during this conversation did I agree to any duration of an extension, and in fact I stated emphatically that I needed to discuss the issue with my client before a final agreement could be reached.

Ms. Coyle McGinn and I also discussed the possibility of settlement, and Ms. Coyle McGinn stated that a settlement offer by Caterpillar had been sitting in her offices for some time, but that the letter would be finalized and sent shortly. We agreed that settlement was open for discussion and that I would seriously discuss the letter with my client when it arrived.

The above-referenced settlement proposal arrived this morning, at which time I reviewed it with my client. Also included with the proposal were two deposition notices, indicating that Caterpillar wishes to take additional depositions on May 12, 2004 and May 14, 2004, despite the fact that discovery is set to close on May 5, 2004.

As we discussed earlier today, my client has declined to stipulate to an extension of the discovery deadline. Although Ms. Coyle McGinn indicated that an extension would allow for further settlement discussions, settlement can be discussed at *any* time – not merely during the discovery phase of the Cancellation. Accordingly, my client feels that the only purpose served by extending the discovery deadline would be to allow Caterpillar to take additional depositions. Moreover, Ms. Coyle McGinn indicated to me on the phone that the purpose of the two additional depositions is to discover information not obtained in its initial depositions. These first depositions, however, took place in February. Caterpillar has had more than adequate time to notice additional depositions. Pending settlement discussions, if any, need not bring discovery to a standstill.

Nonetheless, there are still three depositions noticed for next Monday through Wednesday which we understand pose a problem for Caterpillar as its attorneys wish to attend the International Trademark Association Conference. We are prepared to proceed with the depositions as scheduled, but are willing to stipulate to a unilateral extension of the discovery period to accommodate Caterpillar's counsels' schedules. Ms Coyle McGinn indicated that Ms. Innis is out of the office today, but that I could expect a proposal as to alternate dates sometime tomorrow.

As for today's settlement discussions, I have reviewed your settlement proposal with my client, who is unwilling to accept without some offer of monetary compensation

made by Caterpillar. We remain open to settlement discussions, but I note that financial recompense will be a key component for my client.

I look forward to hearing from you tomorrow as to alternate dates for Pave Tech's depositions.

Very truly yours,

Rebecca J. Bishop

Rebecca J. Bishop

cc: Michael J. O'Loughlin
Michael J. O'Loughlin & Associates, P.A.
1012 Grain Exchange Building
400 South Fourth Street
Minneapolis, MN 55415

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

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

CATERPILLAR INC.,	)	
	)	
Petitioner,	)	
v.	)	Cancellation No. 41,776
	)	
PAVE TECH, INC.,	)	
	)	
Registrant.	)	

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Certificate of Mailing
I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Trademarks, 2900 Crystal Drive, Arlington Virginia 22202-3514 on April 30, 2004.

MOTION FOR PROTECTIVE ORDER

Petitioner, Caterpillar Inc. moves the Board pursuant to Fed. R. Civ. P. 26(c) and Rule 2.120(f) for a protective order to prevent the depositions of Gene Bolmarcich, Terry G. Sharpe and Caterpillar's 30(b)(6) witness from proceeding on May 3-5. In support of this motion, Caterpillar hereby states as follows:

1. On April 21, 2004, Pave Tech served three notices of depositions on Caterpillar for the last three days before discovery closes on May 5, 2004. The depositions noticed were for the following persons: Terry G. Sharp on May 3, 2004 in Eden Prairie, Minnesota; Gene Bolmarcich on May 4, 2004 in Peoria, Illinois, and Caterpillar's 30(b)(6) witnesses on May 5, 2004 in Peoria, Illinois. Exhibit A, Pave Tech Notices of Depositions. In the e-mail accompanying the notices of depositions, Pave Tech's counsel indicated that Pave Tech was open to "alterations in the deposition times and places." Exhibit B, April 21, 2004 E-mail from Rebecca Bishop.

2. On April 22nd, Caterpillar's counsel responded to Pave Tech's e-mail stating that both of the attorneys would be out of the office from May 1st to May 7th and that the depositions would have to be rescheduled. In that same e-mail, Caterpillar's counsel stated the parties "would need to agree to extend the discovery period to schedule the depositions and further depositions on our end." Exhibit C, April 22, 2004 E-mail from Mary Innis.

3. On April 27, 2004, Caterpillar's counsel spoke with Pave Tech's attorney, Rebecca Bishop, regarding an extension of the discovery schedule, the additional depositions that Caterpillar intended to take, and a potential settlement. During that conversation, Caterpillar's counsel requested a 60 day extension of the discovery deadline for both of the parties to take the depositions they had requested. Ms. Bishop indicated that Pave Tech would be willing to agree to a 30 day extension of discovery but that she would have to ask her client before she could agree to a 60 day extension of discovery. Exhibit D, Declaration of Nerissa Coyle McGinn.

4. On April 28, 2004, Caterpillar sent Pave Tech a letter with a settlement proposal. In addition to the settlement proposal, the letter also attached two notices of depositions for Dale Sapkowiak on May 14, 2004 and Glen Wrobleski on May 12, 2004. Exhibit E, April 28, 2004 Letter from Nerissa McGinn and Caterpillar Notices of Depositions. These were the two depositions Caterpillar had referred to in its April 22, 2003 e-mail. Exhibit D, Declaration of Nerissa Coyle McGinn.

5. On April 29, 2004, Pave Tech's attorney reneged on its previous agreements to extend the discovery period and to reschedule the May 3-5 depositions. Pave Tech's counsel suddenly insisted on taking the depositions on May 3-5 unless Caterpillar would agree to a "unilateral" extension of time. The terms of this "unilateral" extension of time would allow Pave

Tech to take its three depositions after the close of discovery, but would preclude Caterpillar from taking its two depositions. Exhibit D, Declaration of Nerissa Coyle McGinn.

6. Caterpillar argued that this proposal directly violated the oral agreement between the parties discussed on April 27th. Exhibit D, Declaration of Nerissa Coyle McGinn. Not surprisingly, Pave Tech's attorney denied that she had agreed to an extension of time claiming that she had stated that "I do not have a problem with the 30 day extension", not that her client does not have problem with the 30 day extension. *See also*, Exhibit F, April 29th letter from Pave Tech. Pave Tech did not deny that it had previously stated that it would be willing to reschedule with depositions.

7. Pave Tech's abrupt change of position is obviously an attempt to preclude Caterpillar from taking the depositions of Dale Sapkowiak and Glen Wrobleski but to allow Pave Tech to continue on with its discovery. This is a bad faith manipulation of the discovery process and the previous agreements between the parties. Caterpillar told Pave Tech within one day of receiving the notices of depositions that it would not be able to attend the depositions. Pave Tech had indicated not only that it would be willing to reschedule the depositions but that it would extend the discovery period. However, now that Caterpillar has served two notices of depositions for Pave Tech employees, Pave Tech is suddenly refusing to reschedule May 3-5 depositions and will not extend the discovery period.

8. Filed simultaneously with this protective order is a Motion for Extension of Time requesting a 60 day extension of the discovery period. Exhibit G, Contested Motion for Extension of Time without Exhibits. If the Board grants this motion, Caterpillar will be willing to reschedule the May 3-5 depositions for times that are convenient for both parties.

9. In compliance with Rule 2.120(f), and as set forth in the Declaration of Nerissa Coyle McGinn filed herewith in support of this Motion as Exhibit D, Caterpillar's counsel attempted in good faith to resolve this discovery dispute but was unable to reach an accommodation with Pave Tech's counsel.

For the reasons set forth herein, Petitioner respectfully requests that the Board issue a Protective Order to prevent the May 3-5 depositions sought by Pave Tech in this action from proceeding on the dates noticed and to allow the parties to reschedule all of the depositions noticed up during the pending discovery period after the Board has granted Caterpillar's Motion for Extension of Time.

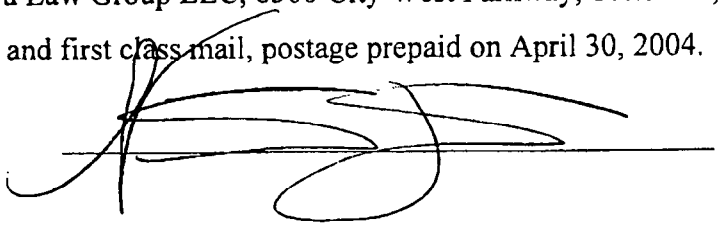
Dated: April 30, 2004

LOEB & LOEB LLP

By: _____

Mary E. Innis
Nerissa Coyle McGinn
200 South Wacker Drive, Suite 3100
Chicago, Illinois 60606
Telephone: (312) 674-4780
Facsimile: (312) 674-4779

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Nerissa Coyle McGinn, hereby certify that I caused a copy of the foregoing **MOTION FOR PROTECTIVE ORDER** to Michael J. O'Loughlin, Micheal J. O'Loughlin & Associates, P.A., 400 South 4th Street, 1012 Grain Exchange Building, Minneapolis, Minnesota 55415 and Rebecca Jo Bishop, Altera Law Group LLC, 6500 City West Parkway, Suite 100, Minneapolis, MN 55344, via facsimile and first class mail, postage prepaid on April 30, 2004.