

**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. 9204776
)
PAVE TECH, INC.,)
)
Registrant.)

TTAB

**PETITIONER'S REPLY BRIEF IN SUPPORT
OF ITS MOTION FOR EXTENSION OF TESTIMONY PERIODS**

In accordance with 37 CFR § 2.127(a), Petitioner requests that the Board, in the exercise of its discretion, consider the following Reply to Registrant's Brief In Opposition To Petitioner's Motion For Extension of Testimony Periods. Registrant's Brief does not rebut Petitioner's basis for good cause in support of its Motion For Extension of Testimony Periods and it raises a new alternative argument for a partial grant of Petitioner's Motion. Registrant's opposition is based upon an argument that the busy business schedule of Petitioner's chosen testimony witness does not constitute good cause for an extension of testimony. Registrant also suggests that Petitioner does not have the right to choose the witness Petitioner believes is most appropriate for the submission of its evidence in this case. Both propositions are wrong. Finally, in an attempt to deprive Petitioner of its right to submit evidence by means of Notices of Reliance, Registrant argues in the alternative, that the Board limit its extension solely to Mr. Tisdale's testimony.

Petitioner's Motion specifically requested the extension of testimony to present Notices of Reliance in addition to the testimony of Mr. Tisdale. A partial extension of the testimony

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, P.O. Box 1451, Alexandria, Virginia 22313-1451 on June 30, 2005.

CH26801.1
40076000044
06/30/2005 ms



07-05-2005

period to allow only the testimony deposition of Mr. Tisdale is unsupported by the Trademark Trial and Appeal Board's Rules of Procedure and Registrant presents no authority in support of such action. Pursuant to 37 CFR § 2.121, "[t]he [testimony] periods may be extended . . . upon motion granted by the Board." Neither the rule, nor the Trademark Trial and Appeal Board Manual of Procedure's ("TBMP") interpretation of the rule, anticipate any partial extensions of the testimony period. (In contrast, the TBMP does provide for partial extensions of discovery. *See*, TBMP 701.) If Petitioner has presented good cause for the grant of the extension of the testimony periods, there is no reason why Petitioner should not be allowed to present other evidence in support of its case. Therefore, if the testimony period is extended for the admission of one type of evidence, it should be extended for all types of evidence.

Moreover, granting an extension of the testimony periods as requested by Petitioner would not prejudice either party, while the requested partial extension would unfairly prejudice Petitioner. Precluding Petitioner from submitting any evidence except the Tisdale testimony would prevent Petitioner from presenting necessary evidence in support of its case through Notices of Reliance. Also, if Petitioner determined that it needed to produce additional evidence following the Tisdale deposition, it would be precluded from doing so. Such a prejudicial effect is not contemplated by the Federal Rules or the TBMP or the efficient administration of justice.

In contrast, an extension of the entire testimony period would not prejudice either party and it is in the interest of justice to allow both parties to present the full measure of evidence in support of their respective cases. Registrant has not claimed that it will be prejudiced by an extension of Petitioner's testimony period, and it will not be prejudiced because it will have the opportunity to evaluate all of Petitioner's testimony and present its own testimony in full during its own testimony period which also would be extended by granting Petitioner's motion. Instead,

Registrant argues only that Petitioner "has been negligent in failing to take its testimony deposition(s) or submitting any Notices of Reliance." This is not true. As fully explained in its Motion, Petitioner has worked diligently to complete its testimony as illustrated by the fact that this is Petitioner's first request for an extension of the testimony periods.

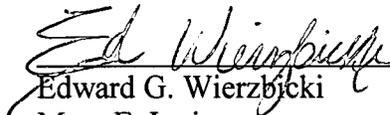
WHEREFORE, Petitioner respectfully requests that the Board grant Petitioner's Motion for Extension of the Testimony Periods in full.

Date: June 30, 2005

Respectfully submitted,

LOEB & LOEB LLP

By:


Edward G. Wierzbicki

Mary E. Innis

Nerissa Coyle McGinn

321 North Clark Street

Suite 2300

Chicago, Illinois 60610

Telephone: (312) 464-3100

Facsimile: (312) 464-3111

CERTIFICATE OF SERVICE

I, Michelle Shebesh, hereby certify that I caused a copy of the foregoing
**PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR EXTENSION OF
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 first class mail, postage prepaid on this 30th day of June, 2005.