

ESTTA Tracking number: **ESTTA39078**

Filing date: **07/18/2005**

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

<b>Proceeding</b>	92041776
<b>Party</b>	Defendant Pave Tech, Inc. Pave Tech, Inc. 15354 Flag Avenue P.O. Box 576 Prior Lake, MN 55372
<b>Correspondence Address</b>	REBECCA JO BISHOP ALTERA LAW GROUP LLC 6500 CITY WEST PARKWAY SUITE 100 MINNEAPOLIS, MN 55344
<b>Submission</b>	Motion to Quash
<b>Filer's Name</b>	Rebecca J. Bishop
<b>Filer's e-mail</b>	rbishop@alteralaw.com, mjabs@alteralaw.com, MinnLaw@integraonline.com
<b>Signature</b>	/Rebecca J. Bishop/
<b>Date</b>	07/18/2005
<b>Attachments</b>	Motion.pdf ( 4 pages ) Exhibit A.pdf ( 4 pages ) Exhibit B.pdf ( 2 pages ) Exhibit C.pdf ( 2 pages ) Exhibit D.pdf ( 5 pages ) Certificate of Service.pdf ( 1 page )

**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. 92041776
	)	
PAVE TECH, INC.,	)	
	)	
Registrant.	)	
	)	

**PAVE TECH'S EMERGENCY  
MOTION TO QUASH AND FOR PROTECTIVE ORDER**

Pursuant to Fed. R. Civ. P. 7 and 26(c), 37 CFR 2.120(f) and 2.127, and TBMP §§ 410, 502, 521 and 707.03 (2d ed., 1st revision, March 2004), Registrant Pave Tech, Inc. ("Pave Tech") hereby moves the Trademark Trial and Appeal Board (the "Board") to prevent the testimony of Kurt Tisdale and J. Michael Hurst on July 19, 2005 from proceeding on the grounds that: (1) the notice for testimony was untimely and unreasonable, (2) the noticed testimony is unnecessary and is designed to annoy, oppress or put undue burden or expense on Pave Tech in this matter, and (3) in any event, the taking of the testimony should be deferred until after determination of Caterpillar's Motion for Extension of Testimony Periods. In support of this Motion, Pave Tech hereby states as follows:

1. On March 8, 2005, by order of the Trademark Trial and Appeal Board, Caterpillar's testimony period in the above-identified action closed on June 13, 2005.

2. Beginning on or around March of 2005, Caterpillar initiated requests for Pave Tech's stipulation to an extension of the testimony periods. *See* Declaration of Rebecca J. Bishop, Exhibit A. Given the numerous stipulated extensions of time in the past related to this action and the fact that this case has been pending for an unusually long time, since March 22, 2003, Pave Tech does not wish to delay this case any further. Accordingly, Pave Tech declined to stipulate to an extension of the testimony periods, but kindly attempted to alleviate Caterpillar's time concerns by proposing a stipulation to submit testimony by written affidavit. Indeed, Pave Tech drafted such a stipulation and transmitted it for Caterpillar's consideration on or around March 14, 2005. *See* (Proposed) Stipulation to Form of Submission of Testimony, Exhibit B.

3. Caterpillar declined Pave Tech's proposed stipulation to present testimony by written affidavit. Moreover, despite Pave Tech's clear position with respect to any extension of the testimony periods, continued to request an extension through May of 2005. *See* Exhibit A.

4. On June 6, 2005, Caterpillar filed a Motion for Extension of the Testimony Periods in this action, and served Pave Tech with a Notice of Taking Testimony of Mr. Kurt Tisdale scheduled for July 19, 2005.

5. On June 24, 2005, Pave Tech filed its Brief in Opposition to Caterpillar's Motion for Extension of Testimony Periods, objecting specifically to any testimony of Mr. Tisdale as untimely and improper.

6. On July 5, 2005, Caterpillar filed a Reply Brief in Support of its Motion for Extension of Testimony Periods. *Caterpillar failed to serve a copy of this brief on counsel for Pave Tech, as required by the rules. See* Exhibit A and Exhibit C, Letter from Pave Tech to Caterpillar on July 18, 2005.

7. Late in the day on Friday, July 15, 2005, Caterpillar served a Notice of Taking Testimony of J. Michael Hurst along with a letter indicating Caterpillar's continued pursuit of taking testimony outside of the current testimony period. Caterpillar scheduled this additional testimony to be taken on the morning of Tuesday, July 19, 2005. *See* Exhibit D.

8. Pave Tech submits that Caterpillar's Notices of Taking Testimony are untimely, do not provide reasonable notice, and should be quashed.

9. First and foremost, Caterpillar's testimony period expired on June 13, 2005, but testimony is scheduled to be taken on July 19, 2005. Absent a ruling to the contrary by the Trademark Trial and Appeal Board, testimony cannot be taken outside of the designated testimony period. TBMP 703.01. As a ruling has not yet been issued by the Trademark Trial and Appeal Board, Caterpillar improperly noticed testimony outside of the testimony period. Accordingly, Pave Tech respectfully requests that the Notices of Taking Testimony be quashed.

10. Specifically with respect to the Notice of Taking Testimony of Mr. Hurst, Caterpillar did not provide notice of this testimony deposition until late in the day on Friday, July 15, 2005 and the testimony is scheduled to take place the morning of Tuesday, July 19, 2005. One full business day is clearly not sufficient or adequate notice.

11. Pave Tech further submits that noticing *any* testimony depositions while Caterpillar's Motion to Extend Testimony Periods is still pending before the Trademark Trial and Appeal Board, especially in the face of Pave Tech's clear objection to such testimony, is unnecessary and designed to annoy, oppress or put undue burden or expense on Pave Tech in this matter. Accordingly, Pave Tech respectfully moves for a Protective Order preventing the taking of Mr. Hurst's or Mr. Tisdale's testimony.

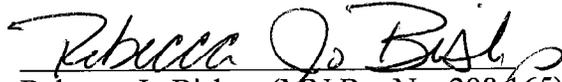
12. In compliance with Rule 2.120(f), and as set forth in the Declaration of Rebecca J. Bishop filed herewith in support of this Motion, Pave Tech's counsel attempted in good faith to resolve this discovery dispute but was unable to reach an accommodation with Caterpillar's counsel. *See* Exhibit A.

For the reasons set forth herein, Pave Tech respectfully requests that the Board deny Caterpillar's Motion for Extension of Testimony Periods and issue a Protective Order to prevent the Hurst and Tisdale testimony depositions sought by Caterpillar in this action from proceeding.

Respectfully submitted,

**PAVE TECH, INC.**

By its attorneys,



Rebecca Jo Bishop (MN Bar No. 298,165)

Karen D. McDaniel (MN Bar No. 194,554)

ALTERA LAW GROUP

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Fax: (952) 912-0574

Michael J. O'Loughlin (MN Bar No. 81,607)

MICHAEL J. O'LOUGHLIN & ASSOC, P.A.

400 South 4<sup>th</sup> Street

1012 Grain Exchange Building

Minneapolis, MN 55415

Telephone: (612) 342-0351

Fax: (612) 342-2399

Dated: July 18, 2005

**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. 92041776
	)	
PAVE TECH, INC.,	)	
	)	
Registrant.	)	

**DECLARATION OF REBECCA J. BISHOP IN SUPPORT OF PAVE TECH'S MOTION  
TO QUASH AND FOR PROTECTIVE ORDER**

1. I am an attorney with Altera Law Group, LLC, 6500 City West Parkway, Suite 100, Eden Prairie, MN 55344. Steve Jones, President of Pave Tech, Inc. ("Pave Tech") retained Altera Law Group to work in conjunction with Michael J. O'Loughlin in the above-identified matter. I am the primary attorney at Altera Law Group involved in this matter.

2. This declaration is being offered to support Pave Tech's Emergency Motion to Quash and for Protective Order. I have personal knowledge of the facts set forth herein and can testify competently hereto.

3. Pursuant to the most recent order of the Trademark Trial and Appeal Board, Caterpillar's testimony period in the above-identified action closed on June 13, 2005.



4. Around the time that the most recent depositions were taken in this case, approximately March of 2005, Caterpillar first requested Pave Tech's stipulation to an extension of the testimony periods. My client declined to stipulate to an extension of the testimony periods.

5. At the time I communicated my client's decision Mr. Ed Wierzbicki, counsel for Caterpillar, I suggested that perhaps the parties may be able to stipulate to submission of testimony by written affidavit. I believe such a process oftentimes saves time and works to avoid some of the scheduling difficulties that accompany formal oral deposition testimony.

6. Counsel for Caterpillar was receptive to discussing such a stipulation, and at my client's sole expense, I drafted a proposed stipulation for Caterpillar's review, transmitted on or around March 14, 2005 by e-mail. *See* Exhibit B to Pave Tech's Motion to Quash and for Protective Order.

7. After several weeks of silence, on or around mid-May of 2005, Caterpillar declined Pave Tech's proposed stipulation to present testimony by written affidavit. At the same time, despite Pave Tech's previous position with respect to extensions of time, Caterpillar again asked whether Pave Tech would stipulate to an extension of the testimony periods. After full discussion with my client, Pave Tech *again* declined to agree to an extension.

8. On June 6, 2005, Caterpillar filed a Motion for Extension of the Testimony Periods in this action, and served Pave Tech with a Notice of Taking Testimony of Mr. Kurt Tisdale scheduled for July 19, 2005.

9. On June 24, 2005, Pave Tech filed its Brief in Opposition to Caterpillar's Motion for Extension of Testimony Periods, objecting specifically to any testimony of Mr. Tisdale as untimely and improper.

10. On or around July 13, 2005, I conducted a routine status check of the publicly available electronic records of the Trademark Trial and Appeal Board to determine whether a decision had been issued regarding Caterpillar's Motion for Extension of Testimony Periods. As I reviewed the electronic records in the case, I discovered that Caterpillar filed a Reply Brief in Support of its Motion for Extension of Testimony Periods on July 5, 2005. After conferring with my co-counsel on this case, it was clear that *Caterpillar never served a copy of this brief on counsel for Pave Tech, as required by the rules.*

11. On or around July 11, 2005, Caterpillar was notified in writing that Pave Tech, in adherence to its position that testimony taken outside of the scheduled testimony period is inappropriate absent an order to the contrary by the Trademark Trial and Appeal Board, did not intend to participate in the deposition scheduled for July 19, 2005.

12. Soon thereafter, late in the day on Friday, July 15, 2005, Caterpillar noticed *yet another* testimony deposition outside of the current testimony period, enclosed with a letter indicating that it intends to proceed with testimony at this time. This second Notice of Taking Testimony related to J. Michael Hurst and was scheduled for the morning of Tuesday, July 19, 2005. *See Exhibit D.*

13. On July 18, 2005, and in response to Caterpillar's additional Notice of Taking Testimony, I *again* notified Caterpillar in writing that Pave Tech believes any testimony at this time to be improper. *See Exhibit C.*

14. In compliance with Rule 2.120(f), and as evidenced by my statements herein, I have attempted in good faith to resolve this discovery dispute but was unable to reach an accommodation with Caterpillar's counsel, who continues its determination to take testimony depositions tomorrow.

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

Date: July 18, 2005

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

**(PROPOSED) STIPULATION TO FORM OF SUBMISSION OF TESTIMONY**

Pursuant to T.B.M.P. § 716 and 37 C.F.R. § 2.123(b), Petitioner, Caterpillar Inc., and Registrant, Pave Tech, Inc., hereby stipulate that the testimony of any witness or witnesses of any party may be submitted in the form of an affidavit by such witness or witnesses.

Petitioner and Registrant further stipulate that the twenty-five (25) day period subsequent to the close of each testimony period, except for the rebuttal testimony period, may be used for the opposing party to conduct cross-examination depositions of any witness who submitted testimony by affidavit in the preceding testimony period, according to the following schedule:

30-day testimony period for Petitioner:	May 13, 2005 to June 13, 2005
25-day period for Registrant to cross-examine by deposition any witness who submitted testimony by affidavit on behalf of Petitioner:	June 14, 2005 to July 9, 2005
30-day testimony period for Registrant:	July 12, 2005 to August 12, 2005
25-day period for Petitioner to cross-examine by deposition any witness who submitted testimony by affidavit on behalf of Registrant:	August 13, 2005 to September 7, 2005



15-day rebuttal testimony period for Petitioner: September 11, 2005 to September 26, 2005

Finally, Petitioner and Registrant stipulate that to the extent any of the above time periods end on a Saturday, Sunday or legal holiday, as defined by Federal Rules of Civil Procedure 6, the time period shall end on the next regular business day that is not a Saturday, Sunday or legal holiday.

Respectfully submitted,

**PAVE TECH, INC.**

By its attorneys,

Dated: \_\_\_\_\_

\_\_\_\_\_  
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

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

**CATERPILLAR, INC.**

By its attorneys,

Dated: \_\_\_\_\_

\_\_\_\_\_  
Edward G. Wierzbicki  
Mary Innis  
Nerissa Coyle McGinn  
**LOEB & LOEB, LLP**  
200 321 North Clark Street, Suite 2300  
Chicago, IL 60610-4714  
Telephone: (312) 464-3100



# ALTERA

L A W G R O U P L L C

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

July 18, 2005

Edward G. Wierzbicki  
Loeb & Loeb LLP  
321 North Clark Street  
Suite 2300  
Chicago, IL 60610-4714

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

Dear Mr. Wierzbicki:

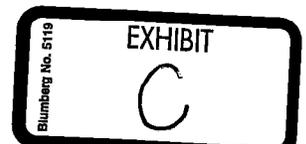
In response to your letter of July 15, 2005, and in the absence of further guidance from the U.S. Trademark Trial and Appeal Board, Pave Tech continues its objection to the taking of Mr. Tisdale's testimony tomorrow, July 19, 2005. We thank you for your continued invitation to participate, but Pave Tech adamantly believes that this testimony is improper.

On a related matter, Pave Tech wishes to express its disappointment in Caterpillar's decision to wait until late in the day on Friday to notice the testimony of J. Michael Hurst to be taken tomorrow. Not even two business days is clearly insufficient notice, and Pave Tech strongly objects to this testimony.

Pave Tech also notes its recent surprising discovery that Caterpillar filed a Reply Brief in Support of its Motion for Extension of Testimony Period on July 5, 2005. Neither counsel for Pave Tech received a courtesy copy of this document nor any notice that it had been filed. It is unfortunate that Caterpillar chose to file this document without serving a copy on either counsel for Pave Tech, in clear violation of the relevant rules regarding the Trademark Trial and Appeal Board procedure.

Pave Tech acknowledges its receipt just last week of still more documents produced by Caterpillar in this case. As the discovery phase of this matter has been closed for some time, Pave Tech was surprised at this late production of documents.

Finally, Pave Tech requests some guidance on Caterpillar's procedures for notifying Pave Tech of its actions in this case. For example, Caterpillar has been





producing documents only to Michael O'Loughlin without any notice to Rebecca Bishop, but sending correspondence only to Rebecca Bishop without copying Michael O'Loughlin. Moreover, neither counsel for Pave Tech was notified of Caterpillar's recent filing with the U.S. Trademark Trial and Appeal Board, as referenced above. Please note that both Pave Tech counsel should be notified of discovery, testimony, correspondence and formal filings with The Board in this matter to avoid unnecessary delay or confusion.

Very truly yours,

Rebecca J. Bishop

ALTERA

---

L A W G R O U P L L C

**LOEB & LOEB** LLP  
A LIMITED LIABILITY PARTNERSHIP  
INCLUDING PROFESSIONAL CORPORATIONS

ATTORNEYS AT LAW  
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TELEPHONE: 312.674.4780  
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## FACSIMILE TRANSMITTAL

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DATE: July 15, 2005

TIME: 2:27 PM

Please deliver these 05 pages (including this cover letter)...

TO: Rebecca J. Bishop, Esq.

Facsimile: (952) 912-0574

Voice: (952) 253-4100

FROM: Ed Wierzbicki

Personal ID: 10694

Direct Dial: 312-674-4783

Client/Re: 400760-00044

Facsimile: 312-674-4779

NOTE: If transmission is not complete, please call our operator at 312.674.4780.

MESSAGE TO ADDRESSEE:



**LOEB & LOEB LLP**A LIMITED LIABILITY PARTNERSHIP  
INCLUDING PROFESSIONAL CORPORATIONS321 NORTH CLARK STREET  
SUITE 2300  
CHICAGO, IL 60610-4714TELEPHONE: 312-464-3100  
FACSIMILE: 312-464-3111  
[www.loeb.com](http://www.loeb.com)Direct Dial: 312-464-3155  
Direct Fax: 312-803-1656  
e-mail: [ewierzbicki@loeb.com](mailto:ewierzbicki@loeb.com)

July 15, 2005

**VIA FACSIMILE  
AND FIRST CLASS MAIL**Rebecca J. Bishop, Esq.  
Altera Law Group  
6500 City West Parkway  
Suite 100  
Minneapolis, MN 55344Re: Caterpillar Inc. v. Pave Tech, Inc.  
Cancellation No. 92041776 (PAVERCAT)

Dear Rebecca:

In your letter of July 11, 2005, you informed us that absent further guidance from the Trademark Trial and Appeal Board on the pending motion to extend testimony, you will not attend or participate in the testimony scheduled for July 19, 2005. We have been trying to get a response from the Board on our pending motion all week but we have so far been unsuccessful. If we do not get a ruling on our motion, we intend to proceed with Mr. Tisdale's deposition. As you know, Mr. Tisdale has a very busy schedule and delaying his deposition would require us to file another request for an extension of testimony of at least 60 days. We want to avoid filing another extension and you have indicated in your opposition to our current motion to extend testimony that you want to move this proceeding forward. Thus, we ask that you reconsider your decision not to attend the deposition and that you appear and participate in the taking of testimony. At a minimum, we suggest you consider participating in the deposition by telephone as provided for in TBMP 703.01(h) and Fed. R. Civ. P. 30(b)(7), a procedure to which we would stipulate. In order to facilitate this procedure, if you choose to pursue it, we will send to you for Tuesday morning delivery prior to the commencement of the testimony deposition copies of the exhibits we intend to introduce. Thus, we ask that you reconsider your decision not to participate in the taking of Petitioner's testimony.

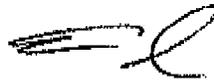
**LOEB&LOEB**LLP

Rebecca J. Bishop, Esq.  
July 15, 2005  
Page 2

We also have enclosed a Notice of Testimony Deposition for J. Michael Hurst for the purpose of introducing evidence of Petitioner's enforcement program. In the event we cannot reach a stipulation with you regarding the introduction of this evidence, or introduce it during Mr. Tisdale's deposition, we will introduce the evidence with Mr. Hurst.

If you have any questions, please call.

Sincerely,



Ed Wierzbicki  
for Loeb & Loeb LLP

EW:ms  
40076000044  
CH26947.1

Enclosure

cc: J. Michael Hurst, Esq.

**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. 92041776  
 )  
PAVE TECH, INC., )  
 )  
 Registrant. )

**NOTICE OF TAKING TESTIMONY**

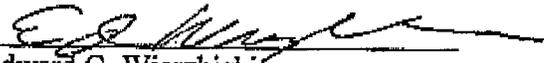
To: Michael J. O'Loughlin Rebecca Jo Bishop  
Michael J. O'Loughlin & Associates, P.A. Altera Law Group LLC  
400 South 4<sup>th</sup> Street 6500 City West Parkway, Suite 100  
1012 Grain Exchange Building Minneapolis, MN 55344  
Minneapolis, Minnesota 55415

Please take notice that testimony will be taken on behalf of the Petitioner, Caterpillar Inc., in the above entitled proceeding, on July 19, 2005, commencing at 10:00 a.m. at the offices of Caterpillar Inc., located at 100 NE Adams Street, Peoria, Illinois 61629.

The witness who will be examined is J. Micheal Hurst, Trademark attorney, Caterpillar Inc.

The testimony will be continued until completed. You are invited to attend and cross examine.

Date: July 15, 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  
Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I, hereby certify that I caused a copy of the foregoing **NOTICE OF TAKING TESTIMONY** to Michael J. O'Loughlin, Michael J. O'Loughlin & Associates, P.A., 400 South 4<sup>th</sup> 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 this 15<sup>th</sup> day of July, 2005.



**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  
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CATERPILLAR INC.,	)	
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Petitioner,	)	Cancellation No. 92041776
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v.	)	
	)	
PAVE TECH, INC.,	)	
	)	
Registrant.	)	

**CERTIFICATE OF SERVICE**

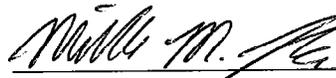
I hereby certify that on July 18, 2005, a true and complete copy of the following:

1. PAVE TECH'S EMERGENCY MOTION TO QUASH AND FOR PROTECTIVE ORDER
2. Exhibit A – Declaration of Rebecca J. Bishop
3. Exhibit B – (Proposed) Stipulation to Form of Submission of Testimony
4. Exhibit C – July 18, 2005 letter from Pave Tech to Caterpillar
5. Exhibit D – July 15, 2005 letter from Caterpillar to Pave Tech and Notice of Taking Testimony

was served by mailing a copy via First Class Mail, postage prepaid, to:

Edward G. Wierzbicki, and  
Mary E. Innis  
Loeb & Loeb, LLP  
321 North Clark Street  
Suite 2300  
Chicago, Illinois 60610

Date: July 18, 2005

  
\_\_\_\_\_  
Michele M. Jabs