

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

Baxley

Mailed: October 27, 2010

Cancellation No. 92051006

Couch/Braunsdorf Affinity,
Inc.

v.

12 Interactive, LLC

Andrew P. Baxley, Interlocutory Attorney:

In the Board's July 19, 2010 order, petitioner's testimony period was last reset to close on October 30, 2010. On October 20, 2010, more than a month after the due date for petitioner's pretrial disclosures and twenty days into petitioner's testimony period, petitioner served supplemental pretrial disclosures, wherein it named three witnesses (Branden Smythe, Sean Keeler, and Daniel Kristal) that petitioner intends to call as trial witnesses and concurrently served notices of depositions of those witnesses for October 28 and 29, 2010.

On October 27, 2010, respondent filed a motion to quash those notices of deposition.¹ In view of the time-sensitive nature of the motion, the Board determined that a telephone

¹ The Board attorney assigned to this case discovered the motion to quash in reviewing his docket shortly after such motion was filed. Under the circumstances, respondent should have telephoned the Board attorney immediately upon filing the motion.

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conference was warranted. See Trademark Rule 2.120(i)(1); TBMP Section 502.06(a) (2d ed. rev. 2004). On that afternoon, such telephone conference was held between petitioner's attorneys Philip A. Jones and Joshua S. Frick, respondent's attorneys Michael G. Kelber and Katherine Dennis Nye, and Board attorney Andrew P. Baxley.

In the motion to quash, respondent indicated that Mr. Smythe is an employee of respondent. In view of respondent's motion, the Board presumes that Mr. Smythe is unwilling to appear voluntarily for the noticed deposition. Accordingly, Mr. Smythe's attendance for a testimony deposition during petitioner's testimony period must be secured by subpoena. See *Consolidated Foods Corp. v. Ferro Corp.*, 189 USPQ 582 (TTAB 1976); TBMP Section 703.01(f)(2). Petitioner's attorneys indicated during the telephone conference that petitioner had not obtained a subpoena compelling Mr. Smythe's attendance for the noticed testimony deposition. Accordingly, the motion to quash is granted with regard to Mr. Smythe's notice of deposition, based on the failure to obtain a subpoena.²

² However, petitioner is not precluded from seeking to obtain a subpoena to compel Mr. Smythe's appearance for a testimony deposition. The Board has no jurisdiction over depositions by subpoena. See *In re Johnson & Johnson*, 59 F.R.D. 174, 178 USPQ 201, 201 (D.Del. 1973) (no power to grant protective order with respect to depositions taken by subpoena); *Luehrmann v. Kwik Kopy Corp.*, 2 USPQ2d 1303, 1304 n.3 (TTAB 1987). Accordingly, any attempt to enforce or quash a subpoena must be raised before the United States District Court that issued the subpoena. See TBMP Section 703.01(f)(2). Whether or not petitioner will be

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With regard to the notices of deposition of Mr. Keeler and Mr. Kristal, both of whom are employees of one of petitioner's subsidiaries or related companies, petitioner's attorneys indicated that these witnesses employees intend to testify regarding alleged recent incidents of actual confusion between the marks at issue. Under the circumstances, the Board finds that the motion to quash with regard to the notices of deposition of Mr. Keeler and Mr. Kristal should be fully briefed and that the need for such briefing constitutes good cause to suspend this case pending the Board's decision on the motion to quash. See Trademark Rule 2.117(c).

Petitioner is allowed until November 10, 2010 to file a brief in response to the motion to quash. Respondent is allowed until ten days from the date of service of petitioner's brief in response to file a reply brief.³ See Trademark Rule 2.127(a). Proceedings herein are otherwise

permitted to supplement its pretrial disclosures and therefore rely on any testimony deposition of Mr. Smythe is a separate inquiry. See Fed. R. Civ. P. 26(a)(3) and 37(c)(1); *Jules Jurgensen/Rhapsody Inc. v. Baumberger*, 91 USPQ2d 1443 (TTAB 2009).

³ In view of the expedited briefing schedule, the parties must serve the remaining briefs in connection with the motion to quash by e-mail and file those briefs through the Board's Electronic System for Trademark Trials and Appeals (ESTTA) (<http://estta.uspto.gov/>).

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suspended pending the Board's decision on the motion to quash.⁴

⁴ Upon resumption of proceedings, petitioner will be allowed a testimony period of four days that will be reset to take place shortly after the issuance of the resumption order. During that testimony period, petitioner may take witness testimony and file notices of reliance.