

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

MBA

Mailed: July 12, 2012

Cancellation No. 92052197

Terri Yenke Gould, Executor

v.

General Marketing Capital,  
Inc. and Supercar  
Collectibles Limited

**Michael B. Adlin, Interlocutory Attorney:**

On June 17, 2011, the Board issued an order (the "Prior Order") which granted respondent's motion to strike "all declaration 'testimony' filed by petitioner," including the declarations of:

- Terri Yenke Gould;
- Thomas Clary;
- Lester Quam; and
- George E. Bullwinkel, petitioner's counsel.

The declarations were excluded because the parties did not agree to submit testimony by declaration. The Prior Order also held that "having failed to make any expert disclosures whatsoever, petitioner may not file or rely on expert testimony, and therefore any expert testimony will be stricken and given no consideration."

This case now comes up for consideration of respondent's fully-briefed motion, filed March 30, 2012, to "re-strike" three of the exact same declarations which were stricken by the Prior Order, which petitioner resubmitted as exhibits to the declarants' testimonial depositions filed on August 10, 2011. Specifically, the previously-filed and stricken Declaration of Thomas Clary was attached as Ex. P-26 to his testimony deposition, the previously-filed and stricken Declaration of Lester Quam was attached as Ex. P-36 to his testimony deposition and the Bullwinkel testimony deposition, and, at least according to respondent, the previously-filed and stricken Declaration of Terri Yenke Gould "was not numbered as an exhibit but was nonetheless filed as an attachment" to her testimony deposition.<sup>1</sup> Respondent points out in its reply brief that petitioner's "back door" attempt to introduce the previously-stricken declarations is inappropriate, including because "[i]n oral deposition testimony, counsel doesn't get to draft, revise and finalize written answers for the witness to use in response to the questions. Rather, it is up to the witness to actually provide a verbal answer without coaching."

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<sup>1</sup> It does not appear that the Yenke Gould testimony deposition transcript which petitioner filed with the Board includes the previously-filed and stricken Yenke Gould declaration. However, during her testimony deposition, Ms. Yenke Gould answered questions about her previously-filed and stricken declaration. This order presumes that the previously-filed and stricken Yenke Gould declaration was refiled.

Respondent also seeks to strike portions, but not the entirety, of Mr. Clary's and Mr. Quam's testimony because respondent argues that the portions at issue constitute "expert" testimony prohibited by the Prior Order. The portions of testimony respondent seeks to strike are identified in Appendix A to respondent's motion to "re-strike."

In her response to the motion to strike, petitioner argues that the Prior Order "was not an order *in limine* barring all further offers of evidence," and did not preclude "the submission of the same evidence in deposition form, which is exactly which [sic] Petitioner did ...." Petitioner also claims that the Quam Declaration was only used for purposes of displaying the embedded photographs to Mr. Quam during his testimony deposition. With respect to the portions of the Clary and Quam testimony which respondent characterizes as "expert" testimony, petitioner claims that these portions in fact constitute "lay testimony" and are admissible.

Respondent's motion to "re-strike" the previously-stricken declarations is hereby **GRANTED** and the previously-stricken Yenko Gould, Clary and Quam declarations remain stricken and will be given no consideration, whenever filed or refilled. While petitioner is correct that the Prior

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Order did not prohibit petitioner from submitting testimony timely and properly taken pursuant to Board rules during oral testimony depositions, the Prior Order prohibited petitioner from refileing or reintroducing the stricken declarations. And to the extent that any witness testified in an otherwise admissible oral testimony deposition directly about any previously-stricken declaration, that portion of the witness's testimony is also hereby stricken. The intent and purpose of the Prior Order is clear, and there was no excuse for petitioner to resubmit stricken declarations, or to submit testimony specifically concerning the previously-stricken declarations.

Consideration of respondent's motion to strike the designated portions of the Clary and Quam testimony is hereby **DEFERRED**, until final decision. Indeed, determining whether the testimony in question is lay or expert testimony requires a review of the testimony itself. However, "for reasons of administrative economy, it is the policy of the Board not to read trial testimony or examine other trial evidence prior to final decision." TBMP § 502.01 (3d ed. rev. 2012). Therefore, a decision on respondent's preserved objection to the designated portions of the Clary and Quam testimony will be included with the final decision herein. It is noted that the parties have submitted briefs on the case and this proceeding is ready for final decision.

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