

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

MBA

Mailed: June 17, 2011

Cancellation No. 92052197

Terri Yenko Gould, Executor

v.

General Marketing Capital,  
Inc. and Supercar  
Collectibles Limited

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

Pursuant to the Board's order of November 23, 2010, petitioner's testimony period was scheduled to close on April 22, 2011. On that day, petitioner filed an "emergency motion" for a seven day extension of her testimony period as well as certain declarations, even though the parties have not agreed to allowing testimony by declaration. Petitioner also filed certain documents, without notices of reliance. Then, after her testimony period was scheduled to close, petitioner filed additional purported "evidence." Respondents contest the motion for extension, and on May 9, 2011 they also filed motions to strike petitioner's putative testimonial declarations, and a motion for judgment under Trademark Rule 2.132, both of which petitioner opposes. Finally, on May 19, 2011 petitioner filed a "supplemental motion to file testimony out of time," which respondents

also oppose, and which is effectively subsumed by petitioner's motion for extension, and will be addressed in connection therewith.

Turning first to respondents' motion to strike, petitioner admits in opposition thereto that respondent never "agreed to let [petitioner] file [her] testimony in affidavit or declaration form." Accordingly, respondent's motion to strike is hereby **GRANTED** and all declaration "testimony" filed by petitioner is hereby **STRICKEN**. Boyd's Collection Ltd. v. Herrington & Co., 65 USPQ2d 2017, 2020 (TTAB 2003); compare, Trademark Rule 2.123(a)(1) with Trademark Rule 2.123(b). Having failed to seek respondents' consent to the introduction of testimony by declaration early in her testimony period and having failed to make pretrial (as opposed to initial) disclosures, petitioner's arguments against this result ring particularly hollow. Compare Trademark Rule 2.120 with Trademark Rule 2.121. In addition, the documents petitioner submitted during and after her testimony period are also **STRICKEN**, because they were not submitted via a notice of reliance (and some would be inappropriate for introduction by notice of reliance in any event). Trademark Rule 2.122(e).

Turning next to petitioner's motion for an extension, petitioner alleges that she had difficulty filing her purported evidentiary materials via the Board's electronic

filing system ("ESTTA"), and that one of her witnesses "is presently vacationing in the Bahamas and therefore temporarily unable to provide his signature" to a declaration. Petitioner also claims that respondent expressed interest in taking discovery of certain of petitioner's intended trial witnesses.

Respondent argues in opposition to the motion that it was not properly served, that petitioner could have filed her "evidence" via certificate of mailing rather than electronically and that there was no agreement to submit testimony by declaration so the filing of declarations during any extended trial period "would do nothing to cure Petitioner's problem."

Because petitioner filed her motion for extension prior to expiration of her testimony period, she need only establish "good cause" for the requested extension. Fed. R. Civ. P. 6(b)(1)(A); TBMP § 509 (2d ed. rev. 2004). Generally, "the Board is liberal in granting extensions of time before the period to act has elapsed, so long as the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused." American Vitamin Products Inc. v. DowBrands Inc., 22 USPQ2d 1313, 1315 (TTAB 1992).

In this case, while petitioner should have learned and followed the Board's rules with respect to service,<sup>1</sup> disclosures and especially testimony, and future noncompliance will not be excused, the parties' communications during petitioner's testimony period were sufficiently ambiguous that petitioner has established good cause for a brief extension of time. Specifically, on April 19, 2011, respondent sent an e-mail which appeared to suggest that respondent might agree to the introduction of testimony by declaration, under certain circumstances. Respondents' Opposition to Motion to Extend Ex. B ("After reviewing the content of the proposed affidavits, we will notify you whether we agree to the requested stipulation."). After receiving the proposed declarations two days later, respondents declined to consent, but by that time petitioner had only one day left in her testimony period. It should go without saying that petitioner should have sought respondents' consent well before April 19, 2011, and provided respondent with draft declarations more than one day before the close of her testimony period, but having

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<sup>1</sup> Although the parties have not agreed to service by e-mail under Trademark Rule 2.119(b)(6), and petitioner therefore failed to properly serve her motion for extension, respondent's opposition to the motion makes clear that respondent received notice of and was able to effectively respond to the motion, and was not prejudiced by the failure of effective service. Therefore, petitioner's motion has been considered. However, the Board may refuse to consider any future papers which are not properly served.

indicated possible agreement to testimony by declaration with only three days left in the testimony period, respondents should not be surprised that petitioner did not schedule testimony depositions, and it was not unreasonable for petitioner to refrain from scheduling testimony depositions. In short, the ambiguity about how testimony would be conducted constitutes good cause for a **single, brief and limited** extension of petitioner's testimony period, as set forth below. Furthermore, there is no evidence that petitioner has acted in bad faith, nor has petitioner abused the privilege of extensions thus far. For all of these reasons, petitioner's motion for a seven day extension of her testimony period is hereby generously **GRANTED, IN PART.**

Specifically, while they shall remain stricken, the declarations petitioner previously filed shall serve as petitioner's pretrial disclosures,<sup>2</sup> meaning that petitioner may not take testimony from any witness other than those from whom petitioner previously filed the now-stricken declarations. See Fed. R. Civ. P. 37(c)(1). Testimony from these previously-disclosed lay witnesses may be considered if taken by means of a properly noticed testimonial deposition in compliance with all Board rules during

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<sup>2</sup> Petitioner's untimely service of these "pretrial disclosures" is harmless given that respondent will have sufficient time to prepare for any testimony.

petitioner's testimony period as reset herein. However, 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. Fed. R. Civ. P. 37(c)(1); cf. General Council of the Assemblies of God v. Heritage Music Foundation, 97 USPQ2d 1890 (TTAB 2011) (expert witness not excluded because expert disclosures were timely-served and "technical deficiencies" therein were promptly cured). In addition, while it may be appropriate for petitioner's counsel to testify to certain non-substantive matters, such as by authenticating documents, the parties should carefully review 37 C.F.R. § 10.63, and the Board will entertain a motion to strike inadmissible or otherwise inappropriate testimony from petitioner's counsel, or for other appropriate relief. Documents submitted under notice of reliance in compliance with all Board rules during petitioner's testimony period as reset herein may also be considered. See, Boyds Collection, 65 USPQ2d at 2019 n. 6 (technical defects in notice of reliance may be cured); Weyerhaeuser Co. v. Katz, 24 USPQ2d 1230, 1233 (TTAB 1992) (same). However, any testimony or evidence submitted beyond that specifically allowed herein will be stricken and given no consideration. Respondent's motion to dismiss is hereby

**DENIED AS MOOT**, because pursuant to this order petitioner's testimony period has not yet closed.

In conclusion, respondents' motion to strike and petitioner's motion for extension are granted to the extent set forth herein, and respondents' motion to dismiss for failure to prosecute is denied as moot. Proceedings herein shall remain suspended until **JULY 12, 2011**, to allow the parties time to make any necessary trial arrangements.

Trial dates are reset as follows:

Plaintiff's Pretrial Disclosures	<b>CLOSED</b>
Plaintiff's Trial Period Resumes	<b>July 12, 2011</b>
Plaintiff's 30-day Trial Period Ends	<b>July 18, 2011</b>
Defendant's Pretrial Disclosures	<b>August 2, 2011</b>
Defendant's 30-day Trial Period Ends	<b>September 16, 2011</b>
Plaintiff's Rebuttal Disclosures	<b>October 1, 2011</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>October 31, 2011</b>

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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