

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

MBA

Mailed: July 8, 2011

Cancellation No. 92052197

Terri Yenke Gould, Executor

v.

General Marketing Capital,  
Inc. and Supercar  
Collectibles Limited

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

This case now comes up for consideration of petitioner's second "emergency motion" in less than three months, this time her motion, filed July 8, 2011, to allow her to take the testimonial depositions of petitioner Terri Yenke Gould (who will be in Woodland Hills, California) and Thomas Clary (who will be in Alton, Missouri) by telephone. On July 8, 2011, the Board held a teleconference with the parties to hear argument and rule upon the motion, at which George E. Bullwinkel appeared on petitioner's behalf and Robert D. Buyan appeared on respondents' behalf. The interlocutory attorney responsible for this proceeding conducted the teleconference.

By way of background, in its order of June 17, 2011 (the "Prior Order"), the Board, among other things, granted petitioner's motion to extend her testimony period in part.

Specifically, petitioner's testimony period was set to resume on July 12, 2011 and close on July 18, 2011. However, the Prior Order faulted petitioner for not filing its prior "emergency" motion until the last minute, and for failure to comply with Board rules and procedures. The Prior Order also limited petitioner, by allowing her to take testimony only from those witnesses from whom she previously, but improperly, submitted declaration testimony. And the Prior Order 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."<sup>1</sup>

In any event, in its new "emergency" motion, petitioner requests an order allowing her to take the Yenko Gould and Clary depositions telephonically, because she "cannot afford the cost of having [her attorney] attend the California and Missouri depositions in person." Respondents argue, however, that: (1) "attorney-client privilege issues" are likely to arise which would prejudice respondents if the depositions are taken telephonically; (2) the number of documents likely to be introduced would make telephonic depositions "cumbersome" and "difficult;" and (3) there is no certain procedure for respondents to use and distribute

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<sup>1</sup> The parties disagree about whether certain testimony would constitute "expert testimony."

to petitioner's counsel and the witnesses any documents necessary for respondents' cross-examination of the witnesses.

During the teleconference, petitioner candidly admitted that she did not notice or move to take the depositions telephonically early enough, but claimed that her delay was the result of "negotiations" regarding whether there was an acceptable way for her counsel to take the depositions in person. On the other hand, as the Board pointed out during the teleconference, "federal practice favors the use of technological benefits in order to promote flexibility, simplification of procedure and reduction of cost to parties." Hewlett-Packard Co. v. Healthcare Personnel Inc., 21 USPQ2d 1552, 1553 (TTAB 1991). Furthermore, "[n]othing in the language of [Fed. R. Civ. P.] 30 requires a showing of necessity, financial inability or other hardship to obtain an order to proceed via telephone, and leave to take telephonic depositions should be liberally granted in appropriate cases." Id.; see also, Fed. R. Civ. P. 30(b)(4); TBMP § 703.01(h) (3d ed. rev. 2011).

Under the circumstances, during the teleconference, the Board held that respondents have not established prejudice sufficient to prohibit petitioner from taking the depositions telephonically. Respondents' privilege concerns are inapposite, because the attorney-client relationship is

between petitioner (and conceivably petitioner's witnesses) and petitioner's counsel, and the privilege is therefore petitioner's or the witnesses' to waive. Indeed, neither respondents nor respondents' counsel claim to have an attorney-client relationship with any of petitioner's witnesses. With respect to the documents to be used during examination and cross-examination, respondent's concerns are not sufficient to overcome the holdings of Hewlett-Packard. Accordingly, petitioner's motion to take testimonial depositions telephonically is hereby **GRANTED**. In addition, as held during the teleconference, respondents are allowed leave to take their own testimonial depositions telephonically.

However, as also held during the teleconference, having again waited until the last minute to act, despite the Prior Order, it is petitioner's burden to satisfy respondents' concerns with respect to documents. That is, petitioner is ordered to work with respondent, well in advance of the depositions, to provide respondents with the documents petitioner intends to use, in the manner which respondents will find most useful and efficient. Petitioner is further ordered to work with respondents to ensure that: (1) there is a means by which respondents may transmit any documents to the place where the depositions are being held; and (2) any such documents may be printed, distributed and

conveniently used during any cross-examination. With respect to the attorney-client privilege, to the extent that petitioner's witnesses testify about privileged matters, their testimony will constitute a waiver of the privilege, such that petitioner will not be heard to object based on the privilege to any cross-examination by respondents which does not go beyond the scope of the witnesses' direct testimony. Finally, the Prior Order, including with respect to any attempt by petitioner to rely on expert testimony, remains in effect, and respondents are free to object to what they deem to be "expert" testimony on that basis.

In short, petitioner's motion for leave to take its testimonial depositions by telephone is granted subject to the requirements of this order, and respondents are also granted leave to take any of their testimonial depositions telephonically. The parties are free to stipulate to modifications to this order, or to other parameters for testimonial depositions. Dates remain as set in the Prior Order.

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