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

In the Matter of Application Serial No. 76/026,184
Mark: FARM LIVING
Published in the Official Gazette on January 2, 2001

REIMAN PUBLICATIONS, LLC,

Opposer,

v.

Opposition No. 91/150,075

FARM LIVING, INC.,

Applicant.

BRIEF IN OPPOSITION TO APPLICANT'S MOTION TO QUASH NOTICE OF TRIAL DEPOSITION OF JUDITH A. WOLF

Trademark Trial and Appeal Board
South Tower Building, Ninth Floor
2900 Crystal Drive
Arlington, VA 22202-3513

Opposer Reiman Publications LLC opposes Applicant's Motion to Quash the Notice of Trial Deposition of Judith A. Wolf and, in support of its opposition states as follows:

BACKGROUND FACTS

1. On August 22, 2002, the Opposer took the trial deposition of Jeffrey Anderson, Senior Vice President and Chief Financial Officer of Reiman Publications LLC. Counsel for Applicant appeared by telephone at this deposition. (Declaration of Nathan D. Jamison at ¶ 2). The Opposer intended to rely solely on this deposition of Mr. Anderson.

2. Just prior to Mr. Anderson's deposition, the parties received an order from the Board suspending proceedings for six months. The parties agreed to take Mr. Anderson's

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deposition during the suspension period because of the difficulty in scheduling the deposition and because Mr. Anderson was leaving Reiman Publications. (Jamison Dec. at ¶ 3).

3. During the trial deposition of Mr. Anderson, counsel for Farm Living objected to the admission into evidence of a summary of voluminous financial information, arguing that a sufficient foundation had not been made because the Reiman Publications employee who physically prepared the document had not testified. (Jamison Dec. at ¶ 4).

4. By letter dated September 13, 2002, counsel for Reiman Publications asked counsel for Farm Living to stipulate to the taking of a brief deposition of the employee who prepared the document or to stipulate to the admissibility of the document. Counsel for Farm Living rejected this request and instead filed a Motion to Resume Proceedings Nunc Pro Tunc, asking the Board to declare that Reiman Publications' testimony period had closed and resume proceedings beginning with Farm Living's testimony period. (Jamison Dec. at ¶ 5).

5. The Board denied Farm Living's motion by a decision and order dated November 26, 2002. The Board in its decision recognized Farm Living's motion was an attempt to prevent Reiman Publications from taking the deposition of the employee who prepared the document. The Board reset the testimony periods for both parties, with Reiman Publications' testimony period to close on January 20. By setting the closing date for January 20 (Martin Luther King, Jr.'s Birthday), the closing date is automatically extended to January 21, 2003. Fed. R. Civ. P. 6.

6. Immediately after receiving the Board's November 26 decision and order, counsel for Reiman Publications made arrangements with Paul Seubert, Jeffrey Anderson's replacement at Reiman Publications, to discuss after the holidays the arranging of a deposition of the employee who physically prepared the document. Because Mr. Seubert was extremely busy during the first few days of January with other obligations, he was not able to discuss the

deposition with counsel until January 13, 2003. During a telephone conversation on the afternoon of January 13, counsel for Reiman Publications explained to Mr. Seubert the purpose of the deposition and asked him to determine who had actually prepared the document. (Jamison Dec. at ¶ 6).

7. The following afternoon, January 14, counsel for Reiman Publications again spoke to Mr. Seubert on the telephone. Mr. Suebert informed counsel that Judith Wolf was the employee who had prepared the document. At that time, counsel for Reiman Publications set up a time for Ms. Wolf's deposition. Counsel for Reiman Publications immediately thereafter drafted a Notice of Deposition of Ms. Wolf and sent it by facsimile to counsel for Farm Living. The notice of deposition was accompanied by a letter explaining that the deposition would be short and that Reiman Publications would agree that, as with Jeffrey Anderson's deposition, counsel for Farm Living could appear by telephone. Counsel for Reiman Publications assumed that if there were scheduling issues, counsel for Farm Living would raise them directly with counsel for Reiman Publications, who was perfectly prepared to extend the usual professional courtesies should such scheduling issues arise. (Jamison Dec. at ¶ 7).

8. Instead of attempting to resolve scheduling issues, Farm Living filed a Motion to Quash the Notice of Trial Deposition of Judith Wolf arguing that the deposition of Ms. Wolf should not be held on January 20 because (1) Reiman Publications did not give reasonable notice of Ms. Wolf's deposition; (2) Reiman Publications did not previously identify Ms. Wolf as a trial witness; and (3) Reiman Publications did not furnish documents to Farm Living prior to the deposition.

ARGUMENT

9. The Notice of Deposition of Ms. Wolf was not unreasonable. Federal R. Civ. P. 30(b)(1) requires a party seeking to take testimony depositions to give the adverse party

reasonable notice of the time and place where the depositions will be taken. Whether a notice is reasonable is determined by the individual circumstances of each case. See Duke University v. Haggar Clothing Co., 54 U.S.P.Q.2d 1443, 1445 (TTAB 2000). While there is no magic number of days that constitute reasonable notice, many courts set the limit at five calendar days. See 7 James Wm. Moore et al., Moore's Federal Practice, § 30.20 (3d. Ed. 1999). In Duke University, the Board held that three days notice was reasonable where the opposing party had orally received notice that the witness would be deposed. 54 U.S.P.Q.2d at 1446.

10. Counsel for Farm Living received notice of Ms. Wolf's deposition at least five days before it was scheduled. This is within the time that many courts consider to be reasonable notice and more than the three days that the Board found to be reasonable notice in Duke University.

11. Moreover, counsel for Farm Living will not be prejudiced or inconvenienced if Ms. Wolf's deposition were to take place on January 20. Counsel for Farm Living appeared by telephone at Mr. Anderson's deposition and counsel for Reiman Publications indicated in the cover letter attached to the Notice of Deposition that it would be willing to let counsel for Farm Living appear by telephone at Ms. Wolf's deposition as well. In addition, counsel for Reiman Publications also indicated that Ms. Wolf's deposition would be very brief. In Natural Organics, Inc. v. Proteins Plus, Inc., the Court allowed a deposition on even one-day notice where the parties were on an expedited discovery schedule, and the deposition was by telephone and was brief. 724 F. Supp. 50, 52 n. 3 (E.D.N.Y. 1989).

12. Counsel for Farm Living had advance notice that counsel for Reiman Publications would be deposing an employee of Reiman Publications to authenticate the financial summary document to which counsel for Farm Living had objected during Mr. Anderson's deposition.

Not only was counsel for Farm Living informed orally during Mr. Anderson's deposition of Reiman Publications' intent to depose a Reiman employee, counsel for Reiman Publications requested in writing that counsel for Farm Living allow Reiman Publications to take this deposition while proceedings were suspended. In fact, counsel for Farm Living filed its Motion to Resume Nunc Pro Tunc precisely to prevent Reiman Publications from taking this deposition. Counsel for Farm Living cannot now claim that it was unaware that Reiman Publications would be conducting the deposition of an employee of Reiman Publications to authenticate the financial summary. The only possible "surprise" is the identity of the employee, but Reiman is not aware of any obligation it had to identify this ministerial witness before now.

13. Farm Living has already received documents pertaining to Ms. Wolf's testimony. The entire subject matter of Ms. Wolf's deposition is the document to which counsel for Farm Living objected during Jeffrey Anderson's deposition. This document is a summary of voluminous financial information. Reiman Publications is prepared to provide counsel for Farm Living in advance of Ms. Wolf's deposition, a copy of all of the original documents that were summarized, pursuant to Fed. R. Evid. 1006.

14. The only reason that counsel for Reiman Publications scheduled Ms. Wolf's deposition on five-days notice was because Reiman Publications' testimony period was scheduled to close on January 20.[1] While Reiman Publications does not believe that the Notice of Deposition was unreasonable, Reiman Publications is willing to take Ms. Wolf's deposition at a later time if Reiman Publications' testimony period is extended, either by stipulation of Farm Living or order of the Board. In similar cases, the Board has gone out if its way to allow parties to present testimony while also allowing adverse parties an opportunity to make objections and

[1] Farm Living also objected to the scheduling of the deposition on January 20 because that is a federal holiday and counsel for Farm Living's offices are closed.

cross-examine. For example, in Jean Patou Inc. v. Theon Inc., 18 U.S.P.Q.2d 1072, 1074 (TTAB 1991) the Board allowed a trial deposition taken after unreasonable one-day notice – and where the adverse party did not appear – to be introduced into evidence. The Board decided that it would be equitable to extend the opposer's testimony period and allow the applicant an opportunity to cross-examine the witness and make any objections to the testimony of the witness during direct examination. See id.

15. Because the notice of Ms. Wolf's deposition was not unreasonable, Reiman Publications should be allowed to take her deposition and introduce it into evidence. In the alternative, Reiman Publications requests that its testimony period be extended by two weeks to allow Ms. Wolf's deposition to be taken after reasonable notice.

Dated this 16th day of January, 2003.

MARTA S. LEVINE
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CERTIFICATE OF SERVICE AND MAILING

I hereby certify that the original and two copies of this Motion to Suspend are being sent by Federal Express Overnight to: Trademark Trial and Appeal Board, South Tower Building, Ninth Floor, 2900 Crystal Drive, Arlington, VA 22202-3513, and a copy of this document is being deposited (with sufficient postage) with the United States Postal Service as first class mail in an envelope addressed to: Robert M. Schwartz, Esq., Ruden, McClosky, Smith, Schuster & Russell, P.A., 200 East Broward Boulevard, Fort Lauderdale, Florida 33301, all on the date stated below:

Date of signature and deposit: January 16, 2003

Nathan D. Jamison

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

In the Matter of Application Serial No. 76/026,184
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01-17-2003
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #61

Opposition No. 91/150,075

FARM LIVING, INC.,

Applicant.

DECLARATION OF NATHAN D. JAMISON

I, Nathan D. Jamison, declare as follows:

1. I, Nathan D. Jamison, am an attorney licensed to practice law in the State of Wisconsin. I am one of the attorneys for Opposer Reiman Publications LLC. I make this Declaration in support of Opposer's Brief in Opposition to Applicant's Motion to Quash Notice of Deposition of Judith A. Wolf.

2. On August 22, 2002, the Opposer took the trial deposition of Jeffrey Anderson, Senior Vice President and Chief Financial Officer of Reiman Publications LLC. Counsel for Applicant appeared by telephone at this deposition.

3. Just prior to Mr. Anderson's deposition, the parties received an order from the Board suspending proceedings for six months. The parties agreed to take Mr. Anderson's deposition during the suspension period because of the difficulty in scheduling the deposition and because Mr. Anderson was leaving the employ of Reiman Publications.

4. During the trial deposition of Mr. Anderson, counsel for Farm Living objected to the admission into evidence of a summary of voluminous financial information, arguing that a sufficient foundation had not been made because the Reiman Publications employee who physically prepared the document had not testified.

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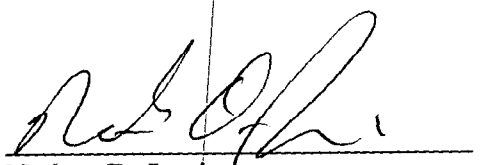
I declare under penalty of perjury that the foregoing is true and correct. Executed on January 16, 2003.



Nathan D. Jamison