UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Mailed: January 29, 2003

Opposition No. 91150075

REIMAN PUBLICATIONS, LLC.

v.

FARM LIVING, INC.

David Mermelstein, Attorney:

By order dated November 26, 2002, the Board reset opposer's thirty-day testimony period to close on January 20, 2003. Now before the Board are applicant's motion to quash a testimonial deposition noted by opposer to be taken on January 20, 2003, and applicant's motion to strike the testimony which was in fact taken on that date. The motions have been fully briefed.[1]

Motion to Quash

It appears from the evidence and statements of record that notice of the testimonial deposition of Judith A. Wolf,

[1] The motion was filed over a certificate of service and certificate of mailing both dated January 16, 2003. Although opposer mailed its opposition to the motion on the same day, it likewise did so by mail. Unfortunately, neither party saw fit to invoke the Board's procedures for resolution of motions by teleconference. *See* Notice, Permanent Expansion of Telephone Conferencing on Interlocutory Matters in Inter Partes Cases Before the Trademark Trial and Appeal Board, 1235 TMOG 68 (June 20, 2000). Such procedures often provide expeditious resolution of motions when time is of the essence. Had one or the other party done so, we may have avoided the necessity of deciding a motion to strike.

one of opposer's employees, transmitted to applicant by facsimile at 7:01 pm EST on January 14, 2003. The Board notes that January 20, 2002, was a Federal holiday in observation of the birthday of Dr. Martin Luther King, Jr. *See* Notice, Change in Legal Holidays, 1069 TMOG 5 (July 15, 1986)[2]

Applicant bases its motion to quash on its assertion that (1) the notice provided was not reasonable; (2) opposer had not previously identified the witness; (3) "[o]pposer has not furnished a single document to [a]pplicant in advance of this deposition"; and (4) that the deposition was inappropriately noticed to occur on a federal holiday, during which federal courts and applicant's law offices were to be closed.[3]

In response, opposer argues that the notice provided was not unreasonable,[4] that applicant knew that opposer would seek to depose an employee for the purpose of offering a foundation for other financial evidence, and that documents have been previously provided. In the alternative, opposer requested an extension of its testimony

[2] Posted at www.uspto.gov/go/og/con/files/cons233.htm. *Cf.* Advisory Committee Notes, Fed. R. Civ. P. 6, 1985 Amendment ("The Birthday of Martin Luther King, Jr. … has been added to the list of legal holidays enumerated in the Rule.").
[3] The USPTO, a U.S. government agency, was also closed for business on January 20, 2003.
[4] Opposer indicated that it was willing to stipulate to applicant's participation in the deposition by telephone.

period to allow the deposition to be rescheduled after reasonable notice.

The notice of testimonial deposition at issue did not fail to provide applicant with reasonable notice. The Board sets periods for the taking of testimony, which correspond to trial in civil cases. It should have come as no surprise to applicant that opposer desired to take testimony during its testimony period.

As opposer points out, we have previously found notice as short as three days to be adequate under some circumstances. Here, the notice was at least five days.[5] We share applicant's concern with the meager notice provided in this case. Even so, it is not the number of days, but the reasonableness of the notice under the circumstances which are at issue. Applicant, which bears the burden of proof as the movant, presented no facts (other than its expressions of surprise and outrage) in support of its contention that the notice was unreasonable. Applicant has simply alleged no facts indicating *why* the notice at issue was unreasonably short.

[5] Applicant's argument that only business days should be counted in determining the reasonableness of notice is without support. While we might feel differently if notice was given, say, on a Friday evening for a Monday morning deposition, that was not the case here. Notice was given late on a Tuesday, allowing applicant all day Wednesday, Thursday, and Friday – as well as the weekend, if desired – to prepare.

Applicant also contends that opposer failed to identify the witness prior to noticing the deposition, and that opposer failed to turn over documents which are presumably related to the subject matter of the deposition. Again, we find applicant's contentions without merit.

Applicant has not indicated whether it requested during discovery that opposer disclose the names of potential witnesses.[6] In any event, parties to Board proceedings are generally not required to disclose the identity or expected testimony of fact witnesses prior to trial. *See* TBMP § 419(7), and cases cited therein.

We are also left in the dark as to what documents applicant believes opposer should have provided prior to noting the deposition, and the basis for applicant's belief that opposer should have done so. However, it is clear that discovery is long over in this matter. If applicant requested documents during discovery which have not been produced, trial is not the appropriate time to compel their production. On the other hand, opposer may be precluded from introducing evidence at trial if it was not disclosed pursuant to a proper discovery request. But these are not

[6] The automatic disclosure provisions of the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 26(a), are not applicable to Board proceedings. Trademark Rule 2.120(a).

questions that can be resolved on this record or at this stage of the proceeding.[7]

We turn next to applicant's final contention – namely that the deposition should be quashed because it was scheduled to take place on a Federal holiday. Curiously, we have been able to find no direct precedent on this issue.

Our rules provide that:

> Whenever periods of time are specified in this part in days, calendar days are intended. When the day, or the last day fixed by statute or by or under this part for taking any action or paying any fee in the Patent and Trademark Office falls on Saturday, Sunday, or on a Federal holiday within the District of Columbia, the action may be taken, or the fee paid, on the next succeeding day which is not a Saturday, Sunday, or a Federal holiday. * * *

Patent and Trademark Rule 1.7.

As noted above, Monday, January 20, 2003, was a Federal holiday. Accordingly, Federal courts – as well as the USPTO – were closed for business on that day. Patent and Trademark Rule 1.7 provides that any time period (which includes a testimony period in a Board proceeding) which is set to end on a Federal holiday will be extended until the next day which does not also fall on a weekend or holiday. The rule is based, it seems obvious, on the presumption that regular business will not be conducted on such days. Otherwise, the extension of the relevant period to the next

[7] A motion which deals with the substance of trial evidence will usually be reserved for decision by a panel of the Board upon final hearing of the case.

available day would simply be a windfall with no apparent purpose.

Although Board testimonial depositions differ from civil trial testimony in that they do not take place in the presence of the Board, it would be anomalous to expect the parties to conduct Board proceedings on a Federal holiday, when the Board itself would not do so. While we take no issue with parties who conduct proceedings on weekends or holidays by agreement, we will not compel an unwilling party to do so upon pain of loss of its right to participate fully in examination of the witness.

Accordingly, applicant's motion to quash would have been granted on this ground.

Motion to Strike

We say "would have been granted…" because it is now apparent that opposer has conducted the deposition as noticed, without applicant's participation.[8] Applicant has moved to strike the testimony, essentially for the same reasons set out in support of its motion to quash, adding that the circumstances surrounding the notice and deposition

[8] Opposer's letter of January 20, 2003, informing applicant that the deposition had been conducted, stated that "[i]f [applicant] would like a transcript of the deposition, please contact the court reporter directly." However, Board rules require that all testimonial depositions must be filed with the Board, Trademark Rule 2.123(h), and that all papers filed with the Board must be served, Trademark Rule 2.119(a). Accordingly, it is opposer's responsibility to ensure that applicant receives a copy of the transcript of the testimonial deposition, with exhibits.

did not allow applicant an opportunity to appear and cross-examine the witness.

Trademark Rule 2.123(e)(3) provides that

> Every adverse party shall have full opportunity to cross-examine each witness. If the notice of examination of witnesses which is served pursuant to paragraph (c) of this section is improper or inadequate with respect to any witness, an adverse party may cross-examine that witness under protest while reserving the right to object to the receipt of the testimony in evidence. Promptly after the testimony is completed, the adverse party, if he wishes to preserve the objection, shall move to strike the testimony from the record, which motion will be decided on the basis of all the relevant circumstances. A motion to strike the testimony of a witness for lack of proper or adequate notice of examination must request the exclusion of the entire testimony of that witness and not only a part of that testimony.

As noted, applicant did not participate in the deposition, and did not cross-examine the witness under protest as set out in the rule. However, given our finding that the deposition should not have been held in the first place, there was no need for applicant to have done so. Inasmuch as it was improper to have conducted the testimonial deposition on a Federal holiday, it follows that applicant was denied thereby its "full opportunity to cross-examine [the] witness."

The only question remaining is the remedy. We note again that opposer alternatively moved (in its opposition to the motion to quash) for an extension of its testimony

---

Applicant need not arrange (or pay) for its own copy of the transcript.

period to allow the deposition of Ms. Wolf to be taken under more appropriate circumstances. By its reply brief, applicant argues that "{o]pposer has never moved for a further extension of its testimony period to accommodate this deposition" (emphasis in original), and that opposer has "unclean hands."

Applicant's statement is clearly incorrect. While opposer's request for an extension of its testimony period was not the subject of a separate motion, it was clearly a request for such relief, which the Board will treat as a motion. Applicant's position that opposer has not moved for an extension of its testimony period is belied by applicant's reply brief, which responds to opposer's request.

An extension of time – applied for prior to the expiration of the relevant period – will be granted upon a showing of "good cause."[9] Fed. R. Civ. P. 6(b). We cannot agree that opposer has unclean hands because it did not immediately reschedule the deposition or call applicant to resolve the matter as soon as it received applicant's motion to quash. Indeed, it does not appear that either party was

[9] Because opposer's request was made in response to a motion filed prior to the expiration of its testimony period (and was itself filed prior to such date), the "good cause" standard applies.

willing to resolve this dispute in the most efficient or timely manner.

Under applicant's standard, applicant could also be faulted for failing to attempt to resolve the matter prior to filing its motion to quash. Even if there were no satisfactory alternative to filing the motion, applicant did not seek resolution of the matter under the Board's teleconferencing rules, which would have answered the central question prior to the deposition. Applicant effectively forced opposer to either postpone the deposition regardless of the merits of the motion to quash and risk the Board's denial of opposer's motion to take the deposition at a later time, or to take the deposition, and risk the Board's striking the testimony for failure to give reasonable notice. We decline to skewer opposer on either horn of the dilemma.

Accordingly, applicant's motion to strike is DENIED, *without prejudice*. As set out in the trial schedule below, we GRANT opposer's motion to extend its testimony period for the sole purpose of allowing applicant an opportunity to conduct cross-examination of Ms. Wolf, if desired, and if so, for any further questions from either party as appropriate under the applicable rules. The Board has set thirty days during which the parties may schedule the

resumption of Ms. Wolf's deposition.[10] We trust that the parties will be able to arrange a mutually-agreeable date during that period for the continuation of Ms. Wolf's deposition.

Opposer shall serve upon applicant (and file with the Board) a copy of Ms. Wolf's deposition transcript, with exhibits, promptly upon its preparation by the court reporter. The revised schedule set out below assumes that applicant will have received the transcript no less than ten days prior to the resumption of Ms. Wolf's deposition. Applicant should promptly notify the Board if this is not the case.

Finally, because applicant was not present during Ms. Wolf's testimony upon direct questions, applicant may state for the record at the beginning of the resumed deposition, any objections it may have otherwise made during such direct testimony. As always, a panel of the Board will rule on all objections upon final consideration of the case.

If opposer fails to make Ms. Wolf available as ordered, applicant may renew its motion to strike.

Further Proceedings

By now the parties should not be surprised to learn that the Board finds the practices engaged in here to be

[10] The deposition itself, however, should not exceed the time limits set out in Fed. R. Civ. P. 30(d)(2), absent leave of the Board.

unnecessarily contentious. Although applicant did not demonstrate that the notice of Ms. Wolf's deposition was unreasonable, there seems little cause to have waited so long to schedule the testimony. To make matters worse, neither party appears to have attempted to resolve this problem before filing their various motions.

Although it should not be necessary to remind the parties, these proceedings are to be conducted with decorum and courtesy. Patent and Trademark Rule 1.3. To that end, the parties are strongly urged to cooperate in the scheduling of any further testimony. The Board will take a dim view of any party necessitating the filing of any further contested scheduling motion.

Dates Reset

Trial dates are reset as follows:

DISCOVERY PERIOD TO CLOSE:	**CLOSED**
Thirty day testimony period for party in position of plaintiff to close:	**April 14, 2003**
Thirty day testimony period for party in position of defendant to close:	**June 13, 2003**
Fifteen day rebuttal testimony period to close:	**July 28, 2003**

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.l25.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.

.oOo.