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

Proceeding	91182064
Party	Plaintiff AS Holdings, Inc.
Correspondence Address	Terence J. Linn Van Dyke, Gardner, Linn & Burkhardt, LLP. 2851 Charlevoix Drive SE, Ste 207 Grand Rapids, MI 49546 UNITED STATES linn@vglb.com, anne@vglb.com
Submission	Motion to Strike
Filer's Name	Terence J. Linn
Filer's e-mail	linn@vglb.com, anne@vglb.com
Signature	/Terence J. Linn/
Date	12/01/2009
Attachments	Opposer's Motion to Strike Exhibits and Testimony for Improper Disclosure.pdf (2 pages)(66835 bytes) Opposer's Brief in Support of Motion to Strike.pdf (6 pages)(259758 bytes) Exhibit A.pdf (6 pages)(261804 bytes) Exhibit B.pdf (2 pages)(58976 bytes) Exhibit C.pdf (12 pages)(194318 bytes) Exhibit D.pdf (9 pages)(160897 bytes) Exhibit E.pdf (10 pages)(171401 bytes) Exhibit F.pdf (3 pages)(67429 bytes)

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

AS HOLDINGS, INC.)
)
Opposer,)
)
v.) Opposition No. 91182064
)
H&C MILCOR, INC. f/k/a)
AQUATICO OF TEXAS, INC.) Serial Number: 76/461,157
) Mark: Miscellaneous Design:
Applicant.) (Pipe Boot Product Design)
)
_____)

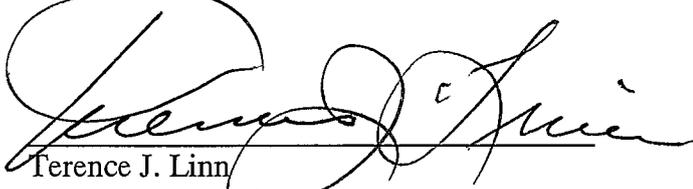
**OPPOSER'S MOTION TO STRIKE EXHIBITS AND TESTIMONY FOR IMPROPER
DISCLOSURE AND FAILURE TO DISCLOSE**

Opposer, AS Holdings, Inc., hereby moves to strike the following exhibits and testimony:

Applicant Defendant's Exhibits 16 – 22; and all testimony relating to Exhibits 16 - 22, including without limitation the related testimony of Sean Steimle (testimonial deposition dated November 12, 2009, page 5 line 22 to page 12 line 7; and page 13 line 13 to line 23) and Lawrence Devitt (testimonial deposition dated November 12, 2009, page 4 line 17 to page 8 line 24; page 39 line 6 to line 22).

The basis for this motion is that Defendant's Exhibits 16 - 22 were not identified in Applicant Defendant's Pretrial Disclosures. These exhibits were not produced by Applicant to Opposer prior to the testimonial depositions during which Applicant belatedly identified these exhibits, namely the testimonial depositions of Sean Steimle and Lawrence Devitt conducted November 12, 2009. Copies of these exhibits were first provided to Opposer's counsel on November 30, 2009. The exhibits and related testimony should be stricken pursuant to Trademark Rules 2.123(e)(3) and 2.121(e). A memorandum in support of this motion is submitted herewith.

Respectfully submitted,



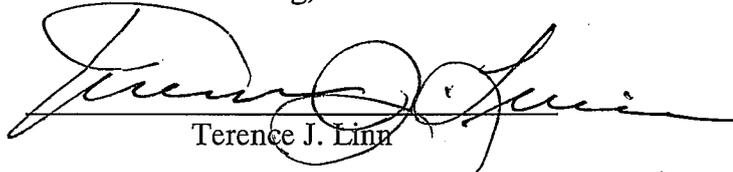
Terence J. Linn
Matthew D. Kendall
Van Dyke, Gardner, Linn & Burkhart, LLP
2851 Charlevoix Drive SE, Suite 207
Grand Rapids, MI 49546
(616) 975-5500

Dated: December 1, 2009

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2009 , a true and correct copy of **Opposer's Motion to Strike Exhibits and Testimony for Improper Disclosure and Failure to Disclose and Memorandum in Support of Its Motion** was sent by first class mail, postage prepaid, to Attorney for Applicant as follows:

Dillis V. Allen
105 S Roselle Rd, Suite 101
Schaumburg, IL 60193



Terence J. Linn

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

AS HOLDINGS, INC.)
)
Opposer,)
)
v.) Opposition No. 91182064
)
H&C MILCOR, INC. f/k/a)
AQUATICO OF TEXAS, INC.) Serial Number: 76/461,157
) Mark: Miscellaneous Design:
Applicant.) (Pipe Boot Product Design)
)
_____)

**OPPOSER'S MEMORANDUM IN SUPPORT OF ITS MOTION TO STRIKE EXHIBITS
AND TESTIMONY FOR IMPROPER DISCLOSURE AND FAILURE TO DISCLOSE**

Opposer, AS Holdings, Inc., has moved to strike (1) Applicant Defendant H&C Milcor, Inc.'s (hereinafter "Milcor" or Applicant) testimonial deposition Exhibits 16-22 which were neither identified in Defendant's Pretrial Disclosures nor produced during discovery, and (2) the testimony of Sean Steimle (testimonial deposition dated November 12, 2009, page 5 line 22 to page 12 line 7, and page 13 line 13 to line 23) and testimony of Lawrence Devitt (testimonial deposition dated November 12, 2009, page 4 line 17 to page 8 line 24, page 39 line 6 to line 22) relating to those exhibits.

Background

A copy of Applicant H&C Milcor, Inc. f/k/a Aquatico of Texas, Inc. Pretrial Disclosures is attached hereto as Motion Exhibit A. The Certificate of Service mailing date for those pretrial disclosures is dated October 16, 2009. Applicant's Pretrial Disclosure stated the following with regard to exhibits (pages 4 – 5):

Applicant intends to rely on or may rely on the Exhibits listed in the Opposer, AS HOLDINGS, INC.'S Pretrial Disclosures, and additionally may rely on the deposition witnesses and exhibits also listed in Opposer, AS HOLDINGS, INC.'s

Pretrial Disclosures, and also may rely on further Exhibits that may be produced at trial. These latter Exhibits will be provided to Opposer's attorney either in advance of the testimony of the individual witnesses or may be contemporaneously provided as the testimony of the individual witnesses progresses.

By letter dated October 22, 2009, a copy of which is attached as Motion Exhibit B, Opposer objected to Applicant's Pretrial Disclosures as improper and inadequate. In that objection of Motion Exhibit B Opposer specifically objected to documents and exhibits not specifically identified in Applicant's Pretrial Disclosures, and in particular to any document or exhibit that Applicant purportedly intended to be utilized under Applicant's reference to further exhibits that may be produced at trial, but which were not identified in any fashion in Applicant's Pretrial Disclosures.

On November 12, 2009 Applicant conducted the testimonial deposition of Sean Steimle and Lawrence Devitt. Pursuant to agreement between the parties, Opposer attended that deposition via telephone. No exhibits were provided to Opposer prior to those depositions. During the testimonial depositions of Sean Steimle and Lawrence Devitt Applicant identified new Applicant Defendant's Exhibits 16 - 22. At that time Applicant elicited testimony over the objection of Opposer from Mr. Steimle regarding new exhibits 16-18. (See attached Motion Exhibit C, Steimle testimonial deposition November 12, 2009, page 5 line 22 to page 12 line 7, and page 13 line 13 to line 23.) During the deposition of Lawrence Devitt, Applicant identified additional new Defendant's Exhibits 19-22, and over Opposer's objection elicited testimony regarding the new exhibits. (See attached Motion Exhibit D, Devitt testimonial deposition November 12, 2009, page 4 line 17 to page 8 line 24, page 39 line 6 to line 22.) At that time Opposer objected to the newly identified exhibits which had not been listed on Applicant's Pretrial Disclosures. (See continuing objection at Motion Exhibit C, Steimle deposition pages 7,

10-11, and Motion Exhibit D, Devitt deposition pages 5-7.)

During the discovery period of this proceeding Opposer served Opposer's First Set of Requests for Production of Documents and Things on Defendant Applicant Milcor. A copy of Applicant Defendant Milcor's responses to Document Requests 1, 21, 28 and 34 are attached as Motion Exhibit E. In particular, Request 21 requested documents relating to third parties' use of the mark sought to be registered.

On November 24, 2009, Opposer's counsel received a copy of the Steimle and Devitt transcripts which included Opposer's objections, but copies of Applicant Defendant's Exhibits 16-22 were not then received. (See attached Motion Exhibit F, email exchange with reporter service re copies of exhibits.) For the first time counsel for Opposer obtained copies of newly identified Applicant Defendant's Exhibits 16-22 on November 30, 2009. Opposer promptly filed the present motion.

Discussion

The rule changes to the Trademark Rules, and the requirement of Pretrial Disclosures, are applicable to opposition proceedings commenced on or after November 1, 2007. 37 C.F.R. § 2.121(e); *Jules Jurgensen/Rhapsody Inc. v. Baumberger*, 91 USPQ2d 1443, 1444 (TTAB 2009). This opposition was initiated after November 1, 2007 and therefore the revised trademark rules are applicable to this proceeding.

Trademark Rule 2.121(e) requires pretrial disclosures. Trademark Rule 2.121(e) establishes that pretrial disclosures as to witnesses and exhibits is mandatory: "the party scheduled to present evidence **must** disclose the name and, if not previously provided, the telephone number and address of each witness from whom it intends to take testimony, or may take testimony if the need arises and a general summary or list of the types of documents and

things which may be introduced as exhibits during testimony of the witness.” (emphasis added.)

Trademark Rule 2.123(e)(3) provides that if pretrial disclosures are “improper or inadequate” with respect to a witness the adverse party may cross-examine that witness under protest while reserving the right to object to the receipt of the testimony in evidence. *Jules Jurgensen/Rhapsody Inc. v. Baumberger*, 91 USPQ2d 1443, 1444 (TTAB 2009).

None of Applicant Defendant’s Exhibits 16-22 were identified in Applicant’s Pretrial Disclosures. Moreover, these exhibits were not produced during the discovery phase of this proceeding.

The testimony introduced by Opposer was originally conducted as discovery depositions taken of Mr. Steimle by Opposer, and several witnesses of Opposer that were deposed by Applicant. By agreement between the parties these discovery depositions were to be used as trial testimony. That testimony taken during the discovery period included testimony directed to the pipe boots of third party Firestone. (See trial testimony previously submitted June 26, 2009, Michael Hubbard Deposition November 13, 2008 pgs 31, 35-37, 41-42, 77-79; and of Chris Kintzele Deposition November 12, 2008 pgs 10-12.) Applicant and its counsel were well aware of that testimony during the discovery phase of this proceeding and cannot now claim some form of surprise as to the testimony or evidence that Opposer submitted. To the extent that Applicant may have believed that additional documents or evidence may be necessary to respond to any of this testimony, Applicant had more than ample opportunity to produce that information and documents during the discovery phase and thus provide Opposer with the opportunity for conducting discovery and evaluation of those documents for purposes of Opposer’s own testimony in chief. Applicant likewise was well aware of that prior testimony when Applicant prepared and served its Pretrial Disclosures.

Moreover, during the discovery phase of this proceeding Opposer took the discovery deposition of Applicant H&C Milcor, Inc. pursuant to Fed.R.Civ.P. 30(b)(6) with Mr. Sean Steimle provided as the representative deponent. During the course of that discovery deposition counsel for Opposer discussed with counsel for Applicant the production of sales information and documentation for years other than 2007 and 2008. (Steimle Deposition October 3, 2008 pp. 72-74; submitted during Opposer's case in chief on June 26, 2009.), and Counsel for Applicant represented that Applicant would not produce more documents that had not been previously produced and attempt to use those documents at trial. (Steimle Deposition October 3, 2008 pp. 73-74.) Opposer relied upon that representation. In particular Applicant's new Defendant's Exhibit 18 consists of selected sales invoices from 2005 and 2006.

Now Applicant, contrary to its representations made during the discovery phase, is producing new documents which had previously not been produced and is attempting to introduce them as evidence in this proceeding. In particular, these documents allegedly relate in some fashion to third party use of the subject mark, by the third party Firestone. (See Motion Exhibit E, Request for Production no. 21.) Not only did Applicant not identify these documents and information, but is doing so in violation of its prior representations to Opposer's counsel.¹

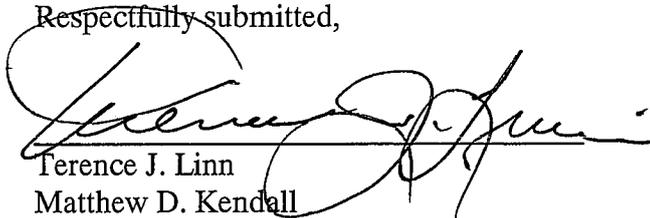
Accordingly, Applicant Defendant's Exhibits 16-22 should be precluded from entry into the record and/or stricken from the record in the event Applicant files the same. All testimony by Applicant's witnesses, namely Mr. Steimle and Mr. Devitt, regarding those exhibits should likewise be precluded from entry in the record and/or stricken from the record in the event that Applicant attempts to file the same. This would include the exclusion and/or striking of the following pages of the testimonial deposition of Sean Steimle dated November 12, 2009: page 5

¹ It should be noted, as well, that Applicant's Pretrial Disclosures do not identify Mr. Steimle as potentially testifying as to sales of pipe boots.

line 22 to page 12 line 7; and page 13 line 13 to line 23; and the following pages of the testimonial deposition of Lawrence Devitt dated November 12, 2009: page 4 line 17 to page 8 line 24; page 39 line 6 to line 22.

In view of the above, Opposer's Motion should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terence J. Linn", written over a horizontal line.

Terence J. Linn
Matthew D. Kendall
Van Dyke, Gardner, Linn & Burkhardt, LLP
2851 Charlevoix Drive SE, Suite 207
Grand Rapids, MI 49546
(616) 975-5500
Attorneys for Opposer

Dated: December 1, 2009

EXHIBIT A

2. John Cirachi, Controller of Winward Roofing,, 919 S. Sacramento, Chicago, IL 60611, Telephone: 773/638-6580. Mr. Cirachi may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.

3. Larry Kozak, Engineering Manager of Hart & Cooley, 815 Kimberly Drive, Carol Stream, IL 60188, Telephone: 630/588-2544. Mr. Kozak may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.

4. Larry Devitt, Marketing Manager/Architect of Hart & Cooley, 815 Kimberly Drive, Carol Stream, IL 60188, Telephone: 630/588-2514. Mr. Devitt may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.

5. Sean Steimle, Vice President of Hart & Cooley, 815 Kimberly Drive, Carol Stream, IL 60188, Telephone: 630/588-2510. Mr. Steimle may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the

functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.

6. Russ Verbrugge, Engineer of Hart & Cooley, 5030 Corporate Exchange Boulevard SE, Grand Rapids, MI 49512, Telephone: 616/656-8200. Mr. Verbrugge may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.

7. Tom Kelly, Owner/Roofing Manager of 2001 Company, 325 Thomaston Avenue, Waterbury, CT 06702, Telephone: 800/537-7663. Mr. Kelly may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.

8. George Criel, President of Century Roofing Consulting, 1645 Hicks Road, Rolling Meadows, IL 60008, Telephone: 847/202-8500. Mr. Criel may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials

and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.

9. Mitch Rabin, Owner of A1 Roofing, 1425 Chase Avenue, Elk Grove Village, IL 60007, Telephone: 847/952-3600. Mr. Rabin may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.

10. David Rabin, Owner of A1 Roofing, 1425 Chase Avenue, Elk Grove Village, IL 60007, Telephone: 847/952-3600. Mr. Rabin may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.

EXHIBITS

Applicant intends to rely on or may rely on the Exhibits listed in the Opposer, AS HOLDINGS, INC.'s Pretrial Disclosures, and additionally may rely on the deposition witnesses and exhibits also listed in Opposer, AS HOLDINGS, INC.'S Pretrial Disclosures, and also may rely on further

Exhibits that may be produced at trial. These latter Exhibits will be provided to Opposer's attorney either in advance of the testimony of the individual witnesses or may be contemporaneously provided as the testimony of the individual witnesses progresses.


Dillis V. Allen
Attorney for H&C Milcor, Inc.
f/k/a Aquatico of Texas, Inc.
Reg. No. 22,460

Dated: October 16, 2009

CERTIFICATE OF SERVICE

This is to certify that a copy of *APPLICANT, H&C MILCOR, INC. f/k/a AQUATICO OF TEXAS, INC.'S PRETRIAL DISCLOSURES* was sent via Federal Express to the Trademark Trial and Appeal Board on October 16, 2009, and a true and correct copy of same was sent on October 16, 2009, via first-class mail, postage prepaid, to Opposer's counsel as follows:

Terence J. Linn, Esq.
Van Dyke, Gardner, Linn & Burkhardt, LLP
2851 Charlevoix Drive SE, Suite 207
Grand Rapids, MI 49588-8695


Dillis V. Allen

Dillis V. Allen, Esq.
105 S. Roselle Road
Suite 101
Schaumburg, IL 60193
847/895-9100

EXHIBIT B

VAN DYKE, GARDNER, LINN & BURKHART, LLP

ATTORNEYS AT LAW

2851 CHARLEVOIX DRIVE S.E.

P.O. BOX 888695

GRAND RAPIDS, MICHIGAN 49588-8695 USA

TELEPHONE (616) 975-5500

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TERENCE J. LINN
DIRECT DIAL (616) 975-5503

FACSIMILE
(616) 975-5505

E-MAIL
linn@vgib.com

October 22, 2009

Mr. Dillis V. Allen
105 S Roselle Rd, Suite 101
Schaumburg, IL 60193

Re: AS Holdings, Inc. v. H&C Milcor, Inc., f/ka Aquatico of Texas, Inc.
Opposition Against the Mark: Miscellaneous Design (Pipe Boot Product Design)

Dear Mr. Allen:

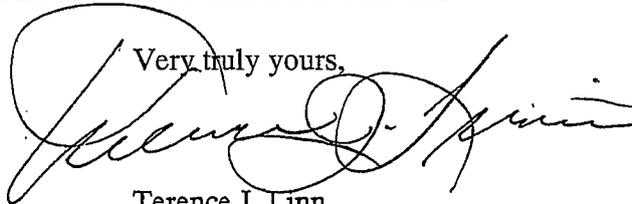
We received Applicant, H&C Milcor, Inc., f/k/a Aquatico of Texas, Inc.'s Pretrial Disclosures bearing a certificate of service dated October 16, 2009. Please be advised that Opposer AS Holding, Inc. objects to those disclosures as improper and inadequate. Specifically, Applicant objects to the Pretrial Disclosures to the extent that Applicant identifies witnesses not identified in Applicant's Initial Disclosures, including Tom Mollen, John Cirachi, Larry Kozak, Russ Verbrugge, Tom Kelly, George Criel, Mitch Rabin, and David Rabin.

Applicant will further object to documents and exhibits not specifically identified in Applicant's Pretrial Disclosures, and in particular will object to any document or exhibit Applicant provides that is purportedly covered by the following statement of Applicant:

and also may rely on further exhibits that may be produced at trial. These later exhibits will be provided to Opposer's attorney either in advance of the testimony of the individual witnesses or may be contemporaneously provided as the testimony of the individual witnesses progresses.

Be advised that Opposer will move to strike pursuant to applicable regulations any and all witness testimony and/or exhibits offered by Applicant that are improperly or inadequately disclosed pursuant to the Initial Disclosure and Pretrial Disclosure rules.

Very truly yours,



Terence J. Linn

TJL/amv

EXHIBIT C

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

AS HOLDINGS, INC.,)	
)	
Plaintiff;)	
)	Opposition
-vs-)	No. 91182064
)	
H&C MILCOR, INC. f/k/a)	
AQUATICO OF TEXAS, INC.,)	
)	
Defendant.)	

The testimonial deposition of SEAN STEIMLE, called by the defendant for examination, pursuant to notice and pursuant to the provisions of the Civil Practice Act of the State of Illinois and the Rules of the Supreme Court thereof pertaining to the taking of depositions for the purpose of evidence, taken before DEBORAH TYRRELL, a Certified Shorthand Reporter and a Notary Public within and for the County of DuPage and State of Illinois, at 815 Kimberly Drive, Carol Stream, Illinois, on the 12th day of November, 2009, at the hour of 11:30 a.m.

METRO REPORTING SERVICE, LTD.
(630) 690-0050

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APPEARANCES:

VAN DYKE, GARDNER, LINN & BURKHART, LLP.
(2851 Charlevoix Drive S.E.
P.O. Box 888695
Grand Rapids, Michigan 49588-8695
Telephone: (616) 975-5503
BY: MR. TERENCE J. LINN

appeared telephonically on
behalf of the plaintiff;

LAW OFFICE OF DILLIS V. ALLEN
(105 South Roselle Road
Suite 101
Schaumburg, Illinois 60193
Telephone: (847) 895-9100
BY: MR. DILLIS V. ALLEN

appeared on behalf of the defendant.

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22 Q Alright. Now you provided us today with a
23 mold insert and I am going to hand it to you and you
24 tell me what that is.

1 A It is our insert for our --

2 MR. LINN: Before you do that, I would like
3 to interpose an objection as to this not having been
4 previously identified or produced and we would object
5 and ultimately we will move to strike. You can
6 proceed, though.

7 MR. ALLEN: Thank you.

8 THE WITNESS: Can you repeat the question
9 again, please?

10 BY MR. ALLEN:

11 Q Can you identify that insert?

12 A Yes. This is an insert for our private
13 label brandied for Firestone.

14 Q What does it say on it in terms of alpha or
15 numeric information?

16 A BFDP EPDM. B as in boy, F as in Frank, D
17 as in dog, and P as in Paul.

18 Q Let me ask you. Was that insert used to
19 make the letter, BFDP EPDM, on Exhibit 4 Firestone
20 pipe boot?

21 A Yes, that is correct.

22 MR. ALLEN: Now, I am not going to attempt
23 to -- Terry, I am not -- they might want to use this
24 insert so what I did is I took some pictures.

1 MR. LINN: I'd object to the pictures as
2 well. Can you just give me a continuing objection to
3 any and all new material that you are producing that
4 were not specifically listed on your pre-trial or
5 previously produced? That way I don't have to keep
6 interrupting you with that objection.

7 MR. ALLEN: You absolutely have that,
8 Terry.

9 MR. LINN: Thank you, very much.

10 BY MR. ALLEN:

11 Q I am handing you two photographs that I
12 took of the insert yesterday. They are eight-by-ten
13 prints. I ask you if that accurately reflects the
14 insert that I previously showed you?

15 A That is correct. That is a picture of our
16 insert --

17 Q Alright.

18 A -- for Firestone pipe boots.

19 MR. ALLEN: I ask that the reporter mark
20 those as Defendant's Group 16.

21 (Exhibit marked as requested.)

22 BY MR. ALLEN:

23 Q I also yesterday photographed with a micro
24 lens the BFDP logo on Exhibit 4 Firestone. I am

1 going to hand you these photographs. There is two of
2 them. I ask if you can give me a conclusion as to
3 whether they are actual photographs of the logo that
4 appears on Exhibit 4?

5 A Yes, they are the pictures of the boot that
6 is in Exhibit 4. You can see the label from the
7 legal Exhibit 4 on the pictures and the replica of
8 the boot insert.

9 MR. ALLEN: Alright. I will give these to
10 the reporter and ask her to mark these Defendant's
11 Group Exhibit 17.

12 (Exhibit marked as requested.)

13 MR. ALLEN: There is already an exhibit
14 that shows a close up of that same thing but it is
15 not a very good one so I took them over again.

16 MR. LINN: Okay. I am not aware of any
17 photos of any kind of insert being made.

18 MR. ALLEN: I will identify it for you.
19 Here it is. It's Exhibit 6.

20 MR. LINN: I am looking at Exhibit 6 and it
21 is as photograph of a pipe boot.

22 MR. ALLEN: Right, that is what Exhibit 17
23 is.

24 MR. LINN: Alright. I understood it to be

1 a photograph of an insert.

2 MR. ALLEN: No. It is a photograph of the
3 result of the insert on the pipe boot.

4 MR. LINN: Okay.

5 MR. ALLEN: Do you see what I am saying?

6 MR. LINN: I am looking at the photograph
7 and I understand what you are saying.

8 MR. ALLEN: Okay. Fine.

9 MR. LINN: Thank you.

10 MR. ALLEN: My pictures on 17 are better.
11 I don't know who took Exhibit 6. It wasn't me I
12 don't think. Maybe it was. Okay.

13 BY MR. ALLEN:

14 Q Now, Mr. Steimle, I am going to show you a
15 plurality of exhibits or invoices rather that are
16 dated '06, '05. They appear to be just '06 and '05.
17 These invoices portend to be invoices from Portals
18 Plus to Firestone for pipe boots. I am going to hand
19 these to Mr. Steimle and ask him if he can identify
20 those invoices?

21 A Yes. They are Portals Plus invoices, part
22 of Hart and Cooley, to Firestone. And we still have
23 invoices to Firestone to present through 2009.

24 Q So you're still presently selling to --

1 A That is correct.

2 Q -- Firestone. This same product we're
3 looking at Exhibit 4?

4 A The same product in Exhibit 4 I would have
5 an invoice in the last three weeks that would
6 represent that to Firestone.

7 Q And these invoices here do they relate at
8 least in part to the Exhibit 4 pipe boot, which is
9 characterized in the literature and in the testimony
10 as the medium pipe boot?

11 A That is correct.

12 MR. LINN: Objection as to form; leading.

13 MR. ALLEN: Okay.

14 THE WITNESS: Should I respond to that?

15 MR. ALLEN: No. We will hand these to the
16 reporter and ask that she mark that as Defendant's
17 Group Exhibit 18.

18 (Exhibit marked as requested.)

19 MR. LINN: I just want to make sure I have
20 a continuing objection to any new exhibits that are
21 not expressly listed on the pre-trial order or
22 pre-trial --

23 MR. ALLEN: Disclosures.

24 MR. LINN: It's called -- yes.

1 MR. ALLEN: Disclosures.

2 MR. LINN: Yes. Pre-trial disclosures.

3 Just confirm I have a continuing objection to any --

4 MR. ALLEN: We agree with that.

5 MR. LINN: Okay. Very good.

6 (Whereupon, a discussion was held
7 off the record.)

8 MR. LINN: Madam Reporter, are you getting
9 all this down?

10 THE COURT REPORTER: No. I was marking the
11 exhibits.

12 MR. LINN: Can you get this down? There's
13 interrogation of the witness going on and I can
14 barely hear it.

15 MR. ALLEN: I can tell you what we were
16 talking about. We were not trying to fool you. If I
17 wanted to talk off the record, I would take him out
18 of the room or something so you could --

19 MR. LINN: I just wanted to make sure you
20 were asking him questions.

21 MR. ALLEN: No, I am not.

22 MR. LINN: You were going back and forth
23 and it appears the court reporter was not able to get
24 it down because she was marking an exhibit.

1 MR. ALLEN: That is okay. I will tell you
2 what the conversation was about. Sean told me that
3 he thought there were invoices in the 30 B 6
4 deposition relating to Firestone. That was the
5 extent of the conversation. Since those are already
6 in evidence, it's not relevant. We will just move
7 on. Terry, are you still there?

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Q Now, Firestone in an effort to secure a quotation for pipe boots from the plaintiff, AS Holdings in this case, sent AS Holdings a specification. I am going to ask you whether this specific drawing out of the Portals Plus document appears in the Firestone specification?

MR. LINN: Objection to the form. Leading and assumes facts not in evidence.

BY MR. ALLEN:

Q Answer.

A Yes. That is correct.

EXHIBIT D

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

AS HOLDINGS, INC.,)
)
Plaintiff;)
) Opposition
-vs-) No. 91182064
)
H&C MILCOR, INC. f/k/a)
AQUATICO OF TEXAS, INC.,)
)
Defendant.)

The testimonial deposition of LARRY DEVITT, called by the defendant for examination, pursuant to notice and pursuant to the provisions of the Civil Practice Act of the State of Illinois and the Rules of the Supreme Court thereof pertaining to the taking of depositions for the purpose of evidence, taken before DEBORAH TYRRELL, a Certified Shorthand Reporter and a Notary Public within and for the County of DuPage and State of Illinois, at 815 Kimberly Drive, Carol Stream, Illinois, on the 12th day of November, 2009, at the hour of 12:30 p.m.

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APPEARANCES:

VAN DYKE, GARDNER, LINN & BURKHART, LLP.
(2851 Charlevoix Drive S.E.
P.O. Box 888695
Grand Rapids, Michigan 49588-8695
Telephone: (616) 975-5503
BY: MR. TERENCE J. LINN

appeared telephonically on
behalf of the plaintiff;

LAW OFFICE OF DILLIS V. ALLEN
(105 South Roselle Road
Suite 101
Schaumburg, Illinois 60193
Telephone: (847) 895-9100
BY: MR. DILLIS V. ALLEN

appeared on behalf of the defendant.

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Q Now there is in evidence a specification that Firestone gave to the plaintiff AS Holdings for the purpose of subcontracting a pipe boot for the benefit of Firestone. And in that specification there is a plurality of technical information and drawings. And I am going to hand you a Portals Plus document and ask if you can identify that for me?

MR. LINN: Okay. I am going to object to

1 whatever that soliloquy was. Object to form;
2 leading; assumes facts not in evidence. And also
3 it's not by way of any kind of questioning. It's
4 just testimony.

5 MR. ALLEN: Thank you.

6 THE WITNESS: Okay. This is a -- the page
7 you gave me is a page from what we commonly call our
8 binder; our technical manual. And it shows three
9 different pipe boots on it that we manufacture.

10 The one probably most important here is
11 what we call the medium pipe boot. Along with a
12 drawing indicating dimensions of heights, diameters,
13 and diameter of the phalange of the pipe boot.

14 MR. LINN: Mr. Allen, what document is
15 that, please?

16 MR. ALLEN: It's a Portals Plus --

17 THE WITNESS: Catalogue page.

18 MR. ALLEN: Catalogue page.

19 MR. LINN: Is this a new thing?

20 MR. ALLEN: I think it probably appears in
21 one of the things that is already in there.

22 MR. LINN: Well, I will have an objection
23 as to the extent that this is an document that is not
24 identified on defendant's pre-trial disclosures. As

1 well as to the extent it hasn't been produced or
2 otherwise identified to us. Again, can I have a
3 continuing objection to any documents of that nature
4 so that I don't have to keep interrupting you?

5 MR. ALLEN: Yes, you can.

6 MR. LINN: Okay. Thank you.

7 MR. ALLEN: First of all, let's mark it.
8 Mark it Defendant's Exhibit 19.

9 (Exhibit marked as requested.)

10 BY MR. ALLEN:

11 Q I am going to hand 19 back to the witness.
12 I am going to ask you if that document was
13 transmitted to Firestone?

14 A Yes, it was.

15 Q Thank you. Now I am going to hand you a
16 three-page document, that includes a fax
17 transmission, a Firestone Building Products EPDM Pipe
18 Boot page, and a letter that appears to go from Ron
19 Resech at Portals Plus to Paul Oliveira at Firestone.
20 Can you identify those three documents?

21 A Yes.

22 MR. LINN: Mr. Allen, in addition to the
23 continuing objection as to the extent it is a new
24 documentation, I will also introduce an objection as

1 to this being hearsay. Go ahead.

2 MR. ALLEN: Understood.

3 BY MR. ALLEN:

4 Q Can you identify those documents?

5 A Yes. What these are, first of all, is a
6 submittal that was made when we were beginning to do
7 business with Firestone and that is why it is hard to
8 describe so someone else can see it. But this
9 particular page that has a drawing of a pipe boot and
10 along again with some dimensions and whatnot and a
11 little bit of description with Firestone's name on it
12 and the Portals Plus logo.

13 Q Who generated that document?

14 A Portals Plus did. Portals Plus generated
15 it and sent it to at that time the purchasing agent
16 at Firestone to give him an idea, a concept, of what
17 it is that he is going to be buying.

18 Q All are all three of these documents
19 produced in the regular course of business of Portals
20 Plus?

21 A Yes. Yes, they are.

22 Q Okay.

23 A And the last one by the way was sending
24 them samples to Paul Oliveira of our products.

1 MR. ALLEN: Thank you. I hand it to the
2 court reporter and ask that she mark that Defendant's
3 Exhibit 20.

4 (Exhibit marked as requested.)

5 BY MR. ALLEN:

6 Q I am handing you a set of documents that
7 are entitled "Firestone Product Specification". It
8 is a ten-page document. I am asking if you can
9 identify that. And, if so, tell me what it is.

10 A This is a copy of a Product Specification
11 from Firestone for their white EPDM pipe boots, which
12 we also manufacture for them, and it includes
13 specifications. The papers that you handed me also
14 includes some emails that I had sent to Firestone
15 with comments on the original copies of the
16 specifications. Suggestions that I made to
17 revisions. And the top copy is if you will a
18 signature copy where various people at Firestone
19 signed off on it as well as I did, too, for Portals
20 Plus in reviewing it.

21 MR. ALLEN: Thank you. I would hand it to
22 the court reporter and ask that she mark it
23 Defendant's Exhibit 21.

24 (Exhibit marked as requested.)

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6 Q Mr. Devitt, Mr. Linn was asking you about
7 Portals Plus private labeling their medium pipe boot
8 as represented by Exhibit 4 to several companies that
9 sell that pipe boot, the medium pipe boot, under
10 their own name. For example, Firestone sells that
11 pipe boot under their own name. Now in spite of the
12 fact that Firestone sells this pipe boot under its
13 own name, does the trade recognize the Firestone pipe
14 boot as being manufactured by Portals Plus?

15 MR. LINN: Objection as to form and
16 hearsay. As well as the man has not been offered as
17 an expert.

18 THE WITNESS: To answer the question, yes,
19 I believe so. From time to time we get calls from
20 people who try to buy those pipe boots directly from
21 us. So, yea, I would say so.

22 MR. ALLEN: That is all.

23

24

EXHIBIT E

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

ALPHA SYSTEMS, INC.,)	
)	
Plaintiff,)	
)	Opposition No. 91182064
-vs-)	
)	Serial No. 76/461,157
H&C MILCOR, INC. f/k/a)	Mark: Miscellaneous Design
AQUATICO OF TEXAS, INC.,)	(Pipe Boot Product Design)
)	
Defendant.)	

*H&C MILCOR, INC.'S RESPONSES TO OPPOSER'S FIRST SET
OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS*

Defendant, H&C MILCOR, INC. f/k/a AQUATICO OF TEXAS, INC., by its attorney, Dillis V. Allen, pursuant to Rule 34 of the Federal Rules of Civil Procedure, hereby responds to Plaintiff, ALPHA SYSTEMS, INC.'S, FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS, as follows:

GENERAL OBJECTIONS

1. H&C MILCOR objects to each of Plaintiff's Requests to the extent that it seeks information or documents subject to the attorney-client privilege, information or documents subject to work product doctrine, and/or documents prepared for use by H&C MILCOR'S attorneys in anticipation of litigation.

2. H&C MILCOR objects to each of Plaintiff's Requests to the extent that a definition, instruction, or request, as stated in the Definitions and Instructions section of Plaintiff's Requests, seeks to impose an obligation on H&C MILCOR to provide information or produce documents beyond the scope of discovery provided under the Federal Rules of Civil Procedure or to perform tasks not required by such Rules, including any requests for supplementation.

3. H&C MILCOR objects to each of Plaintiff's Requests to the extent that it seeks documents that do not pertain to the subject matter of this action or which are not reasonably calculated to lead to discovery of admissible evidence.

4. H&C MILCOR objects to each of Plaintiff's Requests to the extent it includes the definition of "Documents" as set forth in the Definitions and Instructions Section of Plaintiff's Requests. The definition of "Documents" is unclear as to what documents are to be included. Notwithstanding this objection, H&C MILCOR will produce originals and copies of all documents, as the term "Documents" is defined and interpreted under the Federal Rules of Civil Procedure, as stated in the specific responses hereinafter set forth.

5. H&C MILCOR objects to each of Plaintiff's Requests to the extent that Plaintiff seeks to require H&C MILCOR to produce documents in a particular manner. Notwithstanding this objection, H&C MILCOR will produce its documents and things for inspection by Plaintiff's counsel pursuant to the provisions of Rule 34 of the Federal Rules of Civil Procedure.

6. H&C MILCOR will furnish Plaintiff's counsel in due course with an identification of any documents which are described by one or more of Plaintiff's Requests and which have been withheld from production because H&C MILCOR claims that they are privileged or immune from discovery in this action.

RESPONSES

1. All documents and things referring or relating to the above-identified mark shown in Application Serial No. 76/461,157, filed October 18, 2002(hereinafter referred to as "Applicant's Mark").

RESPONSE: Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

21. All documents and things referring or relating to third-party use of the Applicant's Mark.

RESPONSE: Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

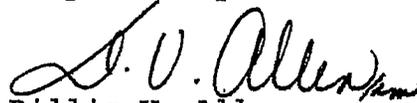
28. All documents and things referring or relating to agreements negotiated and/or entered into by Applicant relating to Applicant's Mark, including, but not limited to, assignments, licenses, permissions, or consents.

RESPONSE: Objection; Trade Secret/Commercially Sensitive, not to be disclosed to the parties under the Protective Order in place by outside counsel and subject to these restrictions. Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

34. All documents and things referring or relating to Applicant's Mark.

RESPONSE: These will be produced.

Respectfully submitted,

A handwritten signature in cursive script that reads "D. V. Allen".

Dillis V. Allen

Reg. No. 22,460

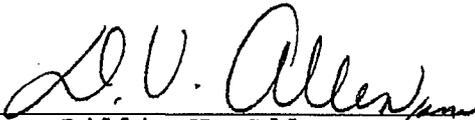
Attorney for H&C Milcor, Inc.

Dillis V. Allen, Esq.
105 S. Roselle Road
Suite 101
Schaumburg, IL 60193
847/895-9100

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing *H&C. MILCOR, INC.'S RESPONSES TO OPPOSER'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS* was served upon the following counsel of record, via Federal Express, on the 9th day of July, 2008:

Terence J. Lin, Esq.
Van Dyke, Gardner, Linn & Burkhardt, LLP
2851 Charlevoix Drive SE, Suite 207
P.O. Box 888695
Grand Rapids, MI 49588-8695


Dillis V. Allen

Dillis V. Allen, Esq.
105 S. Roselle Road
Suite 101
Schaumburg, IL 60193
847/895-9100

EXHIBIT F

Terry Linn

From: Metro Reporting Service [metrocourtrptg@sbcglobal.net]
Sent: Tuesday, November 24, 2009 4:47 PM
To: Terry Linn
Subject: RE: AS HOLDINGS VS. H&C MILCOR DEP. OF LARRY DEVITT TAKEN 11/12/09
11/24/09 EXHIBITS FOR THE TRANSCRIPTS OF SEAN STEIMLE & LARRY DEVITT
ARE
BEING SENT UNDER SEPARATE COVER VIA CERTIFIED MAIL THIS DATE.

--- On Tue, 11/24/09, Terry Linn <Linn@vglb.com> wrote:

From: Terry Linn <Linn@vglb.com>
Subject: RE: AS HOLDINGS VS. H&C MILCOR DEP. OF LARRY DEVITT TAKEN
11/12/09
To: "Metro Reporting Service" <metrocourtrptg@sbcglobal.net>
Cc: "DILLIS ALLEN" <vicvardon@sbcglobal.net>
Date: Tuesday, November 24, 2009, 3:38 PM

Dear Metro Reporting Service:

Please provide me with copies of the exhibits identified during this deposition. I understood these were to be provided to me.

We intend to file a motion to strike those exhibits and do not want to be accused of delay in proceeding with that motion.

Thank you.

Terence J. Linn

Van Dyke, Gardner, Linn & Burkhart, LLP
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2851 Charlevoix Drive, S.E.
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Phone: (616) 975-5503
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11/25/2009

From: Metro Reporting Service [mailto:metrocourtrptg@sbcglobal.net]

Sent: Tuesday, November 24, 2009 3:47 PM

To: Terry Linn

Subject: AS HOLDINGS VS. H&C MILCOR DEP. OF LARRY DEVITT TAKEN 11/12/09

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