

ESTTA Tracking number: **ESTTA408923**

Filing date: **05/12/2011**

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

Proceeding	91195961
Party	Defendant Kelly Van Halen
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Date	05/12/2011
Attachments	91195961_Applicant's Response and Cross Motion_05.12.2011.pdf ( 34 pages ) (1830772 bytes )

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

ELVH, Inc.,	)	
	)	
Opposer,	)	
	)	
v.	)	
	)	
Kelly Van Halen,	)	Opposition No. 91195961
	)	
Applicant.	)	
	)	
_____	)	
	)	
Mark:       KELLYVANHALEN	)	
	)	
Serial No.   77/919644, 77/919645	)	
	)	
Filed:       January 28, 2010	)	
	)	
Published:   June 8, 2010	)	
_____	)	

**APPLICANT’S RESPONSE IN OPPOSITION TO**  
**OPPOSER’S MOTION FOR PARTIAL SUMMARY JUDGMENT**  
**AND APPLICANT’S CROSS MOTION**  
**FOR PARTIAL SUMMARY JUDGMENT**

Applicant Kelly Van Halen, by and through counsel, submits the following response to Opposer’s Motion for Partial Summary Judgment and Applicant’s Cross Motion for Partial Summary Judgment. Numerous issues of fact exist which preclude entry of partial summary judgment in favor of Opposer. Among the issues of fact in dispute are the following:

1. Whether Applicant's mark "KellyVanHalen" ("Applicant's Mark") is dissimilar in sound, sight or meaning with the respect to Opposer's "Van Halen" marks ("Opposer's Marks") as used in connection with the goods in the two classes relevant to Opposer's Motion for Partial Summary Judgment ("Opposer's Motion").

2. Whether there is similarity between the goods recited in the registrations for Opposer's Marks and Applicant's proposed goods in the two classes relevant to Opposer's Motion.

3. That none of the registrations asserted by Opposer claims use of any of Opposer's Marks for any of Applicant's good indentified in international class 24, namely, bed blankets, blanket throws, children's blankets, and lap blankets.

4. Whether Opposer has shown any commonality between the trade channels for the goods recited in Opposer's registrations for Opposer's Marks, on the one hand, and the goods claimed in Applicant's application for the classes relevant to Opposer's Motion.

5. Whether Opposer has shown any commonality or significant overlap between potential customers for the goods recited in Opposer's registrations for Opposer's Marks, on the one hand, and potential customers

for the goods described in the application(s) for Applicant's Marks in the classes relevant to Opposer's Motion.

**I. Opposer's Motion for Partial Summary Judgment on Its Likelihood of Confusion Claim Is Based on Unsupported and Disputed Facts and Therefore Must Fail.**

In Opposer's Motion, Opposer has alleged that there is a likelihood of confusion between its use of the surname "Van Halen" in Opposer's Marks and Applicant's use of her own legal name, Kelly Van Halen. The Board determines the issue of likelihood of confusion by focusing on the question of whether the purchasing public mistakenly would assume that the applicant's goods originate from the same sources as, or are associated with, the goods in the cited registrations. *Paula Payne Prods. Co. v Johnson Publ'g Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (CCPA 1973). The Board makes that determination on a case-by-case basis. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1084, 56 USPQ 2d 1471, 1474 (Fed. Cir. 2000). As stated in Opposer's Motion, in making that determination, the Board is aided by application of the factors set out in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357; 177 USPQ 563 (CCPA 1973).

No evidence is yet of record regarding Opposer's use of its marks in connection with the sale of any of the types of goods described in Applicant's application, and without such information, it is not possible to evaluate the possibility of a likelihood of confusion. Opposer describes its primary business as that of a rock band, and the goods and services described in the registrations for Opposer's Marks are consistent with this fact. As such, the very nature of Opposer's business calls into question the nature and extent of Opposer's rights, and at minimum presents a genuine issue of material fact.

Particularly in light of the only goods that the documents suggest Opposer sells, namely band related merchandise, Opposer cannot demonstrate a likelihood of confusion between the marks. Likelihood of confusion must be evaluated by balancing a number of factors, specifically including: the similarity of the marks, the relatedness of the goods and services, the channels of trade, the classes of purchasers of the goods and services, and the nature and extent of any actual confusion. *E.I. du Pont de Nemours & Co.*, 476 F.2d 1357 (CCPA 1973). No one factor is decisive, and even identical marks can be found not to be confusingly similar. See, e.g., *Allstate Ins. Co. v. Allstate Inv. Corp.*, 210 F. Supp. 25 (W.D. La. 1962), *affd*, 328 F.2d 608 (5th Cir. 1964) (*ALLSTATE* for insurance and

ALLSTATE for mortgage brokerage not likely to be confused); *Vitarroz Corp. v. Borden, Inc.*, 644 F.2d 960 (2d Cir. 1981) (BRAVO'S for crackers and BRAVOS for tortilla chips not likely to be confused); *Columbia University v. Columbia/HCA Healthcare Corp.*, 964 F. Supp. 733, 43 U.S.P.Q.2d 1083 (S.D.N.Y. 1997) (COLUMBIA for a university and COLUMBIA for health care services not likely to be confused). Here, the overwhelming majority of factors favor Applicant.

1. The Goods Are Unrelated.

Opposer's business is that of a rock band. Applicant's business is interior design, construction and the sale of home furnishings and luxury apparel. As such, there is no relationship between the goods sold by Opposer and those sold by Applicant. Any similarity or dissimilarity would have to be evaluated as the parties present evidence regarding actual and intended use of their respective marks.

Applicant's goods in the two classes for which Opposer seeks partial summary judgment consist of luxury home furnishings, apparel and blankets. In sharp contrast, Opposer's goods do not include any of the class 24 goods, and the goods in class 25 consist primarily of band related merchandise use to promote the band itself. *See Kelly Van Halen Decl.*, attached hereto as Exhibit 1.

Opposer has failed to cite any registration for Opposer's Marks that claims use of any such mark for any of the goods which Applicant claims in international class 24, namely, bed blankets, blanket throws, children's blankets, and lap blankets. Despite this deficiency, Opposer has presented anecdotal evidence purporting to show that sellers of apparel sometimes sell blankets and vice versa and that certain types blankets can be "wearable". Such evidence itself presents disputed issues of material fact. Furthermore, such information, even if true, is not relevant to this proceeding or to Opposer's Motion because Opposer has presented no evidence that Opposer's Marks have ever been, or reasonably ever would be, associated with such items as baby blankets. Opposer's use of Opposer's Marks derives from the activities of the associated rock band. The suggestion that consumers would associate a "KellyVanHalen" baby blanket with the concert T-shirts of a rock band is untenable, but at the very least, presents a material issue of fact which remains disputed.

2. The Channels of Trade Are Entirely Different.

Applicant's goods are sold in luxury boutiques and to customers of Applicant's interior design and related services. Opposer has submitted no evidence, either in discovery or in its Motion, that it provides any goods in

such channels of trade. Opposer's evidence indicates that to the extent any similar goods are sold, they are at venues for rock concerts and at specialty shops featuring rock band merchandise. As such, the Opposer and Applicant's channels of trade are entirely distinct.

As Opposer notes, as a matter of law, since neither the registrations asserted by Opposer nor Applicant's applications specify channels of commerce, the Board must assume that the goods identified in the application for which registration is opposed move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers for such goods. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). At this stage in the proceeding, however, Opposer has provided absolutely no proof of any use of Opposer's Marks in any trade channels. Additionally, as noted above, none of the registrations asserted by Opposer claims use of a mark for any goods in international class 24 (blankets). As such, an unresolved question of fact arises as to whether the goods specified in the asserted registrations move in the same channels of trade that would be normal for the parties' respective goods. Through the conduct of discovery, the evidence will show that Applicant's luxury home furnishings and apparel move in channels of trade which are entirely distinct from the channels of trade (rock concert merchandise) of Opposer. As such,

partial summary judgment in favor of Opposer for the two applicable classes would be inappropriate.

3. The Purchasers of the Goods Are Different.

Opposer's goods are offered to fans of the rock band associated with Opposer. Opposer does not claim to offer any apparel which is not specifically associated with the rock band Van Halen. As such, fans of the band are the only purchasers of Opposer's goods. In contrast, Applicant's services are provided to consumers of home building services, interior design services and individuals seeking luxury home furnishings and apparel. As such, an unresolved question of fact arises as to whether the customers for Applicant's goods would be the same or have significant overlap with potential customers for the goods recited in Opposer's asserted registrations for Opposer's Marks.

4. There Is No Evidence of Actual Confusion.

Opposer does not assert that there exists any evidence of actual confusion. Furthermore, Applicant's own investigation of the claims asserted by Opposer produced to date confirm that Opposer has no instances of actual confusion. *See* Applicant's Responses to Opposer's First Set of Interrogatories, No. 12, attached here to as Exhibit 2.

Applicant's communications with its customers demonstrate not only that Applicant's customers are able to distinguish the two sources, but that none has assumed any connection between the two. *Marshall Field & Co. v. Mrs. Fields Cookies*, 25 USPQ 2d (BNA) 1321, 1992 TTAB LEXIS 52, at \*48 (TTAB 1992) (where individuals called and asked whether MRS. FIELDS was a part of or a franchise of MARSHALL FIELD'S, this indicated that rather than being confused, those individuals recognized that these were two separate entities). The presence or absence of any evidence of actual confusion remains an unresolved material question of fact.

5. There Is No Evidence of Likelihood of Confusion.

To date, Opposer has not provided any probative documentary evidence of potential confusion. Until such evidence can be produced and examined, partial summary judgment in favor of Opposer for the two applicable classes would be inappropriate and would be prejudicial to the rights of Applicant.

6. Applicant Has Not Had an Opportunity to Investigate.

In its Initial Disclosures, Opposer identifies a number of individuals who have information regarding Opposer's use of Opposer's marks, including Matt Bruck, identified as Opposer's Manager, Edward Van Halen,

identified as Opposer's member, Alex Van Halen, identified as a musician, Tracy Taub, identified as Opposer's business manager, and Janie Van Halen, identified as a publicist. *See* Opposer's Initial Disclosures, page 1, attached hereto as Exhibit 3. Until Applicant has an opportunity to conduct discovery to gather information from these and other parties, the facts relevant to this proceeding remain in dispute, and partial summary judgment in favor of Opposer for the two applicable classes would be inappropriate.

## **II. APPLICANT'S CROSS MOTION FOR SUMMARY JUDGMENT**

Applicant hereby moves for partial summary judgment under Rule 56 of the Federal Rules of Civil Procedure and Trademark Rule 2.127, 37 CFR § 2.127. Summary judgment is appropriate because there is no genuine issue of material fact in dispute with regard to the services identified in Applicant's pending application serial number 77/919,645, namely "Building construction; Construction management; Construction of environmentally responsible residential real property; Custom construction and building renovation; Housing services, namely, repair, improvement, and construction of residential real property; Installation and maintenance of solar thermal installations; Residential and building construction consulting" in international class 37; and "Design of specialty interior and exterior

environment settings; Interior design services; Interior design services including space planning, furniture selection, material and surface selection” in international class 42 (the “‘645 Application”), or to the goods identified in Applicant’s pending application serial number 77/919,644, namely, “Armoires; Chairs; Dining tables; End tables; Entertainment centers; Pillows; Sofas; Tables; Upholstered furniture” (the “‘644 Application”).

Not only is there no overlap of any kind between Applicant’s services as described in the ‘645 Application, but Opposer has not even presented any allegations to the contrary. Likewise, there is no overlap between Applicant’s class 20 furniture as described in the ‘644 application, and here again, Opposer has not even presented any allegations to the contrary. It is apparent that Opposer included in its Opposition filing the ‘645 Application and the class 20 goods described in the ‘644 Application merely as a procedural tactic to create an additional burden on Applicant. As those goods and services bear no relationship whatsoever to the goods and services provided by Opposer or described in the registrations for Opposer’s Marks, partial summary judgment in favor of Applicant would be appropriate with regard to classes 20, 37 and 42.

Summary judgment is appropriate where, as here, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of

law. See Fed. R. Civ. P. 56(c)(2); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2511 (1986); *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000). When a moving party has established a prima facie case demonstrating the absence of any genuine issues of material fact, the non-moving party bears the burden of proffering “specific facts showing a genuine issue for trial.” Fed. R. Civ. P. 56(e)(2); see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). To overcome this burden, the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586. A party may not create a genuine issue of material fact simply by presenting contradictory or unsupported statements. See *Sec. & Exch. Comm’n v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978).

Here, there are no genuine issues of material fact with regard to any use of Opposer’s Marks in connection with any goods identical or similar to those claimed in class 20 in the ‘644 Application or the services claimed in the ‘645 Application. Opposer has not and cannot produce any evidence that would establish use in commerce of Opposer’s Marks in connection with any goods identical or similar to those claimed in class 20 in the ‘644 Application or the services claimed in the ‘645 Application. Opposer has

not alleged with specificity any potential likelihood of confusion between the goods and services described in the registrations for Opposer's Marks.

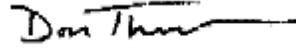
There can be no genuine issue of material fact that Opposer has not used Opposer's Marks in commerce in commerce on any of the goods identified in its registrations for such marks, and therefore, Applicant should be granted partial summary judgment in its favor with regard to classes 20, 37 and 42.

### **III. CONCLUSION**

Opposer's Motion for Partial Summary Judgment is based entirely on disputed facts, including the goods themselves, the channels of trade, and the purchasers of the goods in the two classes which are the subject of Opposer's Motion. Viewing the evidence in the light most favorable to Applicant, it is clear that significant factual disputes exist and that Opposer is not entitled to such partial judgment as a matter of law. Applicant therefore respectfully requests that the Board deny in its entirety the Opposer's Motion. Because there is no genuine dispute as to any issue of material fact with regard to Applicant's goods and services in international classes 20, 37 and 42, Applicant requests that the Board grant partial summary judgment for said classes.

Dated: May 12, 2011

Respectfully submitted,  
Don Thornburgh Law Corporation  
466 Foothill Boulevard #220  
La Cañada Flintridge, CA 91011

A handwritten signature in black ink, appearing to read "Don Thornburgh", is positioned above a solid horizontal line.

Don Thornburgh  
for Don Thornburgh Law Corporation

Attorney for Applicant,  
Kelly Van Halen

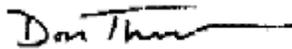
**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

ELVH, Inc.,	)	
	)	
Opposer,	)	
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Kelly Van Halen,	)	Opposition No. 91195961
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Mark: KELLYVANHALEN	)	
	)	
Serial No.    77/919644, 77/919645	)	
	)	
Filed: January 28, 2010	)	
	)	
Published:    June 8, 2010	)	
_____	)	

**Certificate of Service**

I hereby certify that a true and complete copy of the foregoing RESPONSE IN OPPOSITION TO OPPOSER’S MOTION FOR PARTIAL SUMMARY JUDGMENT AND APPLICANT’S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT has been served on the attorney of record for Opposer ELVH, Inc., at the correspondence address of record in the records of the USPTO, by mailing said copy on May 12, 2011, via First Class Mail, postage prepaid to:

Jeffrey R. Cohen, Esq.  
Millen White Zelano & Branigan, P.C.  
2200 Clarendon Boulevard, Suite 1400  
Arlington, VA 22201



\_\_\_\_\_  
Don Thornburgh  
for Don Thornburgh Law Corporation

## **EXHIBIT 1**

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

ELVH, Inc.,	)	
	)	
Opposer,	)	
	)	
v.	)	
	)	
Kelly Van Halen,	)	Opposition No. 91195961
	)	
Applicant.	)	
	)	
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Mark:	)	KELLYVANHALEN
	)	
Serial No.	)	77/919644, 77/919645
	)	
Filed:	)	January 28, 2010
	)	
Published:	)	June 8, 2010
	)	
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Declaration of Kelly Van Halen

in Support of Applicant's Opposition

To Opposer's Motion For Partial Summary Judgment

I, Kelly Van Halen, declare as follows:

In Opposer's initial disclosures, Opposer specifically identified me as a person with knowledge of Opposer's use of its trademarks. *See* Opposer's Initial Disclosures, page 1. Based on that knowledge, I attest that Opposer's use of its

marks relates entirely to activities of the rock band Van Halen, consisting primarily of recording rock music and performing rock music. The marks which Opposer relies upon as the basis for this Opposition are used in connection with band-related merchandise, such as concert T-shirts. Based on my own personal knowledge of such use, it is my belief that (1) the goods themselves are entirely different from the goods which I sell under my own personal name, Kelly Van Halen; (2) the channels of trade for Opposer's goods are entirely different from those in which I sell goods under my own personal name, Kelly Van Halen, because Opposer's goods are sold at rock concert venues and retailers of merchandise related to rock bands, whereas my goods are sold to my interior design customers and in luxury boutiques; and (3) the purchasers of the respective goods are entirely different, because Opposer's goods are sold exclusively to fans of the rock band Van Halen, and my goods are sold to my interior design customers and to patrons of luxury boutiques.



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Kelly Van Halen

## **EXHIBIT 2**

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

ELVH, Inc.,

Opposition No. 91195961

Opposer,

v.

Kelly Van Halen,

Applicant.

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Mark: KELLYVANHALEN

Serial No. 77/919644, 77/919645

Filed: January 28, 2010

Published: June 8, 2010

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**APPLICANT'S RESPONSE TO OPPOSER'S**

**FIRST SET OF INTERROGATORIES**

PROPOUNDING PARTY: ELVH, Inc.

RESPONDING PARTY: Kelly Van Halen

SET NO.: One

Applicant Kelly Van Halen ("Applicant") hereby responds, pursuant to Federal Rule of Civil Procedure 36 and 37 C.F.R. §2.120, to Opposer ELVH, Inc.'s ("Opposer") First Set of Interrogatories, as follows:

## **INTERROGATORY NO. 1**

Identify all uses, or intended uses, by Applicant of Applicant's mark to identify any goods and/or services.

## **RESPONSE TO INTERROGATORY NO. 1**

Applicant objects to this Interrogatory as vague, ambiguous and compound, insofar as it contains multiple sub-parts.

Without waiving the foregoing objections, Applicant responds as follows: Applicant has a bona ride intention to use, and with regard to certain of the goods and services already has begun to use, Applicant's Mark in connection with all of the goods and services described in the applications which are the subject matter of this proceeding ("Applicant's Mark"), namely, armoires; chairs; dining tables; end tables; entertainment centers; pillows; sofas; tables; upholstered furniture, in international class 20; bed blankets; blanket throws; children's blankets; lap blankets, in international class 24; bathing suits; blouses; coats; coverups; dresses; hats; jackets; jeans; leggings; lounge pants; pajamas; pants; ponchos; robes; scarves; shirts; sweaters; vests, in international class 25; building construction; construction management; construction of environmentally responsible residential real property; custom construction and building renovation; housing services, namely, repair, improvement, and construction of residential real property; installation and maintenance of solar thermal installations; residential and building construction consulting; in international class 37; and design of specialty interior and exterior environment settings; interior design services; interior design services including space planning, furniture selection, material and surface selection, in international class 42.

## **INTERROGATORY NO. 2**

Identify the retail outlets, or intended retail outlets, in the United States for the goods and/or services identified in response to Interrogatory No. 1.

## **RESPONSE TO INTERROGATORY NO. 2**

Applicant objects to this Interrogatory as vague, ambiguous and overbroad as to time and scope and irrelevant to the claims and defenses asserted in this proceeding.

Without waiving the foregoing objections, Applicant responds as follows: Applicant intends to sell its goods in department stores, children's stores and boutiques, travel stores, online-direct marketing, and baby stores. Applicant intends to provide its services from its offices in Southern California.

## **INTERROGATORY NO. 3**

Describe the methods, or intended methods, for advertising and promoting in the United States the goods and/or services identified in response to Interrogatory No. 1.

## **RESPONSE TO INTERROGATORY NO. 3**

Applicant objects to this Interrogatory as vague, ambiguous and compound, insofar as it contains multiple sub-parts. Applicant further objects to this Interrogatory as overbroad as to time and scope.

Without waiving the foregoing objections, Applicant responds as follows: Applicant promotes its goods and services primarily through its authorized third party sales representatives and by means of online sales and promotion.

## **INTERROGATORY NO. 4**

State the date of first use, or intended first use, of Applicant's mark for the goods and/or services identified in response to Interrogatory No. 1.

#### **RESPONSE TO INTERROGATORY NO. 4**

Applicant objects to this Interrogatory as vague, ambiguous, compound, and irrelevant to the claims and defenses asserted in this proceeding.

Without waiving the foregoing objections, Applicant responds as follows: Applicant used Applicant's Mark as early as March 2009 for pillows and throws and March 2010 for children's and adult accessories. Applicant's first intended use of the remaining goods and services is expected in 2011.

#### **INTERROGATORY NO. 5**

Describe the circumstances surrounding the first use of Applicant's mark, including the manner of such use, the applicable goods and/or services on or in connection with which the mark was used, and identify the person(s) within Applicant and apart from Applicant who are knowledgeable with respect to such use.

#### **RESPONSE TO INTERROGATORY NO. 5**

Applicant objects to this Interrogatory as vague, ambiguous and compound, insofar as it contains multiple sub-parts. Applicant further objects to this Interrogatory as irrelevant to the claims and defenses asserted in this proceeding.

Without waiving the foregoing objections, Applicant responds as follows: The first commercial uses of the Applicant's Mark were handled directly by the Applicant. The Applicant's Mark was used on baby blankets, which were sold wholesale to stores in Los Angeles, California, and in Japan and South Korea. In addition to Applicant, persons knowledgeable with respect to such use are Ginger Bort of Cosmic Cowboy Trading, LLC, as a sourcer, and Cathy Slatoff of Eloisa & Mia, LLC, as a sales representative.

**INTERROGATORY NO. 6**

State the target market for the goods and/or services identified in response to Interrogatory No. 1.

**RESPONSE TO INTERROGATORY NO. 6**

Applicant objects to this Interrogatory as vague, ambiguous and compound, insofar as it relates to a wide variety of goods and services of Applicant.

Without waiving the foregoing objections, Applicant responds as follows: With regard to Applicant's goods, the target market consists primarily of new mothers, grandmothers, babies, homemakers, men and women travelers. With regard to Applicant's services, the target market consists primarily of home owners, interior designers, and architects.

**INTERROGATORY NO. 7**

State the price or price range (or intended price or price range) for the goods and/or services identified in response to Interrogatory No. 1.

**RESPONSE TO INTERROGATORY NO. 7**

Applicant objects to this Interrogatory as vague, ambiguous and compound, insofar as it relates to a wide variety of goods and services of Applicant.

Without waiving the foregoing objections, Applicant responds as follows: With regard to Applicant's goods, the retail prices range from \$42 to \$5,000. With regard to Applicant's services, the price range would be dependent upon the total budget of the design project for which Applicant was engaged to provide the services, and therefore is difficult or impossible to estimate.

### **INTERROGATORY NO. 8**

Identify and describe all activities by Applicant, or on Applicant's behalf, taken on or prior to the January 25, 2010 filing date of Application No. 77919644 that support a bona fide intention to use Applicant's Mark.

### **RESPONSE TO INTERROGATORY NO. 8**

Applicant objects to this Interrogatory as vague, ambiguous and compound, insofar as it contains multiple sub-parts.

Without waiving the foregoing objections, Applicant responds as follows: Prior to January 25, 2010, Applicant's activities which support its bona fide intention to use Applicant's Mark included market research for the launch of a home décor line, investigating products, sourcing fabrics, sourcing manufacturers, sourcing products, traveling to stores, discussions with prospective product sales representatives, and manufacturing product prototypes, including garden urns, sofas, chairs, nightstands, tables, entertainment centers, lampshades, throws, pillows, baby blankets, travel blankets, robes, slippers, stoles, bath towels, and beach coverups.

### **INTERROGATORY NO. 9**

Identify and describe all activities by Applicant, or on Applicant's behalf, taken on or prior to the January 25, 2010 filing date of Application No. 77919645 that support a bona fide intention to use Applicant's Mark.

### **RESPONSE TO INTERROGATORY NO. 9**

Applicant objects to this Interrogatory as vague, ambiguous and compound, insofar as it contains multiple sub-parts.

Without waiving the foregoing objections, Applicant responds as follows: Prior to January 25, 2010, Applicant's activities which support its bona fide intention to use Applicant's

Mark included market research for the interior design and construction services, and business planning.

**INTERROGATORY NO. 10**

State the facts surrounding the circumstances of the conception, adoption and selection of Applicant's Mark.

**RESPONSE TO INTERROGATORY NO. 10**

Applicant conceived, adopted and selected Applicant's Mark because it is Applicant's legal name, and the name by which she is known both personally and professionally.

**INTERROGATORY NO. 11**

State the facts supporting any meaning, derivation or significance of the wording in Applicant's Mark.

**RESPONSE TO INTERROGATORY NO. 11**

Applicant responds that the "wording" of Applicant's Mark is derived solely from the fact that it is her legal name, and the name by which she is known both personally and professionally. The Applicant's Mark has no other meaning or derivation.

**INTERROGATORY NO. 12**

State whether Applicant has ever received any communication concerning (A) any instance of actual confusion with respect to Opposer's Mark and Applicant's Mark or (B) any instance when a person mistakenly made any association, affiliation or connection between Applicant and Opposer or their respective marks or goods or services; and, if so, describe the circumstances surrounding such communication, including the date thereof and persons having knowledge thereof.

### **RESPONSE TO INTERROGATORY NO. 12**

Applicant objects to this Interrogatory as vague, ambiguous and compound, insofar as it contains multiple sub-parts.

Without waiving the foregoing objections, Applicant responds as follows: Applicant has never received any communication concerning any instance of actual confusion with respect to Opposer's Mark and Applicant's Mark. Applicant is unaware of any instance when a person mistakenly made any association, affiliation or connection between Applicant and Opposer or their respective marks or goods or services. Furthermore, Applicant's investigation is still ongoing, and therefore Applicant reserves the rights to supplement this response as additional information becomes known.

### **INTERROGATORY NO. 13**

If Applicant contends that there is not a likelihood of confusion between Opposer's Mark and Applicant's Mark, state the facts supporting such contention.

### **RESPONSE TO INTERROGATORY NO. 13**

Applicant objects to this Interrogatory as vague, ambiguous and as calling for speculation on the part of Applicant. Applicant further objects to this Interrogatory as calling for a legal conclusion.

Without waiving the foregoing objections, Applicant responds as follows: Applicant's goods and services have nothing whatsoever in common with those of Opposer. Applicant's goods are interior décor and similar types of products, and the services pertain to interior design and construction. In sharp contrast, Opposer's goods consist of merchandise intended for purchase by fans of a rock band. Applicant and Opposer's channels of trade are entirely separate. Applicant and Opposer's intended customers are an entirely separate demographic.

Furthermore, Applicant's investigation is still ongoing, and therefore Applicant reserves the rights to supplement this response as additional information becomes known.

**INTERROGATORY NO. 14**

If Applicant contends that Opposer's Mark is invalid, unenforceable and/or otherwise not entitled to protection, state the facts supporting such contention.

**RESPONSE TO INTERROGATORY NO. 14**

Applicant objects to this Interrogatory as vague, ambiguous and compound, insofar as it contains multiple sub-parts.

Without waiving the foregoing objections, Applicant responds as follows: With regard to the particular goods identified in the registrations for Opposer's Marks, Applicant does not contend that Opposer's Marks are invalid, unenforceable or otherwise not entitled to protection. To the extent that Opposer seeks to enforce such marks in restraint of Applicant's own lawful use of its marks, Applicant contends that such efforts are unlawful and supported neither by the facts nor the law.

**INTERROGATORY NO. 15**

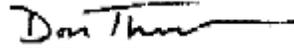
State the facts supporting the matters alleged in each of the Affirmative Defenses as stated in Applicant's Answer to the Notice of Opposition and/or First Amended Notice of Opposition.

**RESPONSE TO INTERROGATORY NO. 15**

Opposer has failed to state a claim for which relief can be granted because Applicant possesses rights superior to the alleged rights claimed by Opposer, and there is nothing in the record to indicate that Opposer has any right to enforce Opposer's Marks against Applicant's lawful use of Applicant's Marks for the purposes identified in the applications for such marks.

Dated: February 7, 2011

Respectfully submitted,  
Don Thornburgh Law Corporation  
466 Foothill Boulevard #220  
La Cañada Flintridge, CA 91011



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Don Thornburgh  
for Don Thornburgh Law Corporation

Attorney for Applicant,  
Kelly Van Halen

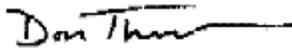
**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

ELVH, Inc.,	)	
	)	Opposition No. 91195961
Opposer,	)	
	)	
v.	)	
	)	
Kelly Van Halen,	)	
	)	
Applicant.	)	
_____	)	
Mark:    KELLYVANHALEN	)	
	)	
Serial No.    77/919644, 77/919645	)	
	)	
Filed:    January 28, 2010	)	
	)	
Published:    June 8, 2010	)	
_____	)	

**Proof of Service**

I hereby certify that a true and complete copy of the foregoing RESPONSE TO OPPOSER'S FIRST SET OF INTERROGATORIES has been served on the attorney of record for Opposer ELVH, Inc., at the correspondence address of record in the records of the USPTO, by mailing said copy on February 7, 2011, via First Class Mail, postage prepaid to:

Jeffrey R. Cohen, Esq.  
Millen White Zelano & Branigan  
2200 Clarendon Boulevard, Suite 1400  
Arlington, VA 22201



\_\_\_\_\_  
Don Thornburgh  
for Don Thornburgh Law Corporation

## **EXHIBIT 3**

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

_____	}	Application Ser. Nos. 77919644
	}	and 77919645
ELVH, INC.	}	Marks: KELLYVANHALEN
	}	
Opposer,	}	
	}	
v.	}	Opposition No. 91195961
	}	
KELLY VAN HALEN	}	
	}	
Applicant.	}	
_____	}	

**OPPOSER’S INITIAL DISCLOSURES**

Opposer, ELVH, INC., hereby submits its initial disclosures in accordance with Fed. R. Civ. P. 26(a)(1)(A) and 37 C.F.R. § 2.120(a).

Individuals Likely To Have Discoverable Information

The following individuals have information regarding Opposer’s use of VAN HALEN Trademarks, channels of trade of goods and services provided by Opposer under VAN HALEN Trademarks and fame of VAN HALEN Trademarks:

Matt Bruck: Opposer’s Manager

Edward Van Halen: Opposer’s member

Alex Van Halen: musician

Tracy Taub: Opposer’s business manager

Janie Van Halen: Van Halen’s publicist

These individuals can be reached through Opposer’s counsel.

Additionally, Applicant has knowledge of Opposer’s use of the VAN HALEN Trademarks, and Applicant’s intent to use the KELLYVANHALEN trademark.

Documents That May Be Used To Support Claims

Pertinent documents that may be used to support Opposer's claims include the file histories of the asserted registrations available from the website of the U.S. Patent and Trademark Office. Evidence of Opposer's use of the marks may also be used, particularly business documents, branding, promotional and marketing materials and sales records, which are located with Opposer in Los Angeles, California.

The provisions for damage computation and insurance coverage under Rule 26 are not applicable.

Date: November 11, 2010

By: 

Jeffrey R. Cohen  
MILLEN, WHITE, ZELANO & BRANIGAN, P.C.  
2200 Clarendon Blvd., Suite 1400  
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cohen@mwzb.com

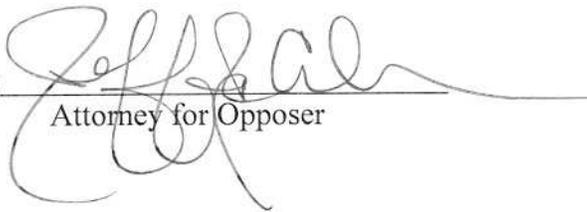
Attorneys for Opposer

Certificate of Service

This is to certify that a copy of the foregoing was served this 11<sup>th</sup> day of November 2010 by first-class mail, postage prepaid, on the following as Applicant's attorney of record:

Don Thornburgh, Esquire  
DON THORNBURGH LAW CORPORATION  
466 FOOTHILL BLVD # 220  
LA CANADA FLINTRIDGE, CA 91011-3518  
uspto@donthornburgh.com

By: \_\_\_\_\_



Attorney for Opposer