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

Proceeding	91205331
Party	Plaintiff Ms. Teresa H. Earnhardt
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Attachments	Response to Motion to Compel Discovery.pdf (4 pages)(14752 bytes)

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

Teresa H. Earnhardt,	Consolidated Opposition Nos. 91205331 (parent) and 91205338
Opposer,	In the matter of:
v.	Application Serial No. 85/383,910 Mark: EARNHARDT COLLECTION (Intl. Class 20)
Kerry Earnhardt, Inc.,	Application Serial No. 95/391,456 Mark: EARNHARDT COLLECTION (Intl. Class 37)
Applicant.	

**OPPOSER’S RESPONSE IN OPPOSITION TO APPLICANT’S
MOTION TO COMPEL DISCOVERY**

Opposer Teresa H. Earnhardt hereby submits this response in opposition to Applicant Kerry Earnhardt, Inc.’s motion to compel.

On November 19, 2012 Applicant served Opposer with Applicant’s first set of requests for the production of documents. *See* Applicant’s Motion to Compel Discovery, ¶ 1. On January 24, 2013 Opposer served her written response to those requests, stated certain objections to the requests, and otherwise indicated that she would produce non-privileged responsive documents and things within her possession, custody, or control. *See Id.*, ¶ 2. Subsequently, Opposer has been conducting a reasonable search for responsive documents, the majority of which had been in storage, and has been producing documents on a rolling basis as they are pulled, scanned and prepared for production.

More particularly, on February 6, 2013 Opposer produced over 2,000 pages of license agreements in response to Applicant’s requests. *See Id.*, ¶ 4. Applicant also produced

responsive documents pertaining to Opposer's right to Dale Earnhardt's name and persona. Still further, Applicant has produced responsive documents evidencing the fame of Dale Earnhardt.

On March 4, 2013, Opposer produced additional license agreements. On March 12, 2013, Opposer produced individual licensees' royalty reports for 2012 and prepared and produced an annual overall royalty summary for 2012. Likewise, on March 18, 2013, Opposer produced individual licensees' royalty reports for 2011 and prepared and produced an annual overall royalty summary for 2011. Opposer is continuing to obtain from storage, gather and produce licensees' royalty reports, and is preparing annual summaries therefrom, for preceding years.

Applicant has asserted incorrectly that Opposer has "refused to provide those documents responsive to KEI's Request for Production." *See Id.*, ¶ 6. Just as Opposer's counsel indicated in his February 26, 2013 email to Applicant's counsel, and consistent with Opposer's obligations, Opposer is conducting a reasonable search for responsive documents and will continue to produce non-privileged responsive documents on a rolling basis and at reasonable times. *See Id.*, ¶ 5(b). This process involves pulling every single licensee's quarterly report out of storage, over a 13 year period, scanning the documents and creating the royalty summary reports. This is a manual process and one that takes an extensive amount of time - it is not generating a report on a computer by simply one click. In addition, Opposer's computer server crashed several weeks ago which has resulted in an unexpected and unavoidable delay in production. As a result, Opposer is still in the process of producing responsive documents, in particular the remaining licensees' royalty reports, and, contrary to Applicant's assertion, Opposer is not refusing to provide these documents.

For the reasons set forth herein, Applicant's Motion to Compel Discovery should be denied.

Respectfully submitted,

s/Carla H. Clements/
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CERTIFICATE OF SERVICE

I hereby certify that on the foregoing *Opposer's Response in Opposition to Applicant's Motion to Compel Discovery* was duly served on Applicant by depositing a copy of same in the United States mail, first-class postage prepaid, on the 19th day of March, 2013 addressed to Applicant's attorneys of record as follows:

D. Blaine Sanders
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By: s/Carla H. Clements/_____
Carla H. Clements