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

Proceeding	91205331
Party	Defendant Kerry Earnhardt, Inc.
Correspondence Address	D BLAINE SANDERS ROBINSON BRADSHAW HINSON PA 101 N TRYON ST, SUITE 1900 CHARLOTTE, NC 28246 0106 UNITED STATES BSanders@RBH.com, MTilley@RBH.com
Submission	Motion to Compel Discovery
Filer's Name	Jennifer Carusone
Filer's e-mail	jcarusone@rbh.com, mtilley@rbh.com
Signature	/Jennifer Carusone/
Date	04/11/2014
Attachments	Third_Motion_to_Compel_Discovery.pdf(299604 bytes) Exhibit A - App 2nd RFP.pdf(368590 bytes) Exhibit B- App 2nd ROGs.pdf(459789 bytes) Exhibit C - Email from Larry Jones to D Blaine Sanders.pdf(129493 bytes)

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

TERESA H. EARNHARDT,

Opposer,

v.

KERRY EARNHARDT, INC.,

Applicant.

Opposition No.: 91205331 (parent)

Application Serial No. 85/383,910

Trademark: EARNHARDT COLLECTION
(Intl. Class 20)

TERESA H. EARNHARDT,

Opposer,

v.

KERRY EARNHARDT, INC.,

Applicant.

Opposition No.: 91205338

Application Serial No. 85/391,456

Service Mark: EARNHARDT COLLECTION
(Intl. Class 37)

APPLICANT'S THIRD MOTION TO COMPEL DISCOVERY

Applicant, Kerry Earnhardt, Inc., ("KEI") hereby moves for an order compelling Opposer, Teresa H. Earnhardt, ("Ms. Earnhardt") to respond to Applicant's Second Set of Interrogatories and Second Request for Production of Documents. Because of the nature of this motion, this pleading will also serve as KEI's brief. As grounds for this motion, KEI shows as follows:

1. On February 12, 2014, KEI served Ms. Earnhardt with KEI's Second Set of Interrogatories and Second Request for Production of Documents (collectively, the "Discovery Requests"), copies of which are attached hereto as **Exhibits A** and **B**, respectively. Ms. Earnhardt, through counsel, subsequently requested, and KEI agreed to, a two-week extension for Ms. Earnhardt to respond to the Discovery Requests. Ms. Earnhardt was therefore required to serve her responses to KEI's Discovery Requests on or before April 1, 2014.

2. Ms. Earnhardt has not responded to KEI's Discovery Requests. On April 7, 2014, Ms. Earnhardt's counsel, Larry Jones, sent an e-mail to KEI's counsel, Blaine Sanders, stating:

Blaine:

Before you ask---

We have not served responses to your client's second sets of interrogatories and requests for production, because we do not yet have our client's input.

....

(See E-mail from Larry C. Jones to D. Blaine Sanders, dated April 7, 2014, attached hereto as **Exhibit C.**) In the same e-mail, Mr. Jones also explained that Ms. Earnhardt had not responded to him regarding KEI's request to coordinate concerning KEI's requests for certain third party discovery. (*See id.*)

3. Throughout this case, Ms. Earnhardt repeatedly has refused to comply with her discovery obligations. This is the third time she has forced KEI to file a motion to compel to secure responses to its discovery requests. Ms. Earnhardt initially refused to provide documents responsive to KEI's First Request for Production of Documents or even provide a date when she would make those documents available, notwithstanding KEI's numerous requests, until after KEI filed its First Motion to Compel Discovery in February 2013. (*See Applicant's First Motion to Compel Discovery (Dkt. # 11).*) Ms. Earnhardt also refused—for the better part of a year—to provide available dates for her deposition. When KEI eventually noticed her deposition for December 5, 2013, she refused to attend. Though she eventually relented and agreed to attend her deposition (which was held on January 17, 2014), she did so only *after* KEI was forced to a second motion, seeking dismissal of her case as a discovery sanction. (*See Applicant's Motion*

to Dismiss as a Sanction for Opposer's Failure to Appear at Her Deposition and Alternative Second Motion to Compel (Dkt. # 35).¹

4. KEI has attempted to work with Ms. Earnhardt in a good faith attempt to secure her cooperation with discovery and her responses to KEI's current Discovery Requests. Her failure, however, to provide her counsel the information necessary to respond to KEI's current Discovery Requests renders any further attempt to secure her cooperation futile.

5. Ms. Earnhardt lacks any substantial justification for refusing to respond to KEI's current Discovery Requests. Moreover, Ms. Earnhardt's persistent disregard of her discovery obligations—*not to mention the Board's rules*—has caused KEI needless expense and delay, and hampered its efforts to defend this action. Ms. Earnhardt's misconduct is all the more egregious given that she chose to file this proceeding.

WHEREFORE, KEI requests that the Board:

(a) Enter an order compelling Ms. Earnhardt to respond to KEI's Second Set of Interrogatories and Second Request for Production of Documents;

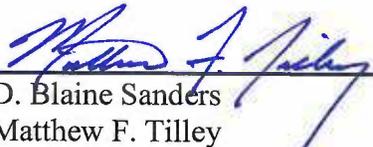
(b) Suspend this case pending the Board's decision on this motion, pursuant to 37 C.F.R. § 2.210(e)(2), and reset the trial dates thereafter as appropriate; and

(c) Grant such other and further relief as the Board deems just and appropriate.

[Remainder of Page Intentionally Left Blank]

¹ Ms. Earnhardt only agreed to attend her deposition after the parties had fully brief KEI's motion for sanctions. KEI withdrew that motion on January 10, 2014 (Dkt. # 39), and the Board subsequently entered a notice on April 5, 2014, stating the motion was moot (Dkt. # 41).

This 11th day of April, 2014.



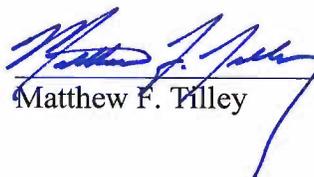
D. Blaine Sanders
Matthew F. Tilley
ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, North Carolina 28246-1900
Telephone: (704) 377-2536
Facsimile: (704) 373-4000
E-mail: bsanders@rbh.com;
mtilley@rbh.com
Attorneys for Kerry Earnhardt, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **THIRD MOTION TO COMPEL DISCOVERY** has been served upon the party listed below by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

Larry C. Jones
Alston & Bird LLP
101 S. Tryon Street, Suite 4000
Charlotte, North Carolina 28280-4000
Telephone: (704) 444-1000
Larry.jones@alston.com

This 11th day of April, 2014


Matthew F. Tilley

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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TERESA H. EARNHARDT,

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Trademark: EARNHARDT COLLECTION
(Intl. Class 20)

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Applicant.

Opposition No.: 91205338 (parent)

Application Serial No. 85/391,456

Service Mark: EARNHARDT COLLECTION
(Intl. Class 37)

APPLICANT'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS

PLEASE TAKE NOTICE that, pursuant to Rule 34 of the Federal Rules of Civil Procedure and 37 C.F.R. Section 2.120, Applicant Kerry Earnhardt, Inc. ("Applicant"), through counsel, hereby requests that Opposer Teresa H. Earnhardt ("Opposer") produce and permit Applicant to inspect and copy any and all documents described below which Opposer possesses, has access to, has custody of, or controls, at the offices of ROBINSON, BRADSHAW & HINSON, P.A., 101 North Tryon Street, Suite 1900, Charlotte, NC 28246, within thirty-five (35) days after service of this request. Further, Applicant requests that such production and inspection proceed in accordance with the definitions and instructions set out below.

DEFINITIONS AND INSTRUCTIONS

1. "Opposer," "You" or "Your" shall mean Teresa H. Earnhardt, her agents, employees, attorneys and any person acting on her behalf or at her instruction, including her related companies.

2. "Document" refers to all items subject to discovery under Rule 34 of the Federal Rules of Civil Procedure, including but not limited to any written or recorded material of any kind, including the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise; notations of any sort of conversations, telephone calls, meetings or other communications; all graphic or oral records or representations of any kind; and mechanical or electronic records or representations of any kind including tapes, cassettes, disks or records.

3. *Marking and Arrangement.* The documents produced in response to this request shall be marked and arranged in such a way as to indicate clearly the request to which each such document is responsive.

4. *Privilege or Immunity from Production.* To the extent that any documents are not produced on the basis of a claim of privilege or immunity: (a) submit a list identifying each such document; (b) identify the nature of the privilege (including work product) which is being claimed; and (c) identify each person having knowledge of the factual basis, if any, on which the claim of privilege or immunity is based. For these purposes, “identify” shall mean in the case of a document, to state the document’s date, its author, its recipient or the person for whom it was prepared, the type of document (e.g., letter, memorandum, chart, or other category), its present location or custodian, a summary of its contents, and any other information necessary to render the document distinguishable from all others and subject to ready location.

5. *Proprietary Matter.* If any document request is deemed to call for disclosure of confidential or proprietary data within the meaning of Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, Applicant’s counsel is prepared to receive such data pursuant to an appropriate order with respect to confidentiality.

6. *Destroyed Documents.* If any documents requested herein have been lost, discarded, or destroyed, the documents so lost, discarded, or destroyed shall be identified as completely as possible, including, without limitation, the following information: date of disposal, manner of disposal, reason for disposal, person authorizing the disposal, and the person disposing of the document.

7. Unless otherwise specified, these document requests refer to the time period from January 1, 2009 to the present.

DOCUMENTS REQUESTED

Produce the following:

1. All documents constituting or reflecting any permit obtained by Opposer for the purpose of a residential real estate development.

RESPONSE:

2. All documents identifying or demonstrating Opposer’s sale or intent to sell (including by her related companies and licensees) any goods or services in International Class 20 or 37 since January 1, 2009.

RESPONSE:

3. All documents constituting or reflecting any communications between Opposer and JAS-AM, Inc. (or any of its officers or agents, including Sajjan Dhaliwal) in connection with the sale or intent to sell residential homes.

RESPONSE:

4. All documents constituting or reflecting any communications between Opposer and any other person or entity in connection with the sale (or intent to sell) or construction (or intent to construct) residential homes.

RESPONSE:

5. All documents constituting or reflecting any plans or intentions of Opposer to use its trademarks or service marks in connection with the sale or construction of residential homes.

RESPONSE:

6. All documents constituting or reflecting any communications between Opposer and any other person or entity in connection with the sale or intent to sell furniture or home furnishings.

RESPONSE:

7. All documents constituting or reflecting any plans or intentions of Opposer to use its trademarks or service marks in connection with the sale of furniture or home furnishings.

RESPONSE:

8. All documents identified in response to Applicant's Second Set of Interrogatories.

RESPONSE:

Pursuant to Rule 26(e) of the Federal Rules of Civil Procedure, this request is continuing and requires further and supplemental production by Opposer in the event she obtains or discovers additional documents between the time of initial production and the time of hearing or trial.

This 12th day of February, 2014.



D. Blaine Sanders
N.C. Bar No. 12541
Matthew F. Tilley
N.C. Bar No. 40125

ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
(704) 377-2536

Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **SECOND REQUEST FOR PRODUCTION OF DOCUMENTS** has been served upon each of the parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

Larry C. Jones
Carla H. Clements
Alston & Bird LLP
Bank of America Plaza
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280-4000

This 12th day of February, 2014.



D. Blaine Sanders

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Applicant.

Opposition No.: 91205338

Application Serial No. 85/391,456

Service Mark: EARNHARDT COLLECTION
(Intl. Class 37)

APPLICANT'S SECOND SET OF INTERROGATORIES

Pursuant to Rule 33 of the Federal Rules of Civil Procedure and 37 C.F.R. Section 2.120, Applicant Kerry Earnhardt, Inc. ("Applicant"), through counsel, requests Opposer Teresa H. Earnhardt ("Opposer") to answer the following interrogatories, in writing and under oath, within thirty-five (35) days from the date of service, in accordance with the definitions and instructions set out below.

DEFINITIONS AND INSTRUCTIONS

1. "Opposer," "You" or "Your" shall mean Teresa H. Earnhardt, her agents, employees, attorneys and any person or entity acting on her behalf or at her instruction, including her related companies.

2. "Document" refers to all items subject to discovery under Rule 34 of the Federal Rules of Civil Procedure, including, but not limited to, any written or recorded material of any kind, including the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise; notations of any sort of conversations, telephone calls, meetings or other communications; all graphic or oral records or representations of any kind; and mechanical or electronic records or representations of any kind, including tapes, cassettes, disks or records.

3. "Identify" shall mean:

(a) In the case of a person, to state his or her full name, present or last-known home and business address, and his or her present or last-known employer and job title;

(b) In the case of a business concern, to state its name and its present or last-known address, and the nature of such business concern (*e.g.*, partnership, corporation, etc.);

(c) In the case of a document, to state its date, its author, its recipient or the person for whom it was prepared, the type of document (*e.g.*, letter, memorandum, chart, or other category), its present location or custodian, a summary of its contents, and any other information necessary to render the document distinguishable from all others and subject to ready location. In lieu of identifying a document, a copy of the document may be supplied.

(d) In the case of a communication or act, to identify the person(s) present when the communication or act occurred, the date and location of such communication or act, the substance of such communication or act, and all documents which record, refer to, or otherwise concern such communication or act.

4. “*Describe*” means to provide a comprehensive, full, frank, fair, complete, accurate, and detailed description of the matter inquired of.

5. *Proprietary Matter*. If any interrogatory is deemed to call for disclosure of confidential or proprietary data within the meaning of Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, Applicant’s counsel is prepared to receive such data pursuant to an appropriate order with respect to confidentiality.

6. If an interrogatory or definition or instruction is objected to in whole or in part, specify all grounds on which objection rests. Respond to all portions of each such request to which no objection is asserted. In addition, state whether any responsive information has been omitted from an interrogatory response or whether and in what way the search for responsive information has been delimited or circumscribed on the basis of any such objection.

7. If Opposer contends that an answer to any interrogatory herein is privileged in whole or in part, or otherwise objects to any part of any interrogatory, identify:

(a) the reason(s) for each objection, claim of privilege or immunity, or ground for exclusion;

(b) each person having knowledge of the factual basis, if any, on which the claim of privilege or immunity or other ground is based, and

(c) in the case of a document, identify the document as defined in paragraphs 3(c) and (d) of the instructions to these interrogatories.

8. Unless otherwise specified, these interrogatories refer to the time period from January 1, 2009 to the present.

INTERROGATORIES

1. (a) Identify each person (including Opposer and her related companies and their licensees) known or believed by Opposer to be using currently in this country any trademark or service mark which includes the surname Earnhardt and which does not also include a given name (which marks are referred to collectively hereafter as “Earnhardt Surname Only Marks”).

(b) For each person identified in response to 1(a), state the following:

- i. The particular Earnhardt Surname Only Mark known or believed by Opposer to be currently used in this country by that person;
- ii. The particular goods or services on or in conjunction with which each such Earnhardt Surname Only Mark is known or believed by Opposer to be used in this country; and
- iii. The date of earliest known use in this country of each such mark.

RESPONSE:

2. (a) Identify each current use in this country by Opposer (including by her related companies and licensees) of an Earnhardt Surname Only Mark as a trademark or service mark in International Class 20 or 37.

(b) For each use identified in response to 2(a), state the following:

- i. The particular goods or services on or in conjunction with which an Earnhardt Surname Only Mark is used by Opposer in this country; and
- ii. The date of earliest known use in this country by Opposer of an Earnhardt Surname Only Mark in conjunction with the goods or services identified.

RESPONSE:

3. (a) Identify each current use in this country by Opposer (including by her related companies and licensees) of DALE EARNHARDT as a trademark or service mark in International Class 20 or 37.

(b) For each use identified in response to 3(a), state the following:

- i. The particular goods or services on or in conjunction with which DALE EARNHARDT is used by Opposer in this country; and
- ii. The date of earliest known use in this country by Opposer of DALE EARNHARDT as a trademark or service mark in conjunction with the goods or services identified.

RESPONSE:

4. (a) Identify each current use in this country by Opposer (including by her related companies and licensees) of any trademark or service mark incorporating the name EARNHARDT in International Class 20 or 37.

(b) For each use identified in response to 4(a), state the following:

- i. The particular goods or services on or in conjunction with which the mark incorporating the name EARNHARDT is used by Opposer in this country; and
- ii. The date of earliest known use in this country by Opposer of a trademark or service mark incorporating the name EARNHARDT in conjunction with the goods or services identified.

RESPONSE:

5. (a) Identify each current use in this country by Opposer (including by her related companies and licensees) of EARNHARDT COLLECTIBLES as a trademark or service mark in International Class 20 or 37.

(b) For each use identified in response to 4(a), state the following:

- i. The particular goods or services on or in conjunction with which EARNHARDT COLLECTIBLES is used by Opposer in this country; and
- ii. The date of earliest known use in this country of EARNHARDT COLLECTIBLES by Opposer.

RESPONSE:

6. Identify each license agreement under which any licensee of Opposer currently sells goods or services in International Class 20 or 37.

RESPONSE:

These requests are continuing and require supplemental responses in the event Opposer obtains or discovers additional information between the date of her response and the time of hearing or trial.

This 12th day of February, 2014.



D. Blaine Sanders
N.C. Bar No. 12541
Matthew F. Tilley
N.C. Bar No. 40125

ROBINSON BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, Federal 28246
(704) 377-2536

Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPLICANT'S SECOND SET OF INTERROGATORIES** has been served upon each of the parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

Larry C. Jones
Carla H. Clements
Alston & Bird LLP
Bank of America Plaza
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280-4000

This 12th day of February, 2014.



D. Blaine Sanders

Tilley, Matthew

From: Jones, Larry <Larry.Jones@alston.com>
Sent: Monday, April 07, 2014 11:55 AM
To: Sanders, Blaine
Cc: Tilley, Matthew; Clements, Carla
Subject: T. Earnhardt v. KEI

Blaine:

Before you ask---

We have not served responses to your client's second sets of interrogatories and requests for production, because we do not yet have our client's input;

Redacted - F.R.E. 408 Settlement Negotiations

We do not have any input from our client as to dates on which Judy Queen is available for her deposition; and

We are presently unable to facilitate your proposed deposition of JAS-AM, Inc.

Larry C. Jones

Alston & Bird LLP
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280-4000
Direct Phone: (704) 444-1019
Direct Fax: (704) 444-1759
Email: Larry.Jones@Alston.com

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