

ESTTA Tracking number: **ESTTA655463**

Filing date: **02/12/2015**

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

Proceeding	91205331
Party	Plaintiff Ms. Teresa H. Earnhardt
Correspondence Address	LARRY C JONES ALSTON & BIRD LLP BANK OF AMERICA PLAZA, 101 S TRYON STREET SUITE 4000 CHARLOTTE, NC 28280-4000 UNITED STATES Larry.Jones@alston.com, Carla.Clements@Alston.com
Submission	Brief on Merits for Plaintiff
Filer's Name	Larry C. Jones
Filer's e-mail	Larry.Jones@Alston.com, Bruce.Rose@Alston.com
Signature	/Larry C. Jones/
Date	02/12/2015
Attachments	Opposer_s Trial Brief 91205331.PDF(1426114 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK AND TRIAL 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
Kerry Earnhardt, Inc.,)	(Intl. Class 20)
)	
)	Application Serial No. 95/391,456
Applicant.)	Mark: EARNHARDT COLLECTION
_____)	(Intl. Class 37)

TRIAL BRIEF ON BEHALF OF OPPOSER

TABLE OF CONTENTS

BRIEF STATEMENT OF THE CASE	1
THE RECORD.....	1
A. The Record Submitted by Opposer Teresa H. Earnhardt	1
B. The Record Submitted by Opposer Kerry Earnhardt, Inc.....	2
C. Opposer’s Objections and Motion to Strike Applicant’s Second and Third Notices of Reliance	3
STATEMENT OF THE FACTS	3
A. Information about Opposer	3
B. Information about Applicant.....	8
STANDING AND PRIORITY	9
PRIMILARY MERELY A SURNAME.....	9
A. The Public Will Perceive Earnhardt Primarily Merely As A Surname	9
a. Rareness	10
b. Connections between Applicant and the surname	11
c. Any other recognized meaning	12
d. The look and feel of the surname.....	12
B. Inclusion Of The Term “Collection” Does Not Diminish The Designation’s Primary Significance As A Surname.....	13
THE LIKELIHOOD OF CONFUSION	16
A. The fame of the opposer’s marks (sales, advertising, length of use).....	17
B. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.....	19
C. The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in conjunction with which a prior mark is in use.	22
D. The similarity or dissimilarity of established, likely-to-confuse trade channels.....	23
E. The conditions under which and buyers to whom sales are made, i.e., “impulse” v. careful sophisticated purchasing.	24
F. The family relationship between the parties.	24
G. The nature and extent of any actual confusion.	25
CONCLUSION.....	26

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Adrian Giger and Thomas Giger, In re,</i> 78 USPQ2d 1405 (TTAB 2006)	11
<i>Chatham Int'l Inc., In re,</i> 380 F.2d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004)	20
<i>Coach Servs., Inc. v. Triumph Learning LLC,</i> 668 F.3d 1356, 101 USPQ2d 1713 (Fed. Cir. 2012)	19
<i>E.I. du Pont Nemours & Co., In re,</i> 177 USPQ 563 (1973).....	16, 22, 24, 26
<i>E. Martinoni Co., In re,</i> 189 USPQ 589 (TTAB 1975)	11
<i>Giant Food, Inc. v. Nation's Foodservice, Inc.,</i> 710 F.2d 1565 (Fed. Cir. 1983).....	22
<i>Gregory, In re,</i> 70 USPQ2d 1792 (TTAB 2004)	12
<i>Hamilton Pharms. Ltd., In re,</i> 27 USPQ2d 1939 (TTAB 1993)	13
<i>Harry Winston, Inc. v. Bruce Winston Gem Corp.,</i> 111 USPQ2d 1419 (TTAB 2014)	19, 25
<i>Hutchinson Tech. Inc., In re,</i> 7 USPQ2d 1490 (Fed. Cir. 1988)	9
<i>Industrie Pirelli, In re,</i> 9 USPQ2d 1564 (TTAB 1988)	12
<i>King Candy, Inc. v. Eunice King's Kitchen, Inc.,</i> 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).....	9
<i>Markbens Administradora de Bens Eireli, In re,</i> No. 85713043, 2014 WL 4731122 (TTAB Sept. 9, 2014)	11
<i>Miller v. Miller,</i> 105 USPQ2d 1615 (TTAB 2013)	10, 12, 13, 14

<i>Mott's LLP, In re,</i> No. 85374805, 2013 WL 3188888 (TTAB Apr. 30, 2013).....	10
<i>Nat'l Data Corp., In re,</i> 753 F.2d 1056 (Fed. Cir. 1985).....	21
<i>Packard Press, Inc. v. Hewlett-Packard Co.,</i> 227 F.3d 1352 (Fed. Cir. 2000).....	21
<i>Paula Payne Prods. Co. v. Johnson Publishing Co.,</i> 177 USPQ 76 (CCPA 1973).....	23
<i>The Hyman Cos., Inc., In re,</i> No. 85483695, 2014 WL 2967637 (TTAB June 4, 2014).....	11
<i>Woolley's Petite Suites, In re,</i> 18 USPQ2d 1810 (TTAB 1991).....	13

STATUTES AND RULES

15 U.S.C. § 1052(e)(4).....	9, 10, 16
Rule 30(b)(6), F.R.Civ.P.....	2
37 C.F.R. § 2.120(j)(1).....	2
37 C.F.R. § 2.120(j)(2).....	3
37 C.F.R. § 2.120(j)(3)(i).....	2
37 C.F.R. § 2.122(d)(2).....	1
37 C.F.R. § 2.122(e).....	2
37 C.F.R. § 2.123.....	2, 3
37 C.F.R. § 2.125.....	2, 3
TBMP § 704.09.....	3
TEMP § 1211.01(b)(vi).....	9

BRIEF STATEMENT OF THE CASE

Opposer, Teresa H. Earnhardt (“Opposer”), believes she will be damaged by the registration of EARNHARDT COLLECTION in International Classes 20 and 37. On July 18, 2011, Applicant filed an application (Serial No. 85/383,910) to register EARNHARDT COLLECTION in International Class 20 as a trademark for furniture. On August 6, 2011, Applicant filed an application (Serial No. 85/391,456) to register EARNHARDT COLLECTION in International Class 37 as a service mark for use in conjunction with the custom construction of homes.

Neither application should mature to registration because the term EARNHARDT COLLECTION, as used in conjunction with either furniture or the custom construction of homes, is primarily merely a surname. This opposition is also based upon Opposer’s prior use and registration of the DALE EARNHARDT mark and several marks which include DALE EARNHARDT or a variant thereof as a prominent component, which marks (the “DALE EARNHARDT marks”) are used, and in several instances registered for use, in connection with a wide array of goods and services. (*Opposer’s First Notice of Reliance* Exhs. A-D).

In its order of September 25, 2012, the Board determined that the two opposition proceedings (Nos. 91205331 and 91205338) involve common questions of law or fact, and the Board consolidated the two cases into this singular proceeding.

THE RECORD

A. The Record Submitted by Opposer Teresa H. Earnhardt

1. Pursuant to 37 C.F.R. § 2.122(d)(2), status and title copies of U.S. Trademark and Service Mark Registration Nos.: 1,644,237 – DALE EARNHARDT (*Opposer’s First Notice of Reliance*, Exh. A); 2,035,107 – DALE EARNHARDT (Script)

(*Opposer's First Notice of Reliance*, Exh. B); 3,436,512 – THE DALE EARNHARDT FOUNDATION & Design (*Opposer's First Notice of Reliance*, Exh. C); and 3,441,133 – DALE EARNHARDT (Script & Design) (*Opposer's First Notice of Reliance*, Exh. D).

2. Pursuant to 37 C.F.R. §§ 2.120(j)(1) and 2.120(j)(3)(i), non-confidential excerpts of the transcript of the discovery deposition of Rene Earnhardt (President of Applicant, Kerry Earnhardt, Inc.) and certain non-confidential exhibits from that deposition (*Opposer's First Notice of Reliance*, Exhs. E and F).

3. Pursuant to 37 C.F.R. §§ 2.120(j)(1) and 2.120(j)(3)(i), certain confidential exhibits from the discovery deposition of Rene Earnhardt (President of Applicant, Kerry Earnhardt, Inc.) (*Opposer's Second Notice of Reliance*, Exh. H).

4. Pursuant to 37 C.F.R. § 2.120(j)(3)(i), Opposer's Interrogatory No. 1 and Applicant's response thereto (*Opposer's First Notice of Reliance*, Exh. G.).

5. Pursuant to 37 C.F.R. § 2.122(e), various printed publications (*Opposer's Third Notice of Reliance*).

6. Pursuant to 37 C.F.R. §§ 2.123 and 2.125, the transcripts and exhibits from Opposer's testimony period depositions of:

- (a) Mary Becker (as the Rule 30(b)(6) designee of nonparty Schumacher Homes Operations, Inc.);
- (b) Carla Clements;
- (c) George G. Taulbee; and
- (d) Judy Queen.

B. The Record Submitted by Opposer Kerry Earnhardt, Inc.

1. Pursuant to 37 C.F.R. § 2.122(e), various printed publications (*Applicant's First Notice of Reliance*).

2. Pursuant to 37 C.F.R. §§ 2.123 and 2.125, the transcripts and exhibits from Applicant's testimony period depositions of:

- (a) Kelly Earnhardt Miller;
- (b) Kerry Dale Earnhardt;
- (c) Rene Cline Earnhardt;
- (d) Stephanie Nance; and
- (e) Amy Hallman.

C. Opposer's Objections and Motion to Strike Applicant's Second and Third Notices of Reliance

Additionally, via *Applicant's Second Notice of Reliance* and *Applicant's Third Notice of Reliance*, Applicant submitted certain non-confidential and confidential excerpts and exhibits from Applicant's discovery deposition of nonparty Judy Queen. Pursuant to 37 C.F.R. § 2.120(j)(2) and TBMP § 704.09, that discovery deposition transcript and its exhibits are not proper materials for submission as evidence in this proceeding. Accordingly, Opposer has filed *Opposer's Objections and Motion to Strike Applicant's Second and Third Notices of Reliance*, and Opposer hereby renews her motion requesting that the Board sustain her objections and strike from the record *Applicant's Second Notice of Reliance*, *Applicant's Third Notice of Reliance*, and the materials submitted therewith.

STATEMENT OF THE FACTS

A. Information about Opposer

Opposer, Ms. Teresa Earnhardt, is an individual having a mailing address of c/o Dale Earnhardt, Inc., 1675 Dale Earnhardt Highway 3, Mooresville, North Carolina

28115. Opposer is the sole owner of Dale Earnhardt Inc. Opposer is the widow and successor-in-interest of Ralph Dale Earnhardt (“Dale Earnhardt”).

Dale Earnhardt was born April 29, 1951, the son of Ralph Earnhardt, who was, at that time, a successful competitive short-track stock car driver in North Carolina. (*Opposer’s Third Notice of Reliance*, Printed Publication 15.) Two years after his father’s death, Dale Earnhardt began his own professional career as a stock car driver in 1975. *Id.* For the first few years of his professional racing career, Dale Earnhardt drove in only a few races, but in 1979 his career shifted into another gear. *Id.* Racing as a rookie on what was then designated as the Winston Cup Series, he was so successful that he not only finished that year as one of the top ten stock car drivers, but also won Rookie of the Year honors. *Id.*

In the following years, NASCAR stock car racing enjoyed continuously increasing popularity across the country, and Dale Earnhardt arguably was the most colorful and most popular driver in a sport whose fans passionately identify with the persona of their favorite driver. (*Opposer’s Third Notice of Reliance*, Printed Publication 19.) As a means of identifying themselves to other NASCAR fans as part of Dale Earnhardt’s fandom, legions of fans yelled “EARNHARDT!” loudly and proudly not only during races, but also wherever and whenever NASCAR fans gathered. (*Opposer’s Third Notice of Reliance*, Printed Publication 14.)

During his career, Dale Earnhardt won 76 NASCAR races and 7 NASCAR Winston Cup Series championships. (*Opposer’s Third Notice of Reliance*, Printed Publication 5.) His aggressive and daringly skillful driving not only brought unequalled success on the race track but also earned him the nickname, “The Intimidator.”

(*Opposer's Third Notice of Reliance*, Printed Publication 19.) However, on the very last lap of the 2001 Daytona 500, while racing in the center of three cars side-by-side heading into Turn 3, a slight contact with one of the other two cars ignited a rapid sequence of events which tragically resulted in Dale Earnhardt's car hitting the track's outside wall nose-first at nearly 160 miles per hour, killing him instantly. (*Opposer's Third Notice of Reliance*, Printed Publication 10.) Following his death, the commercial rights in Dale Earnhardt's name and persona have passed to his widow, Teresa H. Earnhardt, the Opposer in this proceeding. (*Opposer's First Notice of Reliance I.*, Exh. A-D).

As NASCAR stock car racing itself became much more popular nationwide during Dale Earnhardt's career, the passion of its fans spawned lucrative licensing and endorsement opportunities for NASCAR's more popular drivers. (*Opposer's Third Notice of Reliance*, Printed Publication 19.) Dale Earnhardt, as the greatest persona in NASCAR history, took advantage of those opportunities, and his name and persona were licensed for use during his lifetime on and in conjunction with a broad spectrum of products and services. (*Opposer's Third Notice of Reliance*, Printed Publication 1; *G. Taulbee*, p. 16.) Consequently, through such usage and recognition, Opposer has acquired common-law rights in each of the EARNHARDT and DALE EARNHARDT designations as a proprietary trademark, which rights extend, without limitation, to Opposer's exclusive right to use such designations nationwide (directly or through her licensees) on and in conjunction with various goods and services.

Opposer is also the owner of the following U.S. Trademark Registrations covering a large range of goods and services:

Mark	Reg. No.	Reg. Date	Goods/Services
DALE EARNHARDT	1,644,237	May 14, 1991	Metal key rings (Int. Class 6)

Mark	Reg. No.	Reg. Date	Goods/Services
			<p>Pocket knives (Int. Class 8)</p> <p>Paper goods and printed material, namely, posters, bumper stickers, decals, wall calendars, window stickers and books directed to automobile racing (Int. Class 16)</p> <p>Clothing, namely, sweatshirts, warm-up sets, shorts, sport shorts, golf shirts, t-shirts, jackets, caps and socks (Int. Class 25)</p> <p>Toys, namely, miniature cars (Int. Class 28)</p> <p>Entertainment services in the nature of participating in professional automobile * racing * related exhibitions (Int. Class 41)</p>
<p>DALE EARNHARDT (Script)</p> 	2,035,107	Feb. 4, 1997	<p>Metal key rings, metal license plates and metal tag holders (Int. Class 6)</p> <p>Pocket knives (Int. Class 8)</p> <p>Jewelry, namely, lapel pins, charms and belt buckles (Int. Class 14)</p> <p>Paper goods and printed material, namely, posters, bumper stickers, decals, wall calendars, window stickers, card sets, and brochures and books directed to automobile racing (Int. Class 16)</p> <p>Housewares and glass, namely, drinking glasses, cups, mugs; rubber, plastic or foam insulating beverage holders and water bottles sold empty (Int. Class 21)</p> <p>Cloth flags, afghans, towels, cloth * pennants * (Int. Class 24)</p> <p>Clothing, namely, sweatshirts, warm-up sets, shorts, shirts, sport shirts, golf shirts, T-shirts, jackets, headbands, caps, visors, straw hats, socks and infant sets (Int. Class 25)</p> <p>Toys, namely, miniature cars and trucks; and radio controlled cars (Int. Class 28)</p> <p>Entertainment services in the nature of conducting entertainment services in the nature of participating in professional</p>

Mark	Reg. No.	Reg. Date	Goods/Services
<p data-bbox="224 317 532 380">THE DALE EARNHARDT FOUNDATION & Design</p> 	3,436,512	May 27, 2008	<p data-bbox="922 226 1354 289">automobile races and related exhibitions (Int. Class 41)</p> <p data-bbox="922 317 1360 380">Pre-recorded compact disks, all featuring sports (Int. Class 9)</p> <p data-bbox="922 407 1370 470">Paper goods and printed material, namely, brochures, pamphlets (Int. Class 16)</p> <p data-bbox="922 497 1331 560">Clothing, namely, shirts, T-shirts (Int. Class 25)</p> <p data-bbox="922 588 1370 777">Charitable fund raising; charitable fund raising services; charitable services, namely, providing financial assistance in the fields of education, children, human services, environmental, and wildlife (Int. Class 36)</p> <p data-bbox="922 804 1360 951">Entertainment services in the nature of conducting, sponsoring and participating in automobile related exhibitions; charitable services, namely, providing books to needy persons (Int. Class 41)</p>
<p data-bbox="224 993 472 1056">DALE EARNHARDT (Script & Design)</p> 	3,441,133	June 3, 2008	<p data-bbox="922 993 1360 1056">Metal goods, namely, license plates (Int. Class 6)</p> <p data-bbox="922 1083 1170 1115">Magnets (Int. Class 9)</p> <p data-bbox="922 1142 1300 1173">Watches and clocks (Int. Class 14)</p> <p data-bbox="922 1201 1370 1411">Paper goods and printed material, namely, trading cards, posters, stickers, paper goods and printed material, namely, trading cards, commemorative stamps featuring sports, note cards, posters, stickers, decals, calendars, and mounted photographs (Int. Class 16)</p> <p data-bbox="922 1438 1328 1501">Non-metal novelty license plates, seat cushions and cushions (Int. Class 20)</p> <p data-bbox="922 1528 1370 1696">Housewares and glass, namely, drinking glasses, cups and mugs; rubber, plastic or foam insulating coolers and beverage holders; and portable coolers (Int. Class 21)</p> <p data-bbox="922 1724 1344 1787">Afghans, towels, fabric flags, and cloth pennants (Int. Class 24)</p> <p data-bbox="922 1814 1333 1898">Clothing, namely, sweatshirts, sweat pants, shirts, sport shirts, golf shirts, t-shirts, tank tops, jerseys, shorts, pants,</p>

Mark	Reg. No.	Reg. Date	Goods/Services
			<p>jackets, coats, hats, caps, visors, raincoats, and pajamas (Int. Class 25)</p> <p>Toys and sporting goods, namely, miniature automobiles and trucks; radio controlled cars, sports table top games; stuffed toys; stuffed toy animals; and Christmas tree ornaments, except confectionery or illumination articles (Int. Class 28)</p> <p>Charitable fund raising; charitable services, namely, providing financial assistance in the fields of education, children, human services, environment as and wildlife (Int. Class 36)</p> <p>Entertainment services in the nature of conduction, sponsoring and participating in automobile exhibitions; charitable services, namely, providing books to the needy persons (Int. Class 41)</p>

(*Opposer's First Notice of Reliance I.*, Exh. A-D).

Opposer's DALE EARNHARDT registrations are valid, subsisting, and in full force and effect. Moreover, Opposer's Registration No. 1,644,237 is incontestable, and, as such, serves as conclusive evidence of Opposer's exclusive right to use (or license the use of) the mark on and in conjunction with all of the goods and services listed in said registration.

B. Information about Applicant

Applicant, Kerry Earnhardt, Inc. ("KEI"), was co-founded by Kerry Earnhardt and his wife, Rene Earnhardt. *Kerry Earnhardt* at 5. Kerry Earnhardt is the CEO of KEI, and Rene Earnhardt is the company's President. *Id.* Kerry Earnhardt is the son of Dale Earnhardt and step-son of Opposer. *Id.* KEI has applied to register EARNHARDT COLLECTION as a trademark for use on and in conjunction with furniture and the construction of custom homes. In 2011, KEI began plans with Schumacher Homes to

create custom homes under the EARNHARDT COLLECTION name. *Id.* at 29. There are no business plans for the use of EARNHARDT COLLECTION with furniture. (*Opposer's First Notice of Reliance*, Exhs. E and F, p. 114-15).

STANDING AND PRIORITY

By submitting the registration certificates, Opposer has made Registration Nos. 1,644,237, 2,035,107, 3,436,512, and 3,441,133 of record. As such, the record shows these registrations are valid and subsisting and owned by Opposer. It also shows that the earliest of these registered marks has been registered on the Principal Register since May 14, 1991. Inasmuch as Applicant's opposed applications were filed on July 18, 2011, and August 6, 2011, not only has Opposer established its standing to oppose Applicant's applications but also priority is not an issue to be tried in this proceeding. *See King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1402, 182 USPQ 108, 110 (CCPA 1974).

PRIMILARY MERELY A SURNAME

EARNHARDT COLLECTION is primarily merely a surname when used in connection with furniture and the construction of custom homes. and, as such, registration of that designation should be refused. Under the Trademark Manual of Examining Procedure, "[i]f the wording combined with the surname is incapable of functioning as a mark, (i.e., a generic name for the goods or services), the examining attorney must refuse registration on the ground that the entire mark is primarily merely a surname under § 2(e)(4)." TMEP § 1211.01(b)(vi).

A. The Public Will Perceive Earnhardt Primarily Merely As A Surname

"The test for determining whether a mark is primarily merely a surname is the primary significance of the mark as a whole to the purchasing public." *In re Hutchinson*

Tech. Inc., 7 USPQ2d 1490, 1492 (Fed. Cir. 1988). In order to determine whether a designation's primary significance to the public is as a surname, the Board typically considers four factors:

- “(1) whether the surname is rare;
- (2) whether anyone connected with applicant has the involved term as a surname;
- (3) whether the term has any other recognized meaning; and
- (4) whether the term has the ‘look and feel’ of a surname.”

Miller v. Miller, 105 USPQ2d 1615, 1619 (TTAB 2013).

a. Rareness

According to the 2000 U.S. Census, at least 1,559 people in this country had the surname EARNHARDT in 2000. (*Clements*, p. 7; Opp. Exh. 20). In July 2014, Archives.com located 240,182 records for the last name EARNHARDT: 2,547 census records, 230,188 newspaper pages, 1,337 obituaries, and 6,110 vital records. (*Clements*, p. 9; Opp. Exh. 21). In addition, Dale Earnhardt was on the cover of Time Magazine and Sports Illustrated, has been named on Forbes' list of “Top Earning Dead Celebrities” and “Celebrity 100 Power Rankings,” and has been featured in numerous articles from notable media sources such as CNN and USA Today. (*Opposer's Third Notice of Reliance*, Printed Publications 6, 7, 10-12, 18-19). Accordingly, millions of individuals in the United States also have been exposed to the surname EARNHARDT in books, news and print media. (*Opposer's Third Notice of Reliance*, Printed Publications 1-19).

Even if a “surname is not among the most common, that does not automatically qualify it as a rare surname.” *In re Mott's LLP*, No. 85374805, 2013 WL 3188888, at *2 (TTAB Apr. 30, 2013). Moreover, “Section 2(e)(4) makes no distinction between rare

and commonplace surnames,” and “even a rare surname is unregistrable if its primary significance to purchasers is a surname.” *In re Markbens Administradora de Bens Eireli*, No. 85713043, 2014 WL 4731122, at *2 (TTAB Sept. 9, 2014). See *In re E. Martinoni Co.*, 189 USPQ 589, 590-91 (TTAB 1975) (refusing registration of LIQUORE MARTINONI (stylized) for liqueur and noting: “The fact that ‘MARTINONI’ may be a rare surname does not entitle it to treatment different from what would be accorded to a common surname when no other meaning for the word is shown.”). See also *In re Adrian Giger and Thomas Giger*, 78 USPQ2d 1405, 1408 (TTAB 2006) (“[T]he fact that a term is not a common surname does not mean that a surname would not be considered to be primarily merely a surname.”). This Board has recently found that the primary significance to the public of even rare surnames such as LEARDI¹ and ROMANOV² is as surnames and has refused registration of these designations. *In re Markbens Administradora de Bens Eireli*; *In re The Hyman Cos., Inc.*, No. 85483695, 2014 WL 2967637 (TTAB June 4, 2014). The surname EARNHARDT is significantly more common than either LEARDI and ROMANOV. As such, the primary significance to the public of the term EARNHARDT is as a surname.

b. Connections between Applicant and the surname

The surname of Kerry Earnhardt, part owner and CEO of Applicant, is Earnhardt. (*K. Earnhardt*, p. 5). Moreover, the surname of Rene Earnhardt, part owner and President of Applicant, is also Earnhardt. (*R. Earnhardt Test. Depo*, p. 15). EARNHARDT was selected because it is the surname of Kerry and Rene. (*K.*

¹ The record only demonstrated 62 listings for individuals with the surname.

² The record only contained a search by the Examiner showing that 411.com showed “100+ Results” for the surname.

Earnhardt, p. 8-9). Kerry and Rene Earnhardt are identified by their surname in marketing materials and publications. *Id.* The fact that those persons, who are principals in Applicant's business, have the surname Earnhardt strengthens the inference that the public will perceive the term, when used by Applicant or otherwise, as a surname. *See Miller*, 105 USPQ2d at 1620.

c. Any other recognized meaning

There is no other recognized meaning of the term Earnhardt. The term does not appear in Merriam-Webster's Dictionary. (*Clements*, pp. 10-11; Opp. Exh. 22). Its only recognized meaning is that of a common surname.

d. The look and feel of the surname

In order to determine whether a mark has the "look and feel" of a surname, the Board considers whether it has the "structure and pronunciation" or "the look and sound" of a surname. *Miller*, 105 USPQ2d at 1621. As noted in *Industrie Pirelli*, "certain rare surnames look like surnames, and certain rare surnames do not" *In re Industrie Pirelli*, 9 USPQ2d 1564, 1566 (TTAB 1988). EARNHARDT has the "look and feel" of a surname. It "would not be perceived as an initialism or acronym . . . and does not have the appearance of having been coined by combining a root element that has a readily understood meaning in its own right with either a prefix or a suffix." *In re Gregory*, 70 USPQ2d 1792, 1796 (TTAB 2004). EARNHARDT is a "cohesive term with no meaning other than as a surname." *Id.*

Viewing these factors together, there is simply no evidence in the record that, in the United States, EARNHARDT would be perceived as anything other than a surname. The primary significance of EARNHARDT, to the purchasing public, is that of a surname. (*See also Taulbee*, p. 29-30) (Applicant's counsel even insisted that it is

“nothing more than a surname”).

B. Inclusion Of The Term “Collection” Does Not Diminish The Designation’s Primary Significance As A Surname

As used (or to be used) in conjunction with the particular goods and services listed in the opposed applications, the inclusion of the term “COLLECTION” in combination with the surname “EARNHARDT” does not diminish the primary significance of EARNHARDT COLLECTION as a surname. “It is well settled that combining a surname with the generic name for the services does not overcome a mark’s surname significance.” *Miller*, 105 USPQ2d at 1622; see *In re Hamilton Pharms. Ltd.*, 27 USPQ2d 1939 (TTAB 1993) (holding HAMILTON PHARMACEUTICALS primarily merely a surname for pharmaceutical products); *In re Woolley’s Petite Suites*, 18 USPQ2d 1810 (TTAB 1991) (holding WOOLLEY’S PETITE SUITES primarily merely a surname for hotel and motel services).

In this case, “COLLECTION” is a generic designation for both furniture and the custom construction of homes. Opposer’s Exhibit 17 shows that there are 12,000,000 search engine results for “collection” and “custom homes” (*Clements*, p. 11; Opposer’s Exh. 17). The record further reflects printouts of more than 70 websites from that search using “collection” in connection with the construction of custom homes. *Id.* Likewise, Opposer’s Exhibit 19 shows that there are 450,000,000 search engine results for “collection” and “furniture.” (*Clements*, p. 13; Opposer’s Exh. 19). The record further reflects printouts of almost 100 websites from that search using “collection” in connection with furniture. *Id.*

Similar to the *Miller* case, where LAW GROUP was disclaimed from the application of MILLER LAW GROUP, the exclusive right to use the word

“COLLECTION,” apart from the mark as shown, was disclaimed in each opposed application because of its connotation. *See Miller*, 105 USPQ2d at 1622. As was the case in *Miller*, merely combining a surname with a generic name for a group or portfolio of furniture or custom homes does not overcome EARNHARDT’s significance as a surname and as such, registration of EARNHARDT COLLECTION should be refused.

The record makes it clear that “collection” is an appropriate, generic term used often to identify a group of homes or home furnishings. (*See Opposer’s First Notice of Reliance*, Exhs. E and F, pp. 22-23; *Becker*, pp. 19-20). In the housing industry, the term “collection” is often used to identify a portfolio or group of homes or home designs. (*Becker*, pp. 43-49). Mary Becker of Schumacher Homes (KEI’s licensee) acknowledged having seen the term “collection” used by home builders. (*Becker*, pp. 44-45; Opposer’s Exh. 17). The record also reflects other individuals who are familiar with the use of the term “collection” in referring to a group of home furnishings. (*Hallman*, p. 39; *Miller*, p. 24).

Testimony adduced in this proceeding is replete with acknowledged generic use of the term “collection” in conjunction with groups or portfolios of homes (custom and otherwise) and furniture:

- KEI’s own licensee, Schumacher Homes, has used “collection” multiple times as a generic term or noun to refer to a group of homes in its marketing plan such as “early stage development plans for The Collection,” “going to offer a unique collection,” “in the collection,” “determine number of plans in the collection” and “explain the collection and truly bring it to life.” (*Opposer’s First and Second*

Notices of Reliance, Exhs. E, F and H, pp. 51-55; 57-60; Becker, pp. 22-26; Opposer's Exhs. 2- 3).

- Schumacher Homes also referred to an “exciting new collection of Schumacher Homes” and “the collection” in its Discussion Guide for the EARNHARDT COLLECTION concept session. (*Opposer's First and Second Notices of Reliance, Exhs. E, F and H, pp. 96-97; Becker, p. 40; Opposer's Exh. 8).*)
- Schumacher Homes' marketing materials called EARNHARDT COLLECTION “the premier collection of relaxed, comfortable living.” (*Opposer's First and Second Notices of Reliance, Exhs. E, F and H, pp. 113-114; Opposer's Exh. 15).*)
- Mary Becker used the term generically during her deposition, such as “we were trying to identify the name of the collection at that time.” (*Becker, p. 41).* Ms. Becker also explained that she believed that people would use the phrase “outdoor home collection” as a search term to find websites pertaining to collections of outdoor homes. (*Becker, p. 29; Opposer's Exh. 3).*)
- Rene Earnhardt also used the term “collection” generically several times during her deposition, such as “our collection, our collection of homes,” “what we wanted to call the collection,” “[i]t's a collection of homes,” “the naming of the collection of homes.” (*Opposer's First Notice of Reliance, Exhs. E and F, pp. 22, 25, 69, 94).* Ms. Earnhardt also acknowledged that a collection of homes means a line of homes. *Id.* at 73-75.

Moreover, the evidence reveals that, once the EARNHARDT COLLECTION designation was chosen, Applicant still remained concerned that “Earnhardt Collection” by itself may not be sufficient to identify to the public that it is Kerry and Rene Earnhardt

who are the sponsors of the collection of homes. (*Opposer's First and Second Notices of Reliance*, Exhs. E, F and H, p. 107, Opposer's Exh. 12). This was because "Earnhardt" is a surname and "collection" just tells the public what the goods or services are. *Id.* As such, Applicant requested that all promotional materials include specific references to Kerry Earnhardt. *Id.* This further demonstrates that COLLECTION is a generic term, incapable of functioning as a trademark in connection with custom homes or furniture.

In view of the foregoing, the record informs the conclusion that, as used in conjunction with the particular goods and services listed in the opposed applications, the designation EARNHARDT COLLECTION is primarily merely a surname, and, pursuant to Section 2(e)(4) of the Lanham Act, Opposer respectfully requests that the Board refuse registration of that designation as a trademark or service mark for those goods and services.

THE LIKELIHOOD OF CONFUSION

Each of the designations EARNHARDT and DALE EARNHARDT enjoys such fame or reputation that a commercial connection with Dale Earnhardt would be presumed from Applicant's potential use of the designation EARNHARDT COLLECTION in conjunction with custom homes and furniture in this country.

The decision in *In re E.I. du Pont Nemours & Co.*, 177 USPQ 563 (1973), provides a list of evidentiary elements or factors which must be considered in analyzing the likelihood of confusion issue. *Id.* at 567. It should be remembered, however, that the evidentiary elements recited in *du Pont* are not listed in order of merit, and, in any particular case, one element or group of elements may play a dominant role. *Id.* at 567-68. These individual factors are discussed seriatim below.

A. The fame of the opposer's marks (sales, advertising, length of use).

The EARNHARDT and DALE EARNHARDT marks are not only distinctive marks, but also famous marks, particularly when used on and in conjunction with collectibles, and each of the EARNHARDT and DALE EARNHARDT marks acquired that status as a famous mark prior to the first usage in commerce of Applicant's EARNHARDT COLLECTION designation.

As noted above, Dale Earnhardt has been on the cover of both Time Magazine and Sports Illustrated as well as featured in numerous articles from notable media sources such as CNN and USA Today. (*Opposer's Third Notice of Reliance*, Printed Publications 11-12, 18-19). Dale Earnhardt is also listed in the Encyclopedia Americana International Edition, The New Encyclopedia Britannica, and Forbes' Celebrity Power Ranking (1999-2001). (*Opposer's Third Notice of Reliance*, Printed Publications 5, 7, 15).

Dale Earnhardt was "larger than life." (*Opposer's First Notice of Reliance*, Exhs. E and F, p. 112, Opposer's Exh. 14). Dale Earnhardt more or less invented the concept of driver marketing and played a prominent role in developing and enhancing the popularity of NASCAR racing. (*Opposer's Third Notice of Reliance*, Printed Publications 3-4). He has been referred to as "the Bill Gates of personal branding" and the "face of NASCAR." (*Opposer's Third Notice of Reliance*, Printed Publication 10). If the world's most celebrated athlete were defined by the basis of sales of licensed products, this athlete would be Dale Earnhardt. (*Opposer's Third Notice of Reliance*, Printed Publication 2). Before Dale Earnhardt's death, "sales of Earnhardt's licensed products (including the most popular products, apparel, die-cast cars, and trading cards) reportedly accounted for 40% of NASCAR licensed sales, totaling \$50 million." (*Opposer's Third Notice of Reliance*, Printed Publication 1). On top of making numerous TV appearances and

having many sponsorships, Dale Earnhardt was also the first person ever to be featured on a Monopoly game board. (*Opposer's Third Notice of Reliance*, Printed Publication 12; *A. Hallman*, p. 26). Following his death, the sale of Earnhardt licensed products grew to \$60 million in 2001. (*Opposer's Third Notice of Reliance*, Printed Publication 1). Furthermore, over "14,000 other Earnhardt collectables were for sale on the online auction site eBay (nearly 10,000 more than Michael Jordan)." (*Opposer's Third Notice of Reliance*, Printed Publication 1). Dale Earnhardt was listed in Forbes' list of Top Earning Dead Celebrities due to the substantial volume of sales licensed under Opposer's marks. (*Opposer's Third Notice of Reliance*, Printed Publication 6).

"More than a decade later, fans still can't completely let go of the man and his legacy." (*Opposer's Third Notice of Reliance*, Printed Publication 9). Dale Earnhardt is still well respected and deeply remembered. (*Opposer's Third Notice of Reliance*, Printed Publication 8). "The impact he had on fans is still felt today with Earnhardt memorabilia still having a big presence at the track." *Id.* Not only do "Earnhardt-related clothing and memorabilia continue to be among the sport's biggest sellers," but "souvenir trailers carrying Earnhardt legacy merchandise at every Sprint Cup race remain jammed with nearly as many fans as when he was alive." (*Opposer's Third Notice of Reliance*, Printed Publication 9).

When Applicant adopted the opposed designation, the EARNHARDT brand was already very strong and "synonymous with quality and value." (*Opposer's First and Second Notices of Reliance*, Exhs. E, F and H 101, 108; Opposer's Exhs. 10, 12). Dale Earnhardt's licensed merchandise today ranks about 10th-12th amongst NASCAR-related merchandise. (*Miller*, p. 16).

Just as it did during his lifetime and racing career, the designation “EARNHARDT” continues to identify Dale Earnhardt to millions of people in this country. (*Opposer’s Third Notice of Reliance*, Printed Publication 14). Likewise, just as it did during his lifetime and racing career, the term “EARNHARDT COLLECTIBLES,” to many people in this country, connotes merchandise which is associated with and/or enjoys a commercial sponsorship or approval of Dale Earnhardt or his successor-in-interest. (*Opposer’s Third Notice of Reliance*, Printed Publication 16-18; *Queen Test. Depo*, pp. 20-22). The availability of such merchandise under the EARNHARDT and DALE EARNHARDT marks has been advertised and promoted at considerable expense.

The EARNHARDT and DALE EARNHARDT marks have each become famous and distinctive through, *inter alia*, extensive use, advertising and promotion of those marks throughout the United States over a substantial period of time on and in conjunction with a variety of merchandise and services. As such, consideration of this factor, the fame and strength of Opposer’s marks, supports the opposition.

B. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

In assessing likelihood of confusion, conflicting marks are first compared in terms of sound, sight, meaning, and overall commercial impression. *See Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419 (TTAB 2014). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would likely assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted).

The first component of Applicant's EARNHARDT COLLECTION designation, "EARNHARDT," is visually and aurally identical to both Opposer's common law EARNHARDT mark and the second component of Opposer's federally registered DALE EARNHARDT mark. While DALE EARNHARDT is not identical to EARNHARDT COLLECTION, it is obvious that each mark consists of the surname EARNHARDT. Nothing in the record suggests that EARNHARDT has any inherent distinctiveness other than as a surname. As such, to the extent that the marks share the designation EARNHARDT, they are at least in part identical in sound, appearance and commercial impression.

EARNHARDT is clearly the dominant element in all the relevant designations. With respect to DALE, the term simply reinforces the impression that EARNHARDT is an individual's name. The forename DALE modifies the surname EARNHARDT and serves to emphasize that EARNHARDT is a surname. The forename DALE does not alter the commercial impression of the DALE EARNHARDT mark. *See In re Chatham Int'l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) ("the first name JOSE modifies the surname GASPER and serves to emphasize that GASPER is a name").

Furthermore, the record reflects numerous instances when either Opposer or third-parties have used EARNHARDT as a standalone mark to refer to Dale Earnhardt. Opposer's license provisions have, at times, included the EARNHARDT mark (as a standalone mark) as a licensed mark. (*Taulbee*, p 44). The EARNHARDT designation has been used as a standalone mark on goods such as hats, shirts and hoodies. (*Hallman*, pp. 30-33; *Queen Test. Depo.*, pp. 19-20; Opposer's Exhs. 26-28). Moreover, newspaper

and TV journalists and fans alike have all referred to Dale Earnhardt and “Earnhardt.”³ (*Miller*, p. 19; *Hallman*, p. 37; *Queen Test. Depo.*, pp. 14-16). Still further, the public uses the terms “Earnhardt Collectible” and “Earnhardt Collection” to refer to memorabilia pertaining to Dale Earnhardt. (*Queen Test. Depo.*, pp. 20 - 22; see *Opposer’s Third Notice of Reliance*, Printed Publication 13). (“Prior to his death, online listings of *Earnhardt collectibles* had averaged about 10,000 items in a week.”) (emphasis added).

The second component of Applicant’s designation, COLLECTION, is a generic term when used in the context of furniture or custom homes, has been disclaimed by Applicant, and thus does not impart any distinctiveness to Applicant’s composite designation. Because COLLECTION has minimal (if any) commercial significance, the term should be given less weight in assessing the similarity of the marks under *duPont*. See *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985) (stating “[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark”).

“Once all the features of the mark are considered, it is not improper to state that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety.” *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1357 (Fed. Cir. 2000). When viewed in their entirety with non-dominant features appropriately discounted, the marks become nearly identical. The dominant feature of Opposer’s mark,

³ On the other hand, current NASCAR driver Dale Earnhardt, Jr. is often referred to as “Dale, Jr.,” “Junior” or “Earnhardt, Jr.” (*Miller*, p. 21)

EARNHARDT, is also the dominant feature of Applicant's designation. Thus, Opposer's mark and Applicant's designation convey a similar appearance, sound, connotation and commercial impression. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1571 (Fed. Cir. 1983) (holding that the shared dominant term GIANT supports a finding of a likelihood of confusion).

Thus, just as the usage today of "EARNHARDT COLLECTIBLES" connotes in this country merchandise which enjoys a commercial sponsorship or approval of Dale Earnhardt or his successor-in-interest, Applicant's potential use of EARNHARDT COLLECTION in conjunction with furniture and custom homes falsely suggests to the public in this country that such goods enjoy a sponsorship, approval or other commercial connection with Dale Earnhardt or his successor-in-interest.

Hence, Opposer respectfully submits that consideration of this factor, i.e., the appearance, sound, connotation and commercial impression of the parties' marks, strongly favors Opposer's contention that confusion is likely.

C. The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in conjunction with which a prior mark is in use.

Applicant seeks to register the designation EARNHARDT COLLECTION for use in connection with furniture and custom homes. As reflected in *du Pont*, the similarity of the parties' goods is a factor to be considered in the Board's likelihood of confusion analysis.

Opposer's trademarks have been licensed for use on various home furnishings and home decor goods such as clocks, bean bag chairs, folding chairs, rugs, bedding, ceiling fans, waste baskets, lamps, license plate frames, stuffed animals, apparel, photo frames, housewares, furniture, bathroom items, and wall hangings (*Taulbee*, p. 16; *Queen Test*.

Depo., pp. 11-12). EARNHARDT by itself has been licensed and used on products such as hats, hoodies and shirts (*Hallman*, pp. 30 -33; Opposer's Exhs 26-28). With regard to custom homes, Opposer, while admittedly not using her mark on custom homes, has used the EARNHARDT mark in connection with real estate, namely the leasing of residential and commercial properties, and services related to the outdoors such as raising and selling agricultural products (*Queen Test. Depo.*, pp. 5-6).

Given the similarities between the goods and services, coupled with the fame of Dale Earnhardt, the goods and services listed in Applicant's application are types of goods and services which the public may reasonably expect or believe to enjoy a license of the EARNHARDT and DALE EARNHARDT marks. Thus, this factor weighs in favor of Opposer.

D. The similarity or dissimilarity of established, likely-to-confuse trade channels.

Applicant's target customer is any member of the general public who likes the outdoors and is comfortable in an outdoor setting (*Opposer's First Notice of Reliance*, Exhs. E and F, pp. 26-27). EARNHARDT COLLECTION seeks to reach a broad cross-section of population insofar as income and economics; people who enjoy outdoor living, casual, comfortable lifestyle (*Becker*, p. 24). It is also presumed that Applicant's goods and services move in all channels of trade normal for the identified goods and services, and that they are available to all classes of purchasers for these goods and services. *See, e.g., Paula Payne Prods. Co. v. Johnson Publishing Co.*, 177 USPQ 76, 77-78 (CCPA 1973). As such, the universe of potential customers for Applicant's goods and services is relatively broad. Likewise, Opposer's Dale Earnhardt marks are not targeted to a specific class of purchasers and often appeal to diverse members of the general public.

(*Opposer's First Notice of Reliance I*, Exh. A-D; *Queen Test. Depo.* at 10-13).

Accordingly, this factor weighs in favor of Opposer.

E. The conditions under which and buyers to whom sales are made, i.e., “impulse” v. careful sophisticated purchasing.

Purchasers of Opposer's licensed merchandise are likely to be impulse buyers of Dale Earnhardt apparel and memorabilia. This merchandise is typically sold at a low price point. While the purchaser of a custom design home likely is a more sophisticated purchaser, each party targets its products and services broadly to members of the general public. Thus, this factor weighs in favor of a likelihood of confusion.

F. The family relationship between the parties.⁴

Kerry Earnhardt, Applicant's CEO, is the son of Dale Earnhardt, the persona which is the nucleus of Opposer's marks. Not only was the EARNHARDT COLLECTION custom home brand launched publicly at the NASCAR Hall of Fame, where Dale Earnhardt is the only member of the Earnhardt family to have been inducted, Dale Earnhardt himself is referenced in Applicant's marketing materials. (*Opposer's First and Second Notices of Reliance*, Exhs. E, F and H, pp. 109-111, Opposer's Exh. 13-14). Even Applicant recognized the “Earnhardt brand is very strong” and that KEI and its licensee needed “to be sensitive to identifying particularly Kerry with respect to the Earnhardt Collection so there is no confusion with the association amongst the Earnhardt family.” (*Opposer's First and Second Notices of Reliance*, Exhs. E, F and H, pp. 101-07; Opposer's Exh. 10). “EARNHARDT COLLECTION” by itself isn't sufficient to

⁴ The effect of the family relationship between the parties is analyzed under the 13th *du Pont* factor, “any other established fact probative of the effect of use.” *du Pont*, 177 USPQ at 567.

identify to the public that it is Kerry and Rene Earnhardt who are the sponsors of the collections of homes or furniture, because “Earnhardt” is a surname and “collection” just tells the public what the goods are. *Id.* Given Applicant’s admitted concern that EARNHARDT COLLECTION alone would not be adequate to inform the public that it is Kerry and Rene Earnhardt who are associated with the homes, Applicant initially considered adopting marks which clearly resolved the confusion issue by specifically incorporating the full names of Kerry and/or Rene Earnhardt in the brand for the homes. Applicant KEI could have easily adopted the “Kerry and Rene Earnhardt Outdoor Collection” or any other brand identifying Kerry and Rene, but Applicant chose instead to proceed with a brand that lends itself to confusion as to the source or sponsorship of the goods and services (*Opposer’s First and Second Notices of Reliance*, Exhs. E, F and H, at 48-49; Opposer’s Exh. 2).

Accordingly, the family relationship between the parties is an additional factor which, in this case, supports a finding of a likelihood of confusion. *See Harry Winston, Inc.* (finding a likelihood of confusion since Bruce Winston is the son of Harry Winston and their relationship is often discussed in the press).

G. The nature and extent of any actual confusion.

Opposer acknowledges a lack of evidence of actual confusion in this proceeding. However, there has been limited use of EARNHARDT COLLECTION in connection with homes and no use in connection with furniture. Schumacher Homes sold only about 90 homes in the Earnhardt Collection in each of years 2012 and 2013 (*Becker*, p. 43). EARNHARDT COLLECTION has not been licensed to anyone for use other than in conjunction with custom homes (*Opposer’s First Notice of Reliance*, Exhs. E and F, p. 86). There has been no use of EARNHARDT COLLECTION with furniture. *Id.* at 114.

There is also no agreement with any furniture manufacturer, and Applicant itself does not intend to manufacture furniture goods. *Id.* at 115. While Applicant ostensibly intends to use EARNHARDT COLLECTION on furniture made by New Buck Corporation, there is no business plan, and there are no known documents reflecting the substance of any plan for the use of EARNHARDT COLLECTION as a trademark for furniture. (*Opposer's First Notice of Reliance*, Exhs. E and F, pp. 116-18; *Rene Earnhardt Test. Depo.*, p. 19).

As reflected above, in view of the relatively low levels of Applicant's marketing and sales activities, actual confusion is not a factor of any significance in analyzing the likelihood of confusion issue in this case. However, since both Applicant and Opposer market (or intend to market) their products to the general public, the potential confusion in this case relates to the general population. Hence, the far-reaching nature of the potential confusion also weighs in favor of Opposer's position.

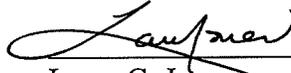
Thus, consideration of several *du Pont* factors, individually and as a whole, informs the conclusion that Applicant's designation EARNHARDT COLLECTION, as used in conjunction with custom homes or furniture, is confusingly similar to Opposer's common law EARNHARDT and federally registered DALE EARNHARDT marks, as used on a variety of goods and services. As used in conjunction with custom homes or furniture, the opposed designation, EARNHARDT COLLECTION, would be perceived by a significant portion of the general public in the United States as connoting a commercial linkage to Dale Earnhardt or his commercial successor-in-interest.

CONCLUSION

Opposer submits that the oppositions should be sustained, and Applicant's applications for registration of EARNHARDT COLLECTION should be refused.

Dated: February 12, 2015.

Respectfully submitted,

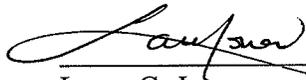


Larry C. Jones
Carla H. Clements
Attorneys for Opposer
Alston & Bird LLP
101 S. Tryon Street, Suite 4000
Charlotte, North Carolina 28280
Telephone: (704) 444-1000

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Trial Brief on Behalf of Opposer* was duly served on Applicant by depositing a copy of same in the United States mail, first-class postage prepaid, on the 12th day of February, 2015, addressed to Applicant's attorneys of record as follows:

Cary B. Davis
D. Blaine Sanders
Matthew F. Tilley
Robinson Bradshaw & Hinson, P.A.
101 N. Tryon Street, Suite 1900
Charlotte, NC 28246-0106



Larry C. Jones