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

Proceeding	91205331
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

TERESA H. EARNHARDT,

Opposer,

v.

KERRY EARNHARDT, INC.,

Applicant.

Consolidated Opposition Nos.:
91205331 (parent) and 91205338

In the matter of:

Application Serial No. 85/383,910
Trademark: EARNHARDT COLLECTION
(Intl. Class 20)

Application Serial No. 85/391,456
Service Mark: EARNHARDT COLLECTION
(Intl. Class 37)

APPLICANT'S TRIAL BRIEF

[PUBLIC VERSION – CONFIDENTIAL INFORMATION REDACTED]

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INDEX

TABLE OF CASES AND AUTHORITIES	iii
BRIEF STATEMENT OF THE CASE	1
DESCRIPTION OF THE RECORD	3
STATEMENT OF THE FACTS	3
A. The Parties	3
B. “Earnhardt” Refers to an Iconic American Racing Family, Not Just One Man	4
C. EARNHARDT COLLECTION Reflects Kerry and René’s Well-Known Passion for the Outdoors	6
D. The Declining Commercial Relevance of Dale Earnhardt, Sr	8
ARGUMENT	10
I. EARNHARDT COLLECTION—WHICH IS A COMPOSITE MARK—IS NOT PRIMARILY MERELY A SURNAME	10
A. When Properly Considered as a Whole, EARNHARDT COLLECTION Is Not Primarily Merely a Surname	11
B. “Collection” Is Not a Generic Term for Either Custom Homes or Furniture	13
C. KEI’s Disclaimer of Rights to the Term “Collection,” Apart from Use In the Mark as a Whole, Does Not Change the Analysis	17
II. THERE IS NO LIKELIHOOD OF CONFUSION BETWEEN KEI’S MARK AND THOSE OWNED BY OPPOSER	19
A. Opposer Only Has Established Priority in the DALE EARNHARDT Marks	19
1. Opposer’s Rights Do Not Extend to the Name “Earnhardt” Alone	19
a. Opposer Has Not Used “Earnhardt” as a Standalone Mark	20
b. Opposer Has Never Used “Earnhardt” on a Substantially Exclusive Basis	23
2. Opposer Has Failed to Establish Common Law Rights in the DALE EARNHARDT Marks for Furniture or Custom Homes	25

B.	The <i>du Pont</i> Factors Strongly Favor KEI	27
1.	The Goods and Services at Issue Are Dissimilar.....	29
2.	The Trade Channels at Issue Are Dissimilar	31
3.	The Purchasing Conditions for Custom Home Purchasers and Racing Souvenir Buyers Are Entirely Different.....	32
4.	Dale Earnhardt Sr.’s Historic Fame Is Insufficient to Support Opposer’s Likelihood of Confusion Claim.....	34
5.	The Marks at Issue Are Dissimilar in Their Entireties as to Appearance, Sound, and Commercial Impression.....	37
6.	Opposer Has Offered No Evidence of Actual Confusion.....	38
III.	OPPOSER HAS ABANDONED HER CLAIMS FOR REFUSAL BASED ON FALSE SUGGESTION OF CONNECTION AND DILUTION	40
	CONCLUSION.....	40
	CERTIFICATE OF SERVICE	42

TABLE OF CASES AND AUTHORITIES

Cases

<i>Bd. of Trustees of Univ. of Alabama v. Pitts</i> , 107 U.S.P.Q.2d 200 (T.T.A.B., 2013)	20, 22, 23, 25
<i>Brennan's, Inc. v. Brennan's Rest., L.L.C.</i> , 360 F.3d 125 (2d Cir. 2004)	38
<i>Bridgestone Americas Tire Operations, LLC v. Fed. Corp.</i> , 673 F.3d 1330 (Fed. Cir. 2012)	38
<i>California Cooler, Inc. v. Loretto Winery Inc.</i> , 774 F.2d 1451 (9th Cir. 1985)	12
<i>Central Garden and Pet Co. v. Dorskocil Manufacturing Co.</i> , 108 U.S.P.Q.2d 1134 (T.T.A.B. 2013)	40
<i>Giersch v. Scripps Network, Inc.</i> , 90 U.S.P.Q.2d 1020 (T.T.A.B. 2009)	22, 27
<i>Harry Winston, Inc. v. Bruce Winston Gem Corp.</i> , Opp. No. 91153147, 2014 WL 3686875 (T.T.A.B. 2014)	34
<i>HBP, Inc. v. Am. Marine Holdings, Inc.</i> , 290 F. Supp. 2d 1320 (M.D. Fla. 2003)	33
<i>In re Allied Mills, Inc.</i> , 150 U.S.P.Q. 757 (T.T.A.B. 1966)	12
<i>In re Bed & Breakfast Registry</i> , 791 F.2d 157 (Fed. Cir. 1986)	14
<i>In re Chatam Int'l Inc.</i> , 380 F.3d 1340 (Fed. Cir. 2004)	38
<i>In Re Cuban Cigar Brands, N.V.</i> , Opp. No. 78554967, 2007 WL 3095397 (T.T.A.B. Oct. 19, 2007)	15
<i>In re E. I. du Pont de Nemours & Co.</i> , 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973)	27
<i>In re Hutchinson Technology</i> , 852 F.2d 552 (Fed. Cir. 1988)	passim
<i>In re I. Lewis Cigar Mfg. Co.</i> , 205 F.2d 204 (C.C.P.A. 1953)	11
<i>In re P.J. Fitzpatrick, Inc.</i> , 95 U.S.P.Q.2d 1412 (T.T.A.B. 2010)	11, 12
<i>In re Soccer Sport Supply Co.</i> , 507 F.2d 1400, 184 U.S.P.Q. 345 (C.C.P.A. 1975)	23

<i>In Re the W.W. Henry Co., L.P.</i> , 82 U.S.P.Q.2d 1213 (T.T.A.B. 2007)	29
<i>Joel Gott Wines LLC v. Rehoboth Von Gott Inc.</i> , 107 U.S.P.Q.2d 1424 (T.T.A.B. 2013)	40
<i>Lane Capital Mgmt., Inc. v. Lane Capital Mgmt., Inc.</i> , 15 F. Supp.2d 389 (S.D.N.Y. 1998)	14
<i>Lane Capital Mgmt., Inc. v. Lane Capital Mgmt., Inc.</i> , 192 F.3d 337 (2d Cir. 1999)	11, 12
<i>Levi Strauss & Co. v. Genesco, Inc.</i> , 742 F.2d 1401, 222 U.S.P.Q. 939 (Fed. Cir. 1984)	25
<i>Life Zone Inc. v. Middleman Group, Inc.</i> , 87 U.S.P.Q.2d 1953 (T.T.A.B. 2008)	21, 26
<i>Ms. Teresa H. Earnhardt v. Bobby Dale Earnhardt LLC</i> , Nos. 91212177, 91212483, 2014 WL 3686879 (T.T.A.B. 2014).....	34
<i>Nautilus Group Inc. v. ICON Health and Fitness Inc.</i> , 71 U.S.P.Q.2d 1173 (Fed. Cir. 2004)	28
<i>Official Airline Guides, Inc. v. Goss</i> , 856 F.2d 85 (9th Cir. 1988)	17
<i>Otto Roth & Co. v. Universal Foods Corp.</i> , 640 F.2d 1317, 209 U.S.P.Q. 40 (C.C.P.A. 1981).....	20
<i>Sea Island Co. v. Koehler Corp.</i> , Opp. No. 91120712, 2005 WL 847431 (T.T.A.B. 2005)	16
<i>Shen Mfg. Co. v. Ritz Hotel Ltd.</i> , 393 F.3d 1238, 73 U.S.P.Q.2d 1350 (Fed. Cir. 2004)	29
<i>Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kasha</i> , 77 U.S.P.Q.2d 1917 (T.T.A.B. 2006)	28, 29, 33, 35
<i>Swatch AG v. M.Z. Berger & Co.</i> , 108 U.S.P.Q.2d 1463 (T.T.A.B. 2013)	40
<i>Syngenta Crop Prot., Inc. v. Bio-Chek, LLC</i> , 90 U.S.P.Q.2d 1112 (T.T.A.B. 2009)	21, 26
<i>Towers v. Advent Software, Inc.</i> , 913 F.2d 942, 16 U.S.P.Q.2d 1039 (Fed. Cir. 1990)	20
<i>Univ. of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co.</i> , 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983)	28, 34, 35

Statutes

15 U.S.C. § 1052.....	40
15 U.S.C. § 1052(d)	20, 27
15 U.S.C. § 1052 (e)(4).....	10

Other Authorities

TMEP § 1211(b)(vi) 10
TMEP § 1211.01(b)(vii) 18
2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:88 (4th ed.) 35

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BRIEF STATEMENT OF THE CASE

Opposer's Trial Brief is much like her Notice of Opposition: an idealized "Story of Dale Earnhardt, Sr." It also is alike in that it is not based on the evidence that the parties adduced at trial, the applicable law of trademarks or the current realities of NASCAR. Rather, Opposer, Dale Earnhardt, Sr.'s widow, has the misbegotten notion that because her late husband once was a marketing powerhouse, she alone has trademark rights in the name "Earnhardt." As a result, she asserts that no one else can register a trademark containing that name, especially not her stepson, who owns Applicant Kerry Earnhardt, Inc. ("KEI"). In an ironic effort to carry out her notion that she alone controls "Earnhardt," Opposer's counsel has advanced the "primarily merely a surname" argument to oppose the registration of EARNHARDT COLLECTION. But her "divide and conquer" approach ignores the holding of the controlling *Hutchinson Technology* case, which requires consideration of "Earnhardt" and "Collection" together.

Opposer also claims a likelihood of confusion. But that argument disregards that while Opposer deals in racing souvenirs, Applicant licenses EARNHARDT COLLECTION in connection with the sale of custom homes. The two businesses thus do not have the same

customers or employ the same channels of trade. It is not surprising then that Opposer, as her counsel had to admit in her brief, has no evidence of actual confusion.

Moreover, Opposer's "Story of Dale Earnhardt, Sr." is incomplete. The Earnhardts are a *family* of independently-recognized racers, whose notoriety began with Ralph Earnhardt, Dale Sr.'s father. Indeed, Dale Earnhardt, Jr.'s market power now far exceeds that of Dale Earnhardt, Sr. Kerry Earnhardt, the CEO of KEI, is an important part of this racing family. Significantly for this case, Dale Earnhardt, Jr. licenses his name for racing souvenirs, the same goods covered by Opposer's marks, and his company has absolutely no concern that KEI's use of EARNHARDT COLLECTION is causing confusion with his marks. Similarly, Opposer's own former Director of Marketing, Amy Hallman, testified that she did not understand this lawsuit and saw no value in trying to prevent Applicant from registering EARNHARDT COLLECTION.

Amazingly enough, although she has taken legal action against her stepson's company, Opposer chose not to testify in support of her own case. One would think that if Opposer truly believed in her positions, she would have been willing to take the stand. But she did not. Instead, of the three witnesses who testified on her behalf, two were her lawyers. The third witness, one of her few remaining employees, made so many damaging admissions in her discovery deposition that her counsel has moved to strike that testimony. It makes for a remarkable trial record, although not surprising given the remarkable positions that Opposer has taken. After reviewing the actual evidence and applicable law, rather than Opposer's detached perception of bygone days, the Board should reject the opposition and permit registration of EARNHARDT COLLECTION.

DESCRIPTION OF THE RECORD

Pursuant to Rule 2.128 of the Trademark Rules of Practice, KEI agrees with Opposer's description of the record, with one notable exception. The record submitted by Applicant also includes excerpts and exhibits from the discovery deposition of Judy Queen submitted through *Applicant's Second Notice of Reliance* and *Applicant's Third Notice of Reliance*. Opposer curiously moved to strike that evidence, ignoring that: (i) Opposer conducts all business regarding the DALE EARNHARDT marks through Ms. Queen's employer, Dale Earnhardt, Inc. ("DEI"), which is wholly owned by Opposer; (ii) as DEI's Vice President of Operations, Ms. Queen oversees the DALE EARNHARDT licensing program; and (iii) rather than testify herself, Opposer relied on the testimony period deposition of Ms. Queen.

Applicant has responded separately to Opposer's motion to strike, and incorporates that response herein. *See Applicant's Response to Opposer's Objections and Motion to Strike Applicant's Second and Third Notices of Reliance*. As set forth therein, Ms. Queen's discovery deposition is admissible in evidence on two separate and independent grounds: (i) DEI is functionally a party to this proceeding, and Ms. Queen is an officer of DEI, *see* 37 C.F.R. § 2.120(j)(1), and (ii) DEI acts as Opposer's agent with respect to the licensing and administration of Opposer's trademarks, such that Ms. Queen's discovery deposition constitutes a vicarious party admission under the Federal Rules of Evidence.

STATEMENT OF THE FACTS

A. The Parties

Applicant. KEI, based in Mooresville, North Carolina, is the entity through which Kerry Earnhardt and his wife, René, conduct their business affairs. (*René Earnhardt Dep.*, p. 5). KEI handles licensing and personal appearances for Kerry, a former NASCAR driver and longtime

outdoor personality. (*Id.*) The company also manages the couple's various business ventures, including development of the EARNHARDT COLLECTION lifestyle brand, the trademark at issue in this proceeding. (*Id.*, pp. 5-7; *Kerry Earnhardt Dep.*, pp. 5-6). Kerry is the company's CEO and René its President. (*Kerry Earnhardt Dep.*, p. 5).

Opposer. Teresa Earnhardt is the widow of Dale Earnhardt, Sr., and the President of DEI. (*Queen Test. Dep.*, p. 44). DEI, which is wholly owned by Opposer, administers the licensing program for the DALE EARNHARDT trademarks, which passed to Opposer following her husband's death. (*Taulbee Test. Dep.*, p. 8). Opposer is Kerry Earnhardt's stepmother. She filed this Opposition seeking to prevent KEI's registration of the mark EARNHARDT COLLECTION in International Classes 20 and 37 for furniture and the construction of custom homes.¹

B. "Earnhardt" Refers to an Iconic American Racing Family, Not Just One Man.

Opposer's brief suggests that consumers know only one "Earnhardt"—Dale Earnhardt, Sr.—and from him, and him alone, flows all notoriety and marketing appeal associated with the family name. The record belies any such suggestion. The Earnhardt legacy spans multiple generations of individual, well-known race car drivers who have won scores of races and multiple championships, owned race teams and operated successful businesses, attracted lucrative sponsorships, inspired legions of fans, created their own distinct public images, and extensively licensed their individual trademarks, names and likenesses.

The family racing legacy began with Ralph Earnhardt, one of the pioneers of stock car racing in the 1950s and 60s. (*Kerry Earnhardt Dep.*, pp. 10-11). A 50-member panel of drivers,

¹ KEI seeks registration through two applications. On July 18, 2011, KEI filed an application (Serial No. 85/383,910) for EARNHARDT COLLECTION in International Class 20. On August 6, 2011, KEI filed an application (Serial No. 85/391,456) for EARNHARDT COLLECTION in International Class 37.

team owners, and journalists confirmed his legendary status in 1998 when they named him one of the 50 greatest drivers in NASCAR history. (*Applicant's First Notice of Reliance*, Printed Publication 16). Dale Earnhardt, Sr., whose contributions to the family legend are well-documented in NASCAR annals, was Ralph's son. He died in a racing accident on the last lap of the 2001 Daytona 500.

Dale Earnhardt, Jr.—Dale Earnhardt, Sr.'s son and Kerry Earnhardt's half-brother—is a current NASCAR Sprint Cup Series² racecar driver and NASCAR Xfinity³ Series team owner. The sport's most visible star, he has been named NASCAR's most popular driver eleven times, consecutively each year between 2003 and 2013. (*Applicant's First Notice of Reliance*, Printed Publication 4). A Harris poll recently named him the 5th most popular athlete in the U.S., tied with Kobe Bryant. (*Applicant's First Notice of Reliance*, Printed Publication 5). According to a recent *Forbes* estimate, he is the 28th highest-paid athlete in the world. (*Applicant's First Notice of Reliance*, Printed Publication 6).

Kelley Earnhardt Miller—Dale Earnhardt, Sr.'s daughter, Dale Jr.'s sister, and Kerry's half-sister—is the General Manager of JR Motorsports, Dale Earnhardt, Jr.'s race team, which also manages his licensing operations. (*Miller Dep.*, p. 5). In 2007, she and Dale Earnhardt, Jr. together were ranked the 2nd most powerful figures in NASCAR. (*Applicant's First Notice of Reliance*, Printed Publication 3). The *New York Times* profiled her that same year. (*Applicant's First Notice of Reliance*, Printed Publication 14). Kelley raced in NASCAR's Late Model Stock Car Division from 1994-96. (*Miller Dep.*, p. 9). Her two daughters currently race—the fourth

2 The Sprint Cup Series is the current name for NASCAR's premier circuit. Its former names include the Grand National Series, the Winston Cup Series, and the NEXTEL Cup Series. For ease of reference, this brief will refer to the series by its current name.

3 The Xfinity Series is the current name for NASCAR's second-highest circuit. Its former names include the Late Model Sportsman Series, the Busch Grand National Series, the Busch Series, and the Nationwide Series. For ease of reference, this brief will refer to the series by its current name.

generation of Earnhardt racers. That generation also includes Kerry's son, Jeffrey Earnhardt, who currently races in the NASCAR Xfinity Series and also has raced in the NASCAR Camping World Truck Series. (*Kerry Earnhardt Dep.*, p. 17).

Kerry himself raced from 1992 to 2006, competing in multiple NASCAR circuits, including the Sprint Cup Series, the sport's top division. (*Miller Dep.* p. 9; *Kerry Earnhardt Dep.*, pp. 12-13; *Applicant's First Notice of Reliance*, Printed Publication 11). During that time, he made appearances—on television, in print and in person—for his sponsors, including SuperCuts, Nationwide Insurance, Bass Pro Shops, the National Wild Turkey Federation, and the National Rifle Association. (*Kerry Earnhardt Dep.*, pp. 20-23). These included appearing in a commercial with former Pittsburgh Steelers quarterback and television announcer, Terry Bradshaw. (*Id.*, p. 23). The *Miami Herald* profiled him in 2004. (*Applicant's First Notice of Reliance*, Printed Publication 11). Outside of racing, Kerry is a well-known outdoorsman. He has hosted and co-hosted various hunting, fishing, and other outdoor television shows, including *Family Traditions* and *Team RealTree*. (*Id.*, pp. 14-15). René Earnhardt also enjoys a public image as an avid outdoor enthusiast and nature lover. (*Applicant's First Notice of Reliance*, Printed Publication 10; *Kerry Earnhardt Dep.*, p. 14).

Kerry owns a trademark registration in his name, KERRY EARNHARDT. (*Nance Dep.*, *Appl.'s Ex.* 18). The mark has been licensed for use in connection with t-shirts, die-cast cars, and other racing memorabilia, along with hunting apparel and firearms. (*Kerry Earnhardt Dep.*, pp. 24-25; *Nance Dep.*, p. 18; *Appl.'s Ex.* 18).

C. EARNHARDT COLLECTION Reflects Kerry and René's Well-Known Passion for the Outdoors.

KEI licenses the mark EARNHARDT COLLECTION to Schumacher Homes, Inc. ("Schumacher") for use in connection with a line of custom home designs and construction

services, sponsored by Kerry and René. (*René Earnhardt Test. Dep.*, pp. 6-7). Schumacher markets the EARNHARDT COLLECTION home designs to customers who wish to build custom-designed homes. (*Id.*, pp. 26-29; *Becker Dep.*, pp. 9-12). The homes are delivered to customers on a turn-key basis. (*René Earnhardt Test. Dep.*, pp. 26-29). Schumacher launched the EARNHARDT COLLECTION line of homes in October 2011. (*Id.*, pp. 22-25). The home designs have been promoted through press events and personal appearances by Kerry and René, as well as print and electronic media. (*Applicant's First Notice of Reliance*, Printed Publication 10).

The EARNHARDT COLLECTION home designs reflect the uniquely personal tastes of Kerry and René, in particular their shared passion for nature and outdoor living. (*René Earnhardt Test. Dep.*, p. 6-8). Schumacher wanted to create a “family lifestyle brand” and reached out to Kerry and René about a partnership. (*Id.*, p. 6). Kerry and René worked alongside Schumacher’s design team to develop house plans that reflect the couple’s love of nature. (*Id.*, pp. 9-10). Each design seeks to create an outdoor living feel by incorporating various natural elements. (*Id.*, pp. 10-12). There are 24 designs in all (*Id.*, p. 6), each with a personal story featuring family memories and locales holding special family meaning (*Id.*, pp. 11-19). The marketing materials, which Kerry and René developed along with Schumacher, prominently feature Kerry and René and highlight their passion for the outdoors. (*Id.*, pp. 8, 23; *Appl.'s Exs.* 8, 9). The marketing campaign’s aim was to develop a unique brand that consumers would associate with Kerry and René’s personalities, values and tastes. (*Becker Dep.*, pp. 49-50). By all accounts, their efforts to develop this brand have been effective. Consumers are buying the homes at a rate of approximately 90 a year. (*Becker Dep.*, p. 43). And in 2013 the

National Housing Association tapped the Blue Ridge plan as the best architectural home of the year. (*René Earnhardt Dep.*, pp. 18-19).

Plans are underway to develop a similar “outdoor living” line of furniture under the EARNHARDT COLLECTION banner. (*Id.*, pp. 19-20). KEI has partnered with New Buck Corporation, a North Carolina-based manufacturer, for this purpose. (*Id.*, pp. 19). As of October 2014, the project was in the product development stage. (*Id.*).

D. The Declining Commercial Relevance of Dale Earnhardt, Sr.

Opposer seeks to turn back the clock to 2001, the year of Dale Earnhardt, Sr.’s death. Opposer’s emphasis on the past, while misplaced, is understandable. As the record reflects, time has drastically eroded the value and strength of the DALE EARNHARDT trademarks. To be sure, Dale Earnhardt, Sr. is still fondly remembered—indeed, revered—as a NASCAR legend. But his commercial appeal—for trademark purposes, the public perception of his name and likeness as source identifiers—is dwindling fast and nearing extinction, as the record here shows.

His company, DEI, once a powerhouse race team operation that employed the likes of Dale Earnhardt, Jr., Michael Waltrip, Martin Truex, Jr. and Kerry Earnhardt, no longer fields a race team. (*Applicant’s First Notice of Reliance*, Printed Publication 8). Dale Earnhardt, Jr. left DEI for Hendrick Motorsports in 2007. (*Applicant’s First Notice of Reliance*, Printed Publication 9). Kerry Earnhardt retired from racing. DEI partnered with Chip Ganassi Racing (“CGR”) in 2009, but that partnership ended in January 2014 and DEI’s name was dropped from CGR’s logos. (*Applicant’s First Notice of Reliance*, Printed Publication 8). DEI still exists, but hardly resembles the company Dale Earnhardt, Sr. built. Down to 55-60 employees, the company’s operations now include a retail store selling Dale Earnhardt, Sr. memorabilia, a division that makes parts for race teams, a charter airplane business, a hospitality division, and

some farms. (*Queen Disc. Dep.*, p. 9).⁴ Particularly relevant for this proceeding, [REDACTED]

[REDACTED]

[REDACTED]

Sales of Dale Earnhardt, Sr.-licensed merchandise have likewise declined dramatically since his death. Opposer focuses on reports that sales of Dale Earnhardt-licensed merchandise allegedly totaled \$50-million in the year preceding his death and \$60 million the year he died. (*Opposer's Br.*, pp. 17-18). However, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Opposer herself is detached from DEI's operations and its licensing program, coming into the office as infrequently as only once every two or three months, and often failing to respond to licensee's requests to approve merchandise. (*Queen Test. Dep.*, pp. 45-46; *Hallman Dep.*, pp. 12-13).

Opposer's detachment extends to this proceeding. She did not testify in support of her case at trial. Instead, she offered only three witnesses, Ms. Queen and two of her lawyers: Carla Clements, who appears as an attorney of record in the case, and George Taulbee, who is a partner at Alston & Bird, the firm representing Opposer in this proceeding.

DEI's decline, and the declining commercial relevance of the DALE EARNHARDT trademarks, coincides with Opposer's deteriorating relationship with her stepchildren. Dale Earnhardt, Jr. left DEI in 2007, reportedly to escape his stepmother's controlling ways (control

⁴ Relevant portions of Ms. Queen's discovery deposition, taken on June 2, 2014, and the exhibits thereto, are attached to *Applicant's Second and Third Notices of Reliance*.

that, for years, included Opposer's ownership of Dale Earnhardt, Jr.'s trademarked name). (*Applicant's First Notice of Reliance*, Printed Publication 13). She fired Kerry in 2012. (*Queen Disc. Dep.*, p. 99). The same year, she filed this Opposition to prevent Kerry from using the family name, even though Dale Earnhardt, Sr. always had approved of and encouraged Kerry's commercial use of the Earnhardt name. (*Kerry Earnhardt Dep.*, pp. 25-28; *Queen Disc. Dep.*, pp. 97-99; *Miller Dep.*, pp. 17-19). Of his relationship with his stepmother, Kerry testified:

I think today describes that.... Just me and my wife trying to build a brand for our family and everything and then for her to come and oppose it. I don't think if you had a relationship that any family member would do that.

(*Kerry Earnhardt Dep.*, p. 28).

ARGUMENT

I. EARNHARDT COLLECTION—WHICH IS A COMPOSITE MARK—IS NOT PRIMARILY MERELY A SURNAME.

Opposer's claim that the mark EARNHARDT COLLECTION for custom homes and furniture is "primarily merely a surname" under Lanham Act Section 2(e)(4) rests on the very line of flawed reasoning the Federal Circuit rejected in *In re Hutchinson Technology*, 852 F.2d 552 (Fed. Cir. 1988). As the court held in that case, when a mark consists of a surname combined with additional wording that is not generic, it is neither *primarily* nor *merely* a surname, and thus Section 2(e)(4) is inapplicable. *Id.* at 554; *see also* TMEP § 1211(b)(vi) ("If the wording combined with the surname is capable of functioning as a mark (*i.e.*, matter that is arbitrary, suggestive, or merely descriptive of the goods or services), the mark is not considered primarily merely a surname under § 2(e)(4).") (citing *Hutchinson Technology*).

Opposer's argument rests on two equally fatal flaws. First, Opposer ignores *Hutchinson Technology's* admonition that a mark "must be considered in its entirety," 852 F.2d at 554, and

instead focuses on the term “Earnhardt” in isolation. The mark at issue, however, is EARNHARDT COLLECTION—a composite mark that is neither *primarily* nor *merely* a surname. Second, Opposer’s contention that the term “collection” is somehow generic for either custom homes or furniture—and therefore should be ignored—misapprehends hornbook trademark law. The term “collection” does not immediately convey, *or even describe*, furniture or custom homes. Even if Opposer were correct that the term “collection” is often used in connection with furniture or custom homes, in no way does that mean the term is descriptive of them. *Hutchinson Technology* holds that mere frequency of use does not render a word generic or descriptive, *id.*, and Opposer has offered no evidence that the purchasing public would understand “collection” to mean custom homes, *or any particular class of goods at all*.

A. When Properly Considered as a Whole, EARNHARDT COLLECTION is Not Primarily Merely a Surname.

Throughout her brief, Opposer fails to treat the mark EARNHARDT COLLECTION as a whole, but instead proceeds with her arguments as if the mark included only the term “Earnhardt” in isolation. Such a piecemeal analysis is improper.

Section 2(e)(4) only bars the registration of a mark that is “*primarily merely* a surname.” (emphasis added). “In this context, ‘merely’ is synonymous with ‘only’, meaning that the question is whether significance of the mark is ‘primarily only a surname.’” *Lane Capital Mgmt., Inc. v. Lane Capital Mgmt., Inc.*, 192 F.3d 337, 345 (2d Cir. 1999); *In re I. Lewis Cigar Mfg. Co.*, 205 F.2d 204, 206 (C.C.P.A. 1953); *In re P.J. Fitzpatrick, Inc.*, 95 U.S.P.Q.2d 1412 (T.T.A.B. 2010).

When a surname is combined with additional terms or material, the primary significance of the mark must be considered as a whole, not as individual parts. *See Hutchinson Technology*, 852 F.2d at 554 (when assessing whether the public will view a mark primarily as a surname, the

“mark sought to be registered must be considered in its entirety”); *Lane Capital Mgmt., Inc.*, 192 F.3d at 345-346 (“[W]hen the mark at issue is a composite mark consisting of personal names and additional words, the question becomes what the purchasing public would think when confronted with the mark as a whole.”).

Thus, the inclusion of an additional term, unless that term is generic, negates a claim that the mark is primarily merely a surname. See *Hutchinson Technology*, 852 F.2d at 554 (reversing T.T.A.B. decision that the term HUTCHINSON TECHNOLOGY was primarily merely a surname based on the inclusion of the term “Technology”); *In re P.J. Fitzpatrick, Inc.*, 95 U.S.P.Q.2d 1412 (T.T.A.B. 2010) (not precedent) (holding composite mark P.J. FITZPATRICK, INC. not primarily merely a surname); *In re Allied Mills, Inc.*, 150 U.S.P.Q. 757, 757 (T.T.A.B. 1966) (composite mark WAYNE FRYERS not primarily merely a surname); see also *California Cooler, Inc. v. Loretto Winery Inc.*, 774 F.2d 1451, 1455 (9th Cir. 1985) (“[A] composite may become a distinguishing mark even though its components individually cannot.”).

In failing to treat the mark EARNHARDT COLLECTION as a whole, Opposer ignores these well-established principles. Here again, *Hutchinson Technology* shows the way. In that case, the T.T.A.B. denied registration to the mark HUTCHINSON TECHNOLOGY for computers, on the grounds that it was primarily merely a surname. Like Opposer in this case, the T.T.A.B. reasoned that the additional term “Technology” was frequently used in connection with computers, and thus concluded that inclusion of the term did not remove the primary surname significance of the mark. The Federal Circuit reversed, holding:

Here, the board failed to establish a prima facie case that HUTCHINSON TECHNOLOGY is primarily merely a surname. . . . [C]ontrary to the board’s consideration of the HUTCHINSON mark, a mark sought to be registered should be considered in its entirety. The board considered the mark as two separate parts, “Hutchinson” and “technology.” . . . However, the fatal flaw in the board’s

analysis is that the mark sought to be registered is not HUTCHINSON or TECHNOLOGY, but HUTCHINSON TECHNOLOGY.

852 F.2d at 555. The Court concluded that the term “Technology” was neither generic nor merely descriptive for computers, and therefore was improperly disregarded in the Board’s analysis. *Id.* at 554-55. The holding in *Hutchinson Technology* controls this case.

B. “Collection” Is Not a Generic Term for Either Custom Homes or Furniture.

After analyzing the term “Earnhardt” in isolation—and without any consideration of the mark EARNHARDT COLLECTION as a whole—Opposer attempts to rescue her flawed analysis by arguing that the term “Collection” is generic for furniture, custom homes, or both, and therefore should be disregarded. To support that claim—though it runs contrary to any accepted definition—Opposer argues that the term “Collection” is “often used to identify a group of homes or home furnishings,” which she equates with being “generic.” (*Opp. Trial Br.*, p. 14).

Once again, Opposer’s argument cannot escape the precedential force of *Hutchinson Technology*. There, the Federal Circuit reversed the T.T.A.B.’s conclusion that the term “Technology” was commonly used in connection with computers and thus was “merely descriptive” of the goods offered under the mark. 852 F.2d at 554-55. The Court observed that mere frequency of use is insufficient to show that a term is generic or merely descriptive, holding:

The key to the board’s decision is its reliance on Hutchinson’s concession that “technology” is used on many goods similar to those listed in Hutchinson’s application. ***However, the fact that the term “technology” is used in connection with computer products does not mean that the term is descriptive of them. Many other goods possibly may be included within the broad term “technology,” but that does not make the term descriptive of all of those goods***

. . . [W]e hold that the board clearly erred by finding that the term “technology” is merely descriptive of Hutchinson’s goods. “A mark is ‘merely descriptive’ [of a product] if it ‘would immediately convey to one seeing or hearing it the thought

of appellant's [product].” As Hutchinson points out, “technology” is a very broad term which includes many categories of goods. The term “technology” does not convey an immediate idea of the “ingredients, qualities, or characteristics of the goods” listed in Hutchinson’s application. Therefore, the term “technology” is not “merely descriptive” of Hutchinson’s goods, and we conclude that the board’s finding that the term “technology,” standing alone, is merely descriptive of Hutchinson’s goods is clearly erroneous.

Id. (emphasis added; citations omitted).

As revealed by Opposer’s assertion that the term “Collection” is commonly used for *both* furniture *and* custom homes (two distinctly different products), the term is not generic for either. Instead, like the term “Technology,” the term “Collection” is a “broad term” that encompasses many types of goods. It does not describe any particular characteristic of the goods or services offered under the EARNHARDT COLLECTION mark.⁵

In order for a term to be generic, it must be “generally a common description of goods’ or services or refer[] ‘to the genus of which the particular product is a species.’” *Lane Capital Mgmt., Inc. v. Lane Capital Mgmt., Inc.*, 15 F. Supp.2d 389, 394 (S.D.N.Y. 1998). In *Hutchinson Technology*, the Court explained that a mark is “merely descriptive,” if it “immediately conveys to one seeing or hearing it the thought [of the product].” 852 F.2d at 555 (quoting *In re Bed & Breakfast Registry*, 791 F.2d 157, 159 (Fed. Cir. 1986)).

The term “Collection” is not a generic designation for, much less merely descriptive of, either furniture or the construction of custom homes. The dictionaries define “collection” as follows:

⁵ For this reason, the PTO routinely registers marks that combine surnames and the word “Collection.” (See *Nance Dep.*, *Appl.’s Exs.* 11-15). These include THE JONES COLLECTION for custom furniture (*Appl.’s Ex.* 11); THE HAMILTON COLLECTION for figurines and commemorative plates (*Appl.’s Ex.* 12); STEWART COLLECTION for motion picture and videotape production (*Appl.’s Ex.* 13); THE PHILLIPS COLLECTION for museum services (*Appl.’s Ex.* 14); and WALLACE COLLECTION for musical instruments (*Appl.’s Ex.* 15). Indeed, a search of the TESS database for the word “collection” produces over 13,000 responses, more than 3,700 of which currently are live, valid registrations. (*Nance Dep.*, p. 7-8, *Appl.’s Ex.* 10).

[T]he body formed by gathering; an assemblage, or assembly; as, a *collection* of books or paintings; a *collection* of strangers”

WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY, UNABRIDGED 355 (Jean L. McKechnie, et al., eds., 2d Ed. 1983).

: the act or process of getting things from different places and bringing them together;

: a group of interesting or beautiful objects brought together to study them or as a hobby

Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/collection> (last visited Oct. 27, 2014) (Appl.’s Ex. 19).

2. A group of objects or works to be seen, studied, or kept together.

3. An accumulation; a deposit; *a collection of dust on the piano*.

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 327 (3d Ed. 1996).

Indeed, the word “Collection” has various meanings and uses. To name just a few, it can refer to a data collection, taking up a collection for a charitable cause, a curated collection of art, antiques or other valuables, or collections of objects generally. As shown by Google search engine results, the term “Collection” is used extensively in connection with numerous, disparate categories of goods, including stamps, apparel, shoes, baseball cards, and jewelry. (*See Nance Dep.*, pp. 21-25; *Appl.’s Ex. 20*). What is key, however, is that the term “Collection” does not refer to, or immediately convey, any particular type of good or services. *See In Re Cuban Cigar Brands, N.V.*, Opp. No. 78554967, 2007 WL 3095397, at *2 (T.T.A.B. Oct. 19, 2007) (not precedent) (holding that CLASSIC COLLECTION for cigars is suggestive, not merely descriptive, because “there is a certain amorphous quality about the words, and no specific information about any quality or characteristic of the goods is conveyed with a degree of

particularity”).⁶ Likewise, the term “Collection” does not describe any particular characteristic of furniture or custom homes. If a member of the public were offered “a collection,” her most likely reaction would be to ask, “A collection of what?”

Opposer implicitly concedes this point in her brief. Rather than arguing that the term “Collection” directly refers to a piece of furniture, the construction of a custom home, or any of the “ingredients, qualities, or characteristics” of them, Opposer contends that “‘collection’ is an appropriate generic term used often to identify a *group of homes or home furnishings*.” (*Opp. Trial Br.*, p. 14 (emphasis added)). In other words, Opposer does not argue that the term “Collection” directly refers to KEI’s goods and services. Instead, she argues that “Collection” can be used to refer to the grouping (or “collection”) of those goods and services. That argument gets her nowhere. KEI and Schumacher do not sell “groupings” of custom homes; they sell the construction of individual custom houses. The same is true with individual pieces of furniture—the term “Collection” does not immediately convey any particular characteristic of the product itself.

The problem with Opposer’s reasoning is that it knows no boundaries. Under Opposer’s view, the word “collection” is apparently generic for *any* line of products or services, so long as the word is commonly used in connection with them. *Hutchinson Technology*, however, expressly rejects such circular reasoning. *See* 852 F.2d at 554 (mere fact that a term is

⁶ Opposer does not include any reference to *Sea Island Co. v. Koehler Corp.*, Opp. No. 91120712, 2005 WL 847431 (T.T.A.B. 2005) (not precedent), a case she cited in support of her failed motion for summary judgment—and for good reason. Rather than hold that “Collection” is generic for furniture, as Opposer contended, that case merely held that the term “Collection” was not the dominant portion of the mark SEA ISLAND COLLECTION for furniture under a likelihood of confusion analysis, because it was either descriptive or possibly generic. *Id.* at *14. The decision, which is not precedent, did not include any analysis or authority for that observation, and certainly did not hold that “Collection” is generic for furniture.

“commonly used” in connection with goods and services “does not mean the term is descriptive of them.”).

For this reason, the various e-mails and deposition excerpts Opposer cites to purportedly show that “Collection” is used “generically” prove nothing. (*See Opp. Trial Br.*, pp. 14-15). To prove the term is generic for trademark purposes, Opposer must “provide . . . evidence with respect to *consumer perceptions*.” *Official Airline Guides, Inc. v. Goss*, 856 F.2d 85, 87 (9th Cir. 1988) (emphasis added). Opposer offers no evidence that consumers perceive “Collection” as a designation that directly and specifically refers to furniture or custom homes. The e-mails and excerpts she cites (none of which reflect consumer perceptions) merely show that the term is “commonly used” to refer to *groupings* of custom home designs (but not necessarily their construction) and furniture. But used in this way, “Collection” is no more a generic designation for furniture or custom homes than “portfolio,” “assemblage,” “batch,” “assortment,” “combination,” or “group.” None of these terms—no matter how frequently used—immediately convey the identity of their constituent parts. As such, COLLECTION is readily distinguishable from LAW GROUP, PHARMACEUTICALS, and PETITE SUITES – the terms at issue in the cases upon which Opposer relies. (*See Opp. Trial Br.*, p. 13).

The term “Collection” here is no different than the term “Technology” in *Hutchinson Technology*. It is “a broad term” that may include many goods other than those to be offered under the applied-for mark. Accordingly, it is neither generic nor merely descriptive.

C. KEI’s Disclaimer of Rights to the Term “Collection,” Apart from Use In the Mark as a Whole, Does Not Change the Analysis.

Opposer also suggests that the term “Collection” should be disregarded because KEI disclaimed any right to “Collection” alone (other than as used in the mark). This argument is a red herring. In *Hutchinson Technology*, the Court concluded the case by remanding with

instructions that the applicant disclaim rights to “Technology.” 852 F.2d 356-57. That is, the Court considered the mark as a whole, found it worthy of registration, and required a disclaimer. The same result is dictated by the Trademark Manual of Examining Procedure. *See* TMEP § 1211.01(b)(vii) (providing that registration of a composite mark that combines a surname with a merely descriptive term, should require a disclaimer, but is otherwise proper for registration). Consistent with this guidance, the PTO routinely permits registration of marks that combine a surname with “Collection” where the applicant disclaims “Collection.” (*See Nance Dep.*, pp. 10-15). In sum, KEI’s applications here dutifully followed not only well-established law, but also well-established PTO guidance and practice.

Application of the *Hutchinson Technology* principles should result in the conclusion that EARNHARDT COLLECTION is worthy of registration. As discussed more fully *supra* at pp. 7-8, EARNHARDT COLLECTION home designs reflect Kerry and René’s unique personal tastes, especially their shared passion for nature and outdoor living. They have worked with Schumacher to create a “family lifestyle brand” and to develop house plans that reflect the couple’s love of nature. Each of the 24 designs seeks to create an outdoor living feel by incorporating various natural elements, and each tells a personal story featuring family memories and locales holding special family meaning. The marketing materials prominently feature Kerry and René and highlight their passion for the outdoors. Sales of EARNHARDT COLLECTION homes suggest that Kerry and René have been successful in developing a distinctive brand. This evidence essentially has been uncontested. Opposer’s surname claim should be rejected.

II. THERE IS NO LIKELIHOOD OF CONFUSION BETWEEN KEI'S MARK AND THOSE OWNED BY OPPOSER.

A. Opposer Only Has Established Priority in the DALE EARNHARDT Marks.

Before addressing Opposer's likelihood of confusion claim under section 2(d), the Board must first determine whether Opposer owns and has priority in her alleged marks, and if so, the scope of those rights. Opposer claims priority based on four U.S. Trademark Registrations—each of which incorporate the full name, DALE EARNHARDT—for, *inter alia*, key rings, posters, decals, pocket knives, toys, clothing, cups, glasses, afghans, flags, charitable fundraising, and entertainment services (collectively, the “DALE EARNHARDT marks”). (*Opp. Trial Br.*, pp. 5-6). The earliest of these, Registration No. 1,644,237 for the word mark DALE EARNHARDT, was issued May 14, 1991. KEI does not contest Opposer's priority in the DALE EARNHARDT marks with respect to the goods covered by these registrations.

Opposer's rights in the DALE EARNHARDT marks, however, do not extend to the name “Earnhardt” by itself, a term which numerous members of the family appropriately have incorporated into marks used in connection with the very same goods and services covered by Opposer's registrations. Likewise, Opposer's rights do not extend to furniture or the construction of custom homes, categories for which Opposer cannot establish any meaningful use or licensing.

1. Opposer's Rights Do Not Extend to the Name “Earnhardt” Alone.

Tellingly, Opposer does not address her claim to priority in the name “Earnhardt” in her brief. (*Opp. Trial Br.*, p. 9). Instead, she merely assumes she has exclusive rights to the name, and begins listing it among her trademarks later in her arguments. (*Opp. Trial Br.*, pp. 20-21). Opposer's bald assertion that she owns the name “Earnhardt,” however, cannot withstand serious scrutiny. As the record reveals, Opposer only has used the name by itself (that, is without

“Dale”) sporadically, if ever, and she has never engaged in such use on a substantially exclusive basis.

Opposer does not hold a registration for “Earnhardt” as a standalone mark. (*Taulbee Dep.*, p. 30). Thus, in order for that term to serve as a basis for her likelihood of confusion claim, Opposer must show she acquired common law rights in the name prior to KEI’s application. *See Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 1321, 209 U.S.P.Q. 40, 44-45 (C.C.P.A. 1981) (“If an opposer’s alleged means of trade designation is not distinctive—does not identify source—then there is no basis upon which to compare such a thing with the applicant’s mark to determine whether confusion as to source is likely.”); *see also Bd. of Trustees of Univ. of Alabama v. Pitts*, 107 U.S.P.Q.2d 200, 212-14 (T.T.A.B., 2013) (holding opposer’s failure to show common law rights in hounds tooth pattern precluded assertion of a likelihood of confusion claim); 15 U.S.C. § 1052(d). That is, she must show the name “Earnhardt” has become “distinctive of [her] goods” as a result of use that is continuous and substantially exclusive. *See Towers v. Advent Software, Inc.*, 913 F.2d 942, 16 U.S.P.Q.2d 1039, 1041-42 (Fed. Cir. 1990) (citing *Otto Roth*, 209 U.S.P.Q. at 44-45).

a. Opposer Has Not Used “Earnhardt” as a Standalone Mark.

The record reveals that Opposer has used the name “Earnhardt” by itself—and in a *trademark sense*—only rarely, if at all. Indeed, the only evidence of such use is Ms. Queen’s oral testimony that the name “Earnhardt” has appeared by itself on hats, t-shirts, mugs, and lounge pants. (*Queen Test. Dep.*, pp. 19, 26-27). Though Opposer introduced three exhibits, showing a jacket, t-shirt, and hat incorporating the name “Earnhardt,” she did not provide any evidence that those items were ever actually offered for sale. (*Hallman Dep.*, pp. 31-34; *Opp.’s Exs.* 26-28). Moreover, Opposer has not offered any evidence showing sales of such “Earnhardt-

only” merchandise, much less when those sales supposedly occurred. Accordingly, her evidence is insufficient to establish priority. *Syngenta Crop Prot., Inc. v. Bio-Chek, LLC*, 90 U.S.P.Q.2d 1112, 1118-20 (T.T.A.B. 2009) (holding opposer failed to establish priority in alleged common law mark, when witnesses’ testimony did not reveal when a supposed use took place); *Life Zone Inc. v. Middleman Group, Inc.*, 87 U.S.P.Q.2d 1953, 1960 (T.T.A.B. 2008) (“Without testimony or other evidence on [when an alleged use commenced], we cannot presume that opposer’s use predates the filing date of the subject application, or indeed whether it even predates the filing of this opposition proceeding.”).

Further, Opposer’s claim that she has used “Earnhardt” as a standalone mark is contradicted by Amy Hallman, DEI’s longtime former licensing director. Ms. Hallman testified that using “Earnhardt” by itself has never been part of DEI’s licensing strategy, and that if the name “Earnhardt” ever were used without “Dale,” the product also would include some other indicia tying it to Dale Earnhardt, Sr.—such as the stylized “3” from his race car, or the full DALE EARNHARDT mark elsewhere on the item. (*Hallman Dep.*, pp. 10, 31-32, 42-43). She also testified that Dale Earnhardt-licensed merchandise always includes a “hang tag” bearing the full DALE EARNHARDT trademark. (*Hallman Dep.*, pp. 31-32).

Ms. Hallman further explained that Opposer requires licensees to add “Dale” when they submit merchandise for approval and does not permit licensees to use the name “Earnhardt” by itself—a point Ms. Queen confirmed during cross examination. (*Hallman Dep.*, p. 10; *Queen Test. Dep.*, pp. 28-29; *Queen, Disc. Dep.*, pp. 18-19). In fact, DEI’s license agreements generally prohibit licensees from altering or varying the DALE EARNHARDT marks listed in the

agreements, which do not include the name “Earnhardt” by itself. (*Taulbee Dep.*, pp. 38, 40-42; *Appl. ’s Ex. 3*).⁷

Opposer cannot dodge this testimony. Ms. Hallman began working in DEI’s licensing department in 1997 and served as its licensing director from 2009 until her resignation in 2013. (*Hallman Dep.*, pp. 5-6). Indeed, Ms. Queen and Mr. Taulbee both admitted that Ms. Hallman is the most knowledgeable person regarding DEI’s licensing program for the three years leading up to the filing of this opposition. (*Queen Test. Dep.*, p. 25; *Queen, Disc. Dep.*, pp. 87-88; *Taulbee Dep.*, pp. 54-55). Opposer offered no reason to question Ms. Hallman’s objective, authoritative testimony. The same cannot be said for Opposer’s witnesses, who are inherently biased. Ms. Queen is a current DEI employee and Opposer’s only direct report. (*Queen Test. Dep.*, pp. 5-6). Mr. Taulbee is a partner at Alston & Bird, the law firm representing Opposer in this lawsuit. (*Taulbee Dep.*, p. 72). He acknowledged that he was recording time for his testimony and did not know at the time of deposition whether his time would be included in the firm’s bill. (*Taulbee Dep.*, pp. 72-77). Mr. Taulbee also refused to say whether he would be willing to give truthful testimony adverse to Opposer, a firm client. (*Id.*).

At most, Opposer’s evidence proves she has used the name “Earnhardt” by itself on only an isolated, infrequent basis (and even then, only on apparel). Such limited use is insufficient to establish exclusive common law rights. *See Bd. of Trustees of the Univ. of Alabama*, 107 U.S.P.Q.2d at 2016-18 (holding university had not acquired distinctiveness in “hounds tooth” pattern where it had only used the pattern “sporadically”); *Giersch v. Scripps Network, Inc.*, 90 U.S.P.Q.2d 1020, 1023-24 (T.T.A.B. 2009) (opposer failed to establish common law rights in

⁷ During his deposition, Mr. Taulbee offered conclusory testimony that DEI “periodically” has licensed the use of EARNHARDT by itself. (*Taulbee, Dep.* pp. 42-44). However, when pressed, he could not identify a single license agreement that so provided, and testified only that he remembered putting such a provision in a license agreement “in the past couple months.” (*Id.*, p. 44).

mark where there was no evidence that such use was “regular and recurring”). Moreover, because the handful of “Earnhardt-only” goods Opposer identified also included other indicia tying them to Dale Earnhardt, Sr.—such as the full DALE EARNHARDT mark on hang tags or the stylized “3”—they are insufficient to support a claim for acquired distinctiveness in the name “Earnhardt” by itself. *Bd. of Trustees of the Univ. of Alabama*, 107 U.S.P.Q.2d at 2016-18 (holding inclusion of other university marks on goods incorporating “hounds tooth” pattern precluded claim to acquired distinctiveness in the pattern itself); *In re Soccer Sport Supply Co.*, 507 F.2d 1400, 184 U.S.P.Q. 345, 348 (C.C.P.A. 1975) (where proffered evidence of acquired distinctiveness consists of simultaneous use of marks other than alleged mark at issue, it may fail to show that the mark at issue has acquired distinctiveness).

b. *Opposer Has Never Used “Earnhardt” on a Substantially Exclusive Basis.*

Opposer’s claim to exclusive rights in the name “Earnhardt” also fails on a more fundamental level: Opposer’s use of the name has never been exclusive. Numerous members of the Earnhardt family have achieved independent fame and recognition in the field of auto racing, licensing their names—all of which include “Earnhardt”— for use in connection with the very same goods and services as Opposer.

Dale Earnhardt, Jr. is among the nation’s most recognized and highly paid athletes. (*See supra*, pp. 4-6). He also is among the most influential people in auto racing and is without question NASCAR’s most popular driver. *Id.* Among other things, Dale Earnhardt, Jr. does substantial business licensing his name for use on virtually the same goods and services as those covered by Opposer’s marks—apparel, t-shirts, die-cast cars, hats, marketing services, stickers, and decals. (*Miller Dep.*, pp. 11-13).

Kerry Earnhardt had his own successful NASCAR career and raced for a variety of well-known sponsors. (*See supra*, pp. 4-6). During this time, he also licensed his name for use on die-cast cars, t-shirts, firearms, and hunting apparel. (*Id.*). In addition, Kerry has made numerous appearances on outdoor-themed hunting and fishing shows. (*Id.*).

The list goes on. Kelley Earnhardt Miller is the General Manager of JR Motorsports, which manages Dale Earnhardt, Jr.'s licensing program. She raced in NASCAR's Late Model Stock Car Division from 1994-96 and was recognized by the press in 2007 as one NASCAR's most powerful figures. (*Id.*). Kerry's son, Jeffery Earnhardt, currently races in the NASCAR Xfinity Series. (*Id.*).

Members of the Earnhardt family also have secured trademark registrations for their names, covering the very same goods and services as those held by Opposer. KEI holds a registration for KERRY EARNHARDT covering lapel pins, brochures, posters, prints, decals, t-shirts, jackets, hats, and entertainment services. (*See Appl's Ex. 18*). Dale Earnhardt, Jr., through his company DEJ Holdings, owns three registrations for the word mark DALE EARNHARDT, JR. in connection with key rings, posters, decals, toys, drinking glasses, and entertainment services (U.S. Trademark Registration No. 2,674,722); hats, jackets, jerseys and t-shirts (U.S. Trademark Registration No. 3,775,648); and pocket knives (U.S. Trademark Registration No. 3,775,649) (*See Appl.'s Ex. 16*).

As a result, there is no evidence that the public has come to identify the name "Earnhardt" as a designation for Opposer's goods. To the contrary, the evidence shows the public perceives "Earnhardt" as referring to a family of race car drivers—not any one member. For instance, fans at races have yelled "EARNHARDT!" in support of Kerry, Kelley, and Dale Earnhardt, Jr. (*Miller Dep.*, pp. 8-9, 22-23; *Kerry Earnhardt Dep.*, p. 17; *Applicant's First*

Notice of Reliance, Printed Publication 7). Media reports have referred to Dale Earnhardt, Jr. simply as “Earnhardt.” (*Applicant’s First Notice of Reliance*, Printed Publication 7). Such prevalent and longstanding use of the name by numerous members of the Earnhardt family defeats Opposer’s claim that she has—or ever had—exclusive rights to the name “Earnhardt.” See *Bd. of Trustees of Univ. of Alabama*, 107 U.S.P.Q.2d at 2017-18 (citing *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 U.S.P.Q. 939 (Fed. Cir. 1984) (“When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, . . . distinctiveness on which purchasers may rely is lacking.”)).

2. *Opposer Has Failed to Establish Common Law Rights in the DALE EARNHARDT Marks for Furniture or Custom Homes.*

Opposer’s rights in the DALE EARNHARDT marks do not extend to the goods for which KEI seeks to register EARNHARDT COLLECTION—furniture and the construction of custom homes. Neither category is covered by Opposer’s registrations, nor has she established common law rights in connection with either of them.

Opposer admits in her brief she has not used the DALE EARNHARDT marks for the construction of custom homes. (*Opp. Trial Br.*, p. 23). She claims to have used the name “Earnhardt” in connection with “real estate” (*Opp. Trial Br.*, p. 23), but the testimony she cites exposes her overreach. Significantly, Opposer offers no proof that she has ever used the name as a *trademark* in connection with real estate. Ms. Queen merely testified that the DEI “umbrella” includes an entity, Earnhardt Rental Properties, LLC, which manages and leases certain of Opposer’s properties. (*Queen Test. Dep.*, pp. 23). Opposer offers no evidence whatsoever that the name “Earnhardt Rental Properties, LLC”—which is merely the name of a legal entity—has ever been used as a trademark or trade name.

Opposer goes so far as to offer her attorney's testimony that his firm once rented DEI's "trophy room" for a corporate event, and that DEI rents its facilities for such events under the designation DALE EARNHARDT THE VENUES. (*Taulbee Dep.*, pp. 20-21). Putting aside that corporate event rentals in no way constitute business in "real estate," Opposer offers no proof whatsoever that the public perceives any connection between this supposed "real estate" activity and the construction of custom homes. Moreover, Mr. Taulbee conceded that he did not know when the marketing materials for DEI's corporate event rentals were prepared, or when DEI supposedly started using "The Venues" designation. (*Taulbee Dep.*, pp. 27-29). Indeed, Ms. Queen testified during discovery that she does not believe the public knows that DEI rents its facilities, because the service has not been marketed outside of a few limited emails to local event planners. (*Queen Disc. Dep.*, pp. 61-63). In any event, Opposer has adduced no testimony to show when any such use began, and accordingly the testimony is insufficient to establish priority. *Syngenta Crop Prot., Inc.*, 90 U.S.P.Q.2d at 1118-20; *Life Zone Inc.* 87 U.S.P.Q.2d at 1960.

Opposer also claims that she has licensed the DALE EARNHARDT marks for use in connection with "home furnishings," but the testimony again reveals a different story. (*Opp. Trial Br.*, p. 22). On cross examination, Ms. Queen confirmed her earlier admission that DEI does not license the DALE EARNHARDT marks to a furniture manufacturer. (*Queen Test. Dep.*, pp. 30-31, 41-42; *Queen Disc. Dep.*, p. 72-74). [REDACTED]

[REDACTED] (*Appl.'s Exs.* 4-6). While Ms. Queen testified that DEI "in the past" had licensed the DALE EARNHARDT marks for children's beds and "blowup" furniture, she conceded that those products are no longer sold. (*Queen Test. Dep.*, pp. 30-31, 41-

42; *Queen Disc. Dep.*, p. 72-74). Opposer likewise offered no evidence that DEI ever licensed its marks to a furniture manufacturer on a regular or recurring basis.

Without any evidence that Opposer used the DALE EARNHARDT marks in connection with furniture beyond—at most—an isolated or sporadic basis, Opposer cannot establish common law rights in her marks for those goods. *Giersch*, 90 U.S.P.Q.2d at 1023 (holding there must be “regular or recurring activity” sufficient to constitute source identification in the eyes of consumers); 15 U.S.C. § 1052(d) (permitting an opposer to assert a likelihood of confusion claim based on an unregistered mark but only when “previously used in the United States by . . . *and not abandoned.*” (emphasis added)).

* * *

In sum, Opposer’s rights and priority in the DALE EARNHARDT marks do not extend to the name “Earnhardt” by itself, nor do they extend to furniture or the construction of custom homes. As such, Opposer’s rights in the DALE EARNHARDT marks with respect to the specific goods and services covered by her registrations serve as the only basis of comparison for her likelihood of confusion claim.

B. The *du Pont* Factors Strongly Favor KEI.

Opposer cannot establish a likelihood of confusion under the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973). As set forth below, the relevant *du Pont* factors weigh decidedly in KEI’s favor.

The goods and services covered by KEI’s applications—furniture and the construction of custom homes—compared to those offered under Opposer’s marks—key rings, t-shirts, hats, die-cast cars, posters, decals and other items of racing memorabilia—are vastly different. They are offered to different customers, in different channels of trade, at dramatically different prices.

These differences, coupled with widespread use of the name “Earnhardt” by numerous members of the family, doom Opposer’s likelihood of confusion claim. Having grown accustomed to various, independent members of the family using the name, consumers would not perceive a commercial connection between Opposer’s racing memorabilia and the custom homes and furniture offered under the EARNHARDT COLLECTION mark.

In order to establish likelihood of confusion, Opposer must show that “applicant’s goods and opposer’s goods are sufficiently related and . . . the circumstances surrounding the marketing of the goods are such that purchasers encountering them would, in view of the similarity of the marks, mistakenly believe that the goods emanate from the same source.” *Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kasha*, 77 U.S.P.Q.2d 1917, 1930 (T.T.A.B. 2006) (citations omitted). Further, “***Even if the marks are identical, if these conditions do not exist, confusion is not likely to occur.***” *Id.* (emphasis added) (citing *Nautilus Group Inc. v. ICON Health and Fitness Inc.*, 71 U.S.P.Q.2d 1173, 1185 (Fed. Cir. 2004)).

Rather than establish her claim under this rubric—which she cannot do—Opposer asks the Board to find a likelihood of confusion based on fame alone, arguing that the DALE EARNHARDT marks “enjoy such fame or reputation” that a commercial connection between Dale Earnhardt and the custom homes licensed by KEI “would be presumed.” (*Opp. Trial Br.*, p. 16). However, the purported fame of Opposer’s marks (which is denied for the reasons discussed below), standing alone, cannot support a likelihood of confusion under Section 2(d). *See Univ. of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co.*, 703 F.2d 1372, 1374, 217 USPQ 505, 509 (Fed. Cir. 1983). As the federal circuit has observed:

“Likely . . . to cause confusion” means more than the likelihood that the public will recall a famous mark on seeing the same mark used by another. It must also be established that there is a reasonable basis for the public to attribute the particular product or

service of another to the source of the goods or services associated with the famous mark. To hold otherwise would result in recognizing a right in gross, which is contrary to principles of trademark law and to the concepts embodied in 15 U.S.C. § 1052(d).

Id.

1. *The Goods and Services at Issue Are Dissimilar.*

There is a stark dissimilarity between furniture and the construction of custom homes and Dale Earnhardt-licensed racing memorabilia. By itself, this difference is enough to defeat Opposer's likelihood of confusion claim.

Where the goods and services in question are not sufficiently related to create an assumption by consumers that the goods and services originate from the same source, there is no likelihood of confusion. *See Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 U.S.P.Q.2d 1350, 1355-56 (Fed. Cir. 2004). Thus, courts and this Board repeatedly have rejected likelihood of confusion claims, even when the marks at issue are identical, when the goods and services at issue are unrelated. *See id.* (holding no likelihood of confusion between applicant's use of RITZ for cooking classes and opposer's use for kitchen textiles); *In Re the W.W. Henry Co., L.P.*, 82 U.S.P.Q.2d 1213 (T.T.A.B. 2007) (holding no likelihood of confusion between PATCH 'N GO for chemical repair filler sold to plastic manufactures and applicant's PATCH & GO for cement drywall patch sold to contractors and do-it-yourselfers in hardware stores, because the products "would be offered to different classes of purchasers through different channels of trade."); *Standard Knitting, Ltd.*, 77 U.S.P.Q.2d at 1930-327 (holding no likelihood of confusion between use of "TUNDRA" on apparel and on automobiles because "opposer's clothing and applicant's automobiles are vastly different goods" and "there is no persuasive evidence that such purchasers would expect these vastly different goods to emanate from the same source").

Opposer offers no evidence to show consumers are likely to believe goods and services as diverse as the construction of custom homes and furniture, on the one hand, and racing memorabilia, on the other, emanate from the same source. Nor does she offer any evidence that such goods and services are commonly marketed together.

To the contrary, the record evidence establishes that consumers *do not* perceive Opposer's and Applicant's goods and services as related. During her testimony, Kelley Earnhardt Miller explained that she did not perceive any likelihood of confusion between EARNHARDT COLLECTION and the DALE EARNHARDT, JR. marks, which are managed by JR Motorsports and used in connection with the same goods and services as Opposer's marks, because furniture and the construction of custom homes are "not a business we are in." (*Miller Dep.*, pp. 11-12, 14-15).

Faced with the stark dissimilarity between her goods and those covered by KEI's applications, Opposer attempts to recast certain DALE EARNHARDT licensed merchandise as "home furnishings and home décor goods." (*Opp. Trial Br.*, pp. 22-23). Yet, the examples she lists—"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"—reveal just how far she reaches in making that claim. (*Id.*) The listed items are merely iterations of racing memorabilia. Further, though she includes "furniture" among her list of supposed Dale Earnhardt merchandise, she ignores (i) Ms. Queen's admission that DEI does not license the DALE EARNHARDT marks to a furniture manufacturer, (*Queen Test. Dep.*, pp. 30-31, 41-42; *Queen, Disc. Dep.* pp. 72-74), and (ii) [REDACTED]

[REDACTED] (*Appl.'s Exs.* 4-5).

Opposer similarly attempts to conjure up a relationship between her licensing efforts and the construction of custom homes, again to no avail. Although forced to admit that she does not license the DALE EARNHARDT marks for use with custom homes, Opposer claims that she has used the name “Earnhardt” in connection with “real estate.” (*Opp. Trial Br.*, pp. 23). As discussed above, however, the testimony she cites proves only that she has used the legal entity Earnhardt Rental Properties, LLC, to manage leasing of her property. (*See* Section II.A.2., *supra*). In no way does this prove she has ever used the name EARNHARDT as a trademark or tradename in connection with “real estate,” much less that consumers will connect those efforts to custom home construction.

Opposer cannot overcome the vast dissimilarities between the racing memorabilia for which she licenses the DALE EARNHARDT marks and the goods covered by KEI’s applications. Opposer offered simply no evidence that the public will view the goods as related.

This factor dispositively favors KEI.

2. *The Trade Channels at Issue Are Dissimilar.*

DALE EARNHARDT licensed merchandise is marketed through vastly different trade channels than furniture and custom home construction. Opposer markets DALE EARNHARDT goods—which consist almost exclusively of racing memorabilia—through retail stores, online stores, and track-side vendors at NASCAR events. (*Queen Test. Dep.*, p. 10; *Miller Dep.*, pp. 11-12). The relevant consumers are “core race fans” and “NASCAR enthusiasts.” (*Hallman Dep.*, pp. 15-16; *Miller Dep.*, pp. 12-13).

In contrast, the target customers of EARNHARDT COLLECTION custom homes are existing property owners who want to build a custom home on their land. (*René Earnhardt Dep.*, pp. 27-29). Thus, while Opposer is correct that the T.T.A.B. should presume EARNHARDT COLLECTION homes will move “in all channels of trade *normal for the identified goods and*

services,” (Opp. Trial Br., p. 23) (emphasis added)), custom homes are not sold through retail outlets or trackside vendors. While Schumacher uses the EARNHARDT COLLECTION brand to target outdoor enthusiasts and an otherwise broad cross-section of customers (*Becker Dep.*, p. 24), the fact remains that its customers are still home buyers—not retail shoppers.

Schumacher primarily sells its custom homes through brick-and-mortar design centers that result in meetings between customers and one-on-one sales representatives. (*René Earnhardt Dep.*, pp. 21, 27-29). Purchasing and building an EARNHARDT COLLECTION custom home through Schumacher requires multiple visits and meetings with a one-on-one sales representative. (*René Earnhardt Dep.*, pp. 27-29). Opposer does not market her retail merchandise in this manner, instead relying largely on impulse buying. (*Queen Disc. Dep.*, pp. 70).

Nor is there any evidence that Opposer’s merchandise moves in the same channels of trade as traditional furniture. To the contrary, Opposer does not license the DALE EARNHARDT marks for use in connection with traditional furniture and has never been presented with an opportunity to do so. (*Hallman Dep.*, 9-10).

The stark dissimilarities in the trade channels also weighs heavily, if not dispositively, in KEI’s favor.

3. *The Purchasing Conditions for Custom Home Purchasers and Racing Souvenir Buyers Are Entirely Different.*

Buying items of racing memorabilia and buying custom homes are fundamentally different activities that occur under drastically different conditions. As Opposer readily admits in her brief: “Purchasers of Opposer’s licensed merchandise are likely to be *impulse buyers* of Dale Earnhardt apparel and memorabilia.” (*Opp. Trial Br.*, pp. 24) (emphasis added). Ms. Queen testified that the price point of a typical DALE EARNHARDT licensed item is at or

below \$50, and that customers make decisions regarding their purchases while in the store. (*Queen Disc. Dep.*, pp. 68-70).

Purchasers of furniture and custom homes, on the other hand, are likely to consider their choices longer and thus are less susceptible to confusion as to source. For one, traditional furniture is expensive, and building a custom home is dramatically more so. The price of Schumacher's custom homes range from \$100,000 to \$450,000. (*Becker Dep.*, pp. 11-12). Further, buying an EARNHARDT COLLECTION custom home requires going to a Schumacher design center and meeting multiple times with an assigned sales representative, whose job is to assist in deciding whether to buy the home, which plan to choose, and what design and architectural options to select. (*René Earnhardt Dep.*, pp. 27-29).

Buying and building a custom home (like buying a piece of furniture) is not the type of decision that is made impulsively or on "general impressions." Buyers of EARNHARDT COLLECTION custom homes spend substantial time considering their purchase. The complexity of that decision eliminates any possibility of confusion as to source. *See Standard Knitting, Ltd.*, 77 U.S.P.Q.2d at 1930-32 (holding that there was no likelihood of confusion between applicant's use of the mark TUNDRA for sweaters, and Opposer's use of the same mark for automobiles, because "it is clear that automobiles are expensive and would only be purchased after careful consideration, thereby reducing risk of confusion"); *see also HBP, Inc. v. Am. Marine Holdings, Inc.*, 290 F. Supp. 2d 1320, 1335 (M.D. Fla. 2003) *aff'd sub nom. HBP, Inc. v. Am. Marine Holdings*, 129 F. App'x 601 (11th Cir. 2005) (finding no likelihood of confusion between manufacturer's use of "DAYTONA" for racing boats and promoter's "DAYTONA" mark for automobile races, because "common sense and the evidence indicate [a boat] is not the type of purchase made only on 'general impressions'").

This factor also strongly favors KEI.

4. *Dale Earnhardt Sr.’s Historic Fame Is Insufficient to Support Opposer’s Likelihood of Confusion Claim.*

While KEI does not dispute that Dale Earnhardt, Sr. was a famous race car driver and personality, his historic status alone is insufficient to support Opposer’s likelihood of confusion claim with respect to the wholly unrelated goods and services covered by KEI’s application. Moreover, Opposer’s conclusory statements concerning Dale Earnhardt, Sr.’s marketing prowess many years ago ignore both the fame achieved by other members of the Earnhardt family and the commercial decline of the DALE EARNHARDT marks themselves.

First, as stated above, Opposer cannot use “fame” by itself to extend her rights in the DALE EARNHARDT marks to wholly unrelated goods and services for which those marks have not been used. Allowing her to do so effectively would grant Opposer a “right in gross,” which runs contrary to principles of trademark law. *See Univ. of Notre Dame Du Lac*, 703 F.2d at 1374, 217 U.S.P.Q. at 509. Further, it is not enough for Opposer to show that, because of her late husband’s fame, the public might “recall” Dale Earnhardt, Sr. when they encounter the EARNHARDT COLLECTION mark on custom homes. *See id.*⁸ Instead, the “relevant

⁸ For this same reason, the *Harry Winston* case cited by Opposer is readily distinguishable. There, the TTAB found likely confusion and denied registration of the mark BRUCE WINSTON for jewelry because the application covered the same goods, sold in the same trade channels, as the jewelry sold under the marks of Bruce Winston’s famous father, Harry Winston. *See Harry Winston, Inc. v. Bruce Winston Gem Corp.*, Opp. No. 91153147, 2014 WL 3686875 (T.T.A.B. 2014) (not precedent). Given these similarities, press reports highlighting the family connection had a proclivity to promote the public perception that their businesses were connected. *Id.* at * 26. Those concerns are nowhere present here, as the goods sold under the EARNHARDT COLLECTION mark bear no relation whatsoever to the goods sold under Opposer’s marks, the channels of trade are likewise vastly different, and the record shows the public recognizes the various members of the family as independently famous. *Cf. Ms. Teresa H. Earnhardt v. Bobby Dale Earnhardt LLC*, Nos. 91212177, 91212483, 2014 WL 3686879 (T.T.A.B. 2014) (not precedent) (granting summary judgment for Opposer for a variety of reasons not applicable here: (1) the application covered the same goods as the DALE EARNHARDT marks; (2) the goods move in the same channels of trade; (3) BOBBY DALE EARNHARDT incorporates the entirety of the DALE EARNHARDT mark; and (4) applicant offered no evidence in opposition to the summary judgment motion).

question is whether purchasers will perceive goods as diverse [as racing souvenirs and custom homes] as emanating from the same source.” *Standard Knitting, Ltd.*, 77 U.S.P.Q.2d at 1931; *Univ. of Notre Dame Du Lac*, 703 F.2d at 1374, 217 U.S.P.Q. at 509. Given the fame of other Earnhardt family members, and their longstanding use of the name “Earnhardt” on the very same goods as those covered by Opposer’s marks, the risk of confusion as to source is remote.⁹

As set forth above, numerous members of the Earnhardt family have achieved independent fame and public recognition in their names as a result of successful racing careers—including Dale Earnhardt, Sr.’s father, Ralph Earnhardt; his children, Kerry Earnhardt, Dale Earnhardt, Jr., and Kelley Earnhardt Miller; as well as his grandchildren, including Jeffrey Earnhardt. (*See* pp. 4-6, *supra*). Indeed, fans have yelled “EARNHARDT!” to cheer on each of them during their racing careers. (*Miller Dep.*, pp. 8-9, 22-23; *Kerry Earnhardt Dep.*, p. 17; *Applicant’s First Notice of Reliance*, Printed Publication 7).

Any fame that the DALE EARNHARDT marks may have achieved during his lifetime has been eroded by the substantial increase in his children’s fame since his death. As set forth above, Kerry continued in his professional racing career, in both the NASCAR Nationwide and Sprint Cup series, through 2006, and has gained recognition as an outdoorsman as a result of his appearances on hunting and fishing shows. (*See* pp. 4-6, *supra*). Kelley Earnhardt Miller, who also drove as a professional racer during her father’s lifetime, has achieved recognition as one of

9 This same evidence supports KEI under the sixth *du Pont* factor: “the number and nature of similar marks in use on similar goods.” The extensive, independent use of marks incorporating “Earnhardt” by various members of the family—often on the very same goods and services as those offered by Opposer—precludes Opposer’s claim that she owns the name as a standalone mark. It also weakens any right she may have to exclude others from its use, especially with respect to unrelated goods. *See* 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:88 (4th ed.) (“Evidence of third party use of similar marks on similar goods is admissible and relevant to show that the mark is relatively weak and entitled to only a narrow scope of protection.”)

the most powerful figures in the sport. (*Applicant's First Notice of Reliance*, Printed Publication 3).

Dale Earnhardt, Jr.'s career has progressed so far, in fact, that he has surpassed his father in terms of marketing power and public recognition. As noted previously, Dale Earnhardt, Jr. has been NASCAR's most popular driver for the past decade; he has been listed in a recent *Harris* poll as one of the nation's top-five most recognized professional athletes; and he has become one of the world's most commercially-successful athletes. (*Applicant's First Notice of Reliance*, Printed Publications 2, 5, 6). According to his daughter, Dale Earnhardt, Sr. was more famous prior to his death, but Dale Earnhardt, Jr. is now the most recognized member of the family among the consuming public. (*Miller Dep.*, pp. 15-16).

Particularly damning to Opposer's claim that she owns exclusive rights in the name "Earnhardt" is the fact that her husband promoted, and since his death she has allowed, Kerry and other members of the family to license and register their names (each incorporating EARNHARDT) for use on the very same goods as Opposer's marks. (*Kerry Earnhardt Dep.*, pp. 38; *Miller Dep.*, pp. 11, 18; *see also Appl.'s Exs.* 16, 18) (*See also Section II.A.2., supra*).

Clinging to the past, Opposer ignores the rapidly declining commercial relevance of Dale Earnhardt, Sr. DEI, the company started by Dale Earnhardt, Sr., no longer fields a NASCAR team. (*Applicant's First Notice of Reliance*, Printed Publication 8). And Dale Earnhardt, Jr., Kelley Earnhardt Miller, and Kerry Earnhardt have each left the company. (*Applicant's First Notice of Reliance*, Printed Publications 9, 10). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In sum, Opposer conflates Dale Earnhardt, Sr.'s historic fame with the concept of a present-day famous and vital trademark. These are very different things. The record here provides no *evidentiary* basis for Opposer's contention that the public mistakenly will believe EARNHARDT COLLECTION refers to Dale Earnhardt, Sr.

Accordingly, this factor favors KEI.

5. *The Marks at Issue Are Dissimilar in Their Entireties as to Appearance, Sound, and Commercial Impression.*

Opposer contends that EARNHARDT COLLECTION is effectively "identical" to her marks because each contains "Earnhardt" and all other additional terms should be discounted. Her flawed approach distorts both the extent of her trademark rights and the commercial impression of her marks.

First, Opposer does not own the name "Earnhardt" in isolation—her mark is DALE EARNHARDT. Opposer has never engaged in regular and recurring, much less substantially exclusive, use of the name "Earnhardt" as a standalone mark. Thus, any rights she may now acquire would be subject to her family members' prior, widespread use of the name in racing and on racing memorabilia. As a result, the only proper basis of comparison is her DALE EARNHARDT mark. (*See* Section I.A.1., *supra*.)

Moreover, Opposer's argument that the name "Earnhardt" is the predominant component of the DALE EARNHARDT mark is incorrect. Because the public has come to recognize "Earnhardt" as a designation for a family of race car drivers, and thus "Earnhardt" alone does not distinguish her goods, the term "Dale" is a critical component of her mark and her mark should be treated as a whole: DALE EARNHARDT.

Finally, while the predominant portion of EARNHARDT COLLECTION may be "Earnhardt," Opposer's contention that the term "Collection" is merely a generic designation for

furniture and custom homes is mistaken. As shown above, the term “Collection” does not immediately convey, nor does it describe, any quality or characteristic of KEI’s goods. (See Section II.A.2., *supra*).

When properly compared, the marks DALE EARNHARDT and EARNHARDT COLLECTION convey distinct commercial impressions. The inclusion of the term “Dale” makes clear that Opposer’s mark refers specifically to NASCAR star Dale Earnhardt, Sr., and is therefore meaningful. Compare *Brennan's, Inc. v. Brennan's Rest., L.L.C.*, 360 F.3d 125, 133 (2d Cir. 2004) (including first name is meaningful when individual is well-known), with *In re Chatam Int'l Inc.*, 380 F.3d 1340, 1343 (Fed. Cir. 2004) (including first name JOSE not meaningful when merely signaling that GASPAR is an individual’s name). Similarly, the inclusion of the term “COLLECTION” in Applicant’s mark distinguishes that mark’s appearance from the name of a man who died 14 years ago. Further, the fact that the parties’ goods are wholly unrelated requires Opposer to make a heightened showing of mark similarity, which she cannot do. Cf. *Bridgestone Americas Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 1337 (Fed. Cir. 2012) (“When the goods are identical, the appearance of a mark of similar sound, appearance, or connotation is more likely to cause confusion than if the goods are significantly different.”). Finally, given the public’s recognition that the name “Earnhardt” refers to a family of racers (which results from longstanding and widespread use by multiple family members), consumers are not likely to perceive EARNHARDT COLLECTION as a designation related to Dale Earnhardt, Sr.

This factor favors KEI.

6. *Opposer Has Offered No Evidence of Actual Confusion.*

Given the number of factors weighing against confusion—vastly different goods and services, different trade channels, different customers, different conditions of sale, and different

price points—it is not surprising that Opposer fails to produce any evidence of an actual consumer who has been confused by use of EARNHARDT COLLECTION.

KEI and Schumacher have used the EARNHARDT COLLECTION mark in print, radio, online, and in-store advertising continuously since launching their line of custom homes in October 2011. (*René Earnhardt Test. Dep.*, pp. 22-25; *Appl. 's Exs.* 22-25; *Becker Dep.*, pp. 43). EARNHARDT COLLECTION homes have been featured in magazine articles. (*See, e.g., Applicant's First Notice of Reliance*, Printed Publication 10). These advertisements, marketing materials and publications prominently feature Kerry and René, and reflect the efforts to which they have gone to build consumer recognition in EARNHARDT COLLECTION as a designation for goods and services uniquely connected to them.¹⁰ The “Blue Ridge” plan—a design marketed under the EARNHARDT COLLECTION mark—also won an award for best architectural design in 2013 from the National Housing Association. (*René Earnhardt Test. Dep.*, pp. 18-19).

Notwithstanding the widespread use of the mark, Opposer admittedly has no evidence of any actual confusion among customers or the public. (*Queen Test. Dep.*, pp. 42-43, *Queen Disc. Dep.*, p. 85). That lack of evidence is not surprising, given that EARNHARDT COLLECTION has caused no confusion for customers of the family’s most-recognized living member, Dale Earnhardt, Jr. (*Miller Dep.*, p. 14).

The absence of any actual confusion decidedly favors KEI.

* * *

¹⁰ Opposer insinuates that KEI selected EARNHARDT COLLECTION in bad faith. (*See Opp. Trial Br.*, pp. 24-25). The marketing materials belie any such suggestion. Additionally, the record evidence establishes that KEI opted for EARNHARDT COLLECTION over “Kerry and René Earnhardt Family Collection” because the latter was simply too wordy and therefore not practical from a marketing perspective. (*René Earnhardt Dep.*, p. 33; *Becker Dep.*, pp. 41-42).

In sum, Opposer cannot show that the relevant consuming public is likely to confuse KEI's EARNHARDT COLLECTION mark, when used in connection with furniture and custom homes, with her marks, which she uses on souvenirs and racing memorabilia. Those goods are vastly different, offered to different customers, move through different channels of trade, under different conditions of sale, and are sold at different prices. Accordingly, the *du Pont* analysis leads to but one conclusion: There is no likelihood of confusion.

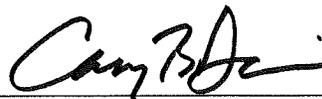
III. OPPOSER HAS ABANDONED HER CLAIMS FOR REFUSAL BASED ON FALSE SUGGESTION OF CONNECTION AND DILUTION.

Opposer did not include any argument in her brief supporting her claims for refusal based on (i) false suggestion of connection with a person, living or dead, under Section 2(a) of the Lanham Act, or (ii) dilution under Section 2(e). *See* 15 U.S.C. § 1052. Accordingly, Opposer has waived those claims, and they are abandoned. *See Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 U.S.P.Q.2d 1424, 1426 n.3 (T.T.A.B. 2013) (opposer's pleaded claim not argued in brief deemed waived); *Swatch AG v. M.Z. Berger & Co.*, 108 U.S.P.Q.2d 1463, 1465 n.3 (T.T.A.B. 2013) (same); *Central Garden and Pet Co. v. Doskocil Manufacturing Co.*, 108 U.S.P.Q.2d 1134, 1136 (T.T.A.B. 2013) (same).

CONCLUSION

Opposer has failed to establish that KEI's EARNHARDT COLLECTION mark is primarily merely a surname, or that it is likely to cause confusion with any mark registered or used by Opposer. She has abandoned her remaining claims. Accordingly, her opposition should be denied, and the Board should permit registration of EARNHARDT COLLECTION pursuant to KEI's applications.

This 16th day of March, 2015.



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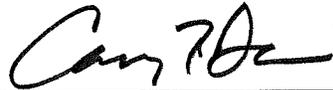
Attorneys for Applicant Kerry Earnhardt, Inc.

CERTIFICATE OF SERVICE

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

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This 16th day of March, 2015.



Cary B. Davis