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

Proceeding	92052197
Party	Plaintiff Terri Yenko Gould, Executor
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark Registration
No. 2049857, registered April 1, 1997.

Terri Yenko Gould, Executor,)	
)	
Petitioner)	
)	
v.)	Cancellation 92052197
)	
SuperCar Collectibles, Limited)	
)	
Registrant)	
)	

**PETITIONER'S RESPONSE TO RESPONDENT'S MOTION
TO STRIKE EXHIBITS AND TESTIMONY**

Petitioner Terri Yenko Gould, Executor of the Estate of Donald Frank Yenko, opposes the motion of Respondent-Registrant General Marketing Capital, Inc. (GMCI) for the following reasons.

FIRST, the Board's procedural order of June 17, 2011 applied only to the sworn witness statements that Petitioner originally sought to file in lieu of depositions. It was not an order *in limine* barring all further offers of such evidence. The order stated:

Testimony from these previously-disclosed lay witnesses may be considered if taken by means of a properly noticed testimonial deposition in compliance with all Board rules during petitioner's testimony period as reset herein. [Order, June 17, 2011]

Thus the Order in no way precluded – indeed it encouraged – the submission of the same evidence in deposition form, which is exactly which Petitioner did, pursuant to the extension of time granted expressly for this purpose.

The subject documents are only four in number, as follows:

- Declaration of Terri Yenko Gould, neither numbered or offered in evidence; identified by the witness at at pg 8, line 15 – pg 9, line 2;
- Declaration of Tom Clary, numbered 26B but not offered in evidence; identified by the witness at pg , line14 – pg 6, line 14;
- Declaration of George Bullwinkel, (neither numbered nor offered in evidence); and
- Declaration of Lester Quam (P-36), referred to in testimony (pg 7. line 14) solely to identify photos he personally took of the Respondent's “YENKO” Camaro at the 2011 SEMA show in Las Vegas.

What exactly does Respondent want by this motion? A blanket *in-limine* prohibition barring all consideration of the subject matter of these declarations in the subsequent testimonial depositions, which the Order specifically permits? Or is it merely requesting that the original testimonial declaration documents, already stricken not be considered?

The former interpretation makes no sense, since Respondent fully participated in the subsequent depositions, either in person or by telephone, and had full opportunity to make objections and pose cross-examination. The latter interpretation might be reasonable, except that only one of the subject documents has been introduced in evidence (P-36) and that only so that the witness could identify certain photographs in it which he personally took.

Thus there is nothing substantive for the Board to strike, and Respondent's motion must therefore be denied.

SECOND, Respondent requests that six designated snippets of supposed “expert” testimony, from Petitioner's witnesses Tom Clary (longtime President of the Yenko Sports Car Club and owner of original YENKO automobiles) and Lester Quam (dedicated car collector and YENKO owner) be stricken. Respondent correctly argues that Petitioner elected not to designate

any expert witnesses, but ignores the fact that the Federal Rules of Evidence, which govern proceedings before this Board ¹, expressly permit opinion testimony from lay witnesses based on their own personal backgrounds and experience. It is this lay testimony, founded on personal observations and experience of the witnesses, that Respondent is trying prevent this Board from considering.

Attached as Appendix A is the full text of the Q and A which Respondent seeks to strike from the record. It will take the Board only a moment to recognize why Respondent fears this testimony, because it clearly spotlights the fact that the name and reputation of Don Yenke, despite the 25 years since his death, continues to have substantial commercial value (Leonard deposition T. 59-60), which Mr. Leonard has been methodically trying to grasp for himself, despite having no connection whatever with the Yenke family, and having never met, or even talked to, the real Don Yenke.

Lay witnesses are not barred from stating opinions if relevant, helpful to the trier of fact, and based on personal knowledge and experience. The Rule states:

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

This is not a Rule 702 situation, because it involves no “scientific, technical, or other specialized knowledge” which a non-expert trier of fact might have to rely on. Instead, it

1 § 2.122 *Matters in evidence*. (a) *Rules of evidence*. The rules of evidence for proceedings before the Trademark Trial and Appeal Board are the Federal Rules of Evidence, the relevant provisions of the Federal Rules of Civil Procedure, the relevant provisions of Title 28 of the United States Code, and the provisions of this Part of Title 37 of the Code of Federal Regulations.

involves the personal knowledge and experience of two witnesses who have for many years been involved with rare high-performance cars and actually own examples of the original YENKO automobiles which Mr. Leonard has been trying to get the automotive public to associate with himself and his company, rather than the real and original Don Yenke.

Lay witnesses are clearly permitted to give opinions on matters within their personal knowledge and experience. Courts have long permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.* 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business.

[Committee Notes on Rules - 2000 Amendment]

Applying these principles, the 5th Circuit held in Texas A&M Research Foundation v. Magna Transportation, Inc., 338 F.3d 394 (5th Cir, 2003):

"Under [FED.R. EVID.] 701, `a lay opinion must be based on personal perception, must be one that a normal person would form from those perceptions, and must be helpful to the [fact finder].'" "In particular, the witness must have personalized knowledge of the facts underlying the opinion and the opinion must have a rational connection to those facts." *Id.* Accordingly, rule 701 does not preclude testimony by business owners or officers on matters that relate to their business affairs. Indeed, an officer or employee of a corporation may testify to industry practices and pricing without qualifying as an expert. Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., 320 F.3d 1213, 1223 (11th Cir.2003).

* * *

Because the [Court's] ruling rested on a misinterpretation of rule 701, the exclusion of the lost-ship-time portion of the affidavit was an abuse of discretion.¹³ [citing Miss. Chem. Corp. v. Dresser-Rand Co., 287 F.3d 359, 373 (5th Cir.2002), and quoting from United States v. Riddle, 103 F.3d 423, 428 (5th Cir.1997)]

338 F.3d 394 at 403 (footnotes omitted)

Not surprisingly, this Board has accepted and applied this definition in at least one decision (reported but not to be cited as precedent): Taiwan Semiconductor Manufacturing Co., Ltd. v. Semiconductor Manufacturing International (Shanghai) Corporation, (Oppositions Nos. 91171146 and 91171147, April 23 2010)

CONCLUSION

Upon the points and authorities set forth above, Petitioner Terri Yenke Gould, Executor of the Estate of Donald Frank Yenke, prays that Respondent's Motion To Strike Exhibits And Testimony be denied in its entirety.

Dated: April 12, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

George E. Bullwinkel, an attorney of record, hereby certifies that one copy of the foregoing PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO STRIKE EXHIBITS AND TESTIMONY was served by mailing, first class, postage prepaid, on April 12, 2012, and also by electronic mail, to the following:

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APPENDIX A

TO: PETITIONER'S RESPONSE TO RESPONDENT'S
MOTION TO STRIKE EXHIBITS AND TESTIMONY

Witness	Page/lines	Q&A
Tom Clary	10/1-25	<p>Q (By Mr. Bullwinkel) Let's look at number Eighteen. Can you identify that?</p> <p>A. Yes, this was a show that I attended in Chicago.</p> <p>Q. And did you see some of those cars there when you were there?</p> <p>A. Yes.</p> <p>Q. Can you just describe the sort of cars that you saw there and their association with the Yenko name?</p> <p>A. Yes, five of the photos are of presumed real Yenko cars and the sixth one is a junior dragster with the Yenko logo on the side.</p> <p>Q. What does that indicate to you , as a long time auto enthusiast, about the continuing interest of the public in Yenko and its automobiles?</p> <p>A. Well</p> <p><i>Mr. Buyan: Objection to the question on grounds that it illicitly [elicits] an expert opinion.</i></p> <p>Q. In your personal opinion, Tom, what did your observation at that show indicate about the level of interest of the public, the automotive public and [in] the Yenko name and brand?</p> <p>A. It's very high.</p>
	7/8 – 18/24	<p>MR. BULLWINKEL: ... So Tom, from your personal knowledge, your personal experience, not as an expert in any kind of marketing. In your opinion have you observed an active market and interest in Yenko automobiles at the present time?</p> <p>A. Yes.</p> <p><i>MR. BUYAN: Objection to the question on grounds that it requires an expert opinion from Mr. Clary.</i></p> <p>MR. BULLWINKEL: Go ahead, Tom.</p> <p>A. Basically, the '70, what's called the Yenko Deuce have been selling from the hundred, \$150,000 range. The 1969 Yenko Camaro, one just recently sold at auction for \$340,000, this was in May [2011]. The '69 Yenko Nova is valued at four to \$500,000 and more. The Yenko Chevelles, one sold there for, I think \$200,000. So that kind of gives you a figure on some of the cars.</p> <p>Q. And what is your basis of [for] this knowledge?</p>

A. The '69 Camaro sold at Mecum auction for \$340,000 and there was one or two Chevelles. I think the one sold for \$220,000. These were actually at auctions. The other ones just word of mouth I heard. A couple people that sold their cars.

Q. Are these things that you generally keep in touch with in your position as the head of the Yenke Sports Car Club.

A. Well, as head of the club but also as I own several Yenkos so I kind of follow the market just when they're your investment, you kind of follow what they're doing. And also I have to – basically, I have them insured so that's another reason I kind of have to know the values for my insurance carrier.

Lester Quam 13/21 -14/18 BY MR. BULLWINKEL: Q. Okay. And now, I don't think there is a need to mark this, but has your attention been drawn to a newspaper article from yesterday's New York Times that refers to the Yenke brand?

A. It has.

Q. Can you just describe briefly what the article is and how it refers to it?

A. This is a – in my hand is a New York Times newspaper from the automobile section dated Sunday, July 17, 2011, discusses a collector named Dennis Auba who indicates that the next car he will be collecting is a Chevrolet Vega Yenke that he is looking for a Yenke copy automobile.

Q. And as a collector yourself, what does that indicate to you about the Yenke name in today's automotive market?

A. The name is still very viable and active –

MR. BUYAN: Objection to the question on the ground that it elicits an expert opinion from Mr. Quam.

16/7 – 17/8 Q. Les, speaking from your own personal experience and as an individual, would you be interested in buying a Yenke brand new automobile from Jeff Leonard or his company [Respondent]?

A. No.

Q. Why not:

MR. BUYAN: I am going to interpose an objection to the question on the grounds that it calls for an expert opinion.

Q: The question is from your own background and experience, would you be interested in buying such a car? What was your answer?

A. No.

Q. And why not?

A. It's not a Yenko automobile... It's just a car with Yenko badging.

Q. And in your personal experience, what does that do to the value of your Yenko automobiles?

A. Diminishes the value of my automobiles.

17/21 – 18/15

Q. Again, from your own personal knowledge and observation, how does the manufacturer [sic] of branded automobiles bearing the name of a formerly famous person effect [sic] the value of automobiles today?

MR. BUYAN: I will interpose an objection. It calls for expert opinion.

A. From my experience, from watching these types of automobiles for the last 35 years, Carol[1] Shelby, a manufacturer of classic automobiles in the '60s, had his cars essentially branded, like in this particular fashion, as Cobras, several different companies did it over the years and it's pretty much diminished the value of his cars for decades now. And it causes an enormous amount of confusion as to what's a real Shelby and what's a real Cobra and what's not a real Cobra, and that problem still exists for Carol[1] Shelby today.