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

Proceeding	92052197
Party	Defendant Supercar Collectibles Limited
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of United States Trademark Registration No. 2,049,847

Terri Yenke Gould, Executor)
) Cancellation No.:92052197
 Petitioner,)
)
 vs.)
)
 General Marketing Capital, Inc./Supercar)
 Collectables Limited)
)
 Respondents.)
)
 _____)

**RESPONDENTS' REPLY TO PETITIONER'S RESPONSE TO RESPONDENTS'
OBJECTIONS AND MOTION TO RE-SRIKE**

Respondents hereby reply to Petitioner's Response to Respondent's Motion to Strike Exhibits and Testimony filed on April 12, 2012.

The Previously Stricken Testimonial Declarations were Re-Filed by Petitioner in Clear Violation of the Board's Prior Order

Petitioner's sole argument regarding her re-filing of the testimonial declarations is, in essence, that the Board's June 17, 2011 (the "Order") did not specifically instruct her *not* to re-file the stricken testimonial declarations in connection with later-taken deposition transcripts so, therefore, it must be okay to do so. This argument is completely meritless.

Respondents originally moved to strike the four (4) improperly filed testimonial declarations and accompanying exhibits on two grounds—i.e., *first* that the declarations had been filed without

any stipulation in willful disregard of 37 CFR § 2.122 and *second* that the declarations contained expert opinion testimony for which Petitioner had failed to serve any pretrial disclosure or expert disclosures as required by Trademark Rule 2.120(2).

In the Order, the Board struck the four (4) testimonial declarations and accompanying exhibits (as well as other documents that petitioner had filed during and after her testimony period without any accompanying notice of reliance) from the record. (Order, Pg. 2) Also, the Board graciously re-opened Petitioner's testimony period for one week to allow Petitioner another opportunity to take proper non-expert testimony by oral deposition in accordance with the applicable rules.

The order was very explicit in striking the written declaration testimony and in precluding Petitioner from introducing any expert testimony during the permitted oral depositions. The wording of the Order is clear and unambiguous. To suggest that the Order "encouraged" Petitioner to simply re-file the *same* previously-stricken declarations as numbered or unnumbered exhibits in deposition transcripts defies reason. These documents were ordered stricken once, they must be stricken again.

Petitioner had more than a fair opportunity to adduce non-expert oral deposition testimony from its witnesses. In an oral non-expert testimonial deposition, counsel asks the witness questions and the witness answers those questions to whatever extent that he or she can answer, using his or her own words. Also, opposing counsel has the opportunity to interpose objections. In oral deposition testimony, counsel doesn't get to draft, revise and finalize written answers for the witness to use in response to the questions. Rather, it is up to the witness to actually provide a verbal answer without coaching. In contrast, Petitioner's testimonial declarations are written documents that were

obviously wordsmithed by counsel and composed in a manner that includes impermissible expert opinion testimony. Simply refilling those previously stricken declarations is certainly not the same as adducing admissible testimony through oral questions and answers during a properly convened oral testimonial deposition.

Nothing in the Order allowed or “encouraged” Petitioner to simply re-file the previously stricken declarations as “exhibits” or as unnumbered attachments or under any other pretence. To the contrary, the Order makes it quite clear that testimonial depositions can not be filed and that expert opinion testimony can not be introduced. Respondent respectfully requests that the Board enforce the Order and remove these improper declaration documents from the record.

Petitioner is Attempting to Circumvent the Trademark Rules and the Board’s April 17, 2011 Oder By Characterizing Expert Opinion Testimony as “Lay” Opinion Testimony

The Order very explicitly precludes Petitioner from relying on any expert opinions. For example, the Order states at page 6, as follows:

... ..having failed to make any expert disclosures whatsoever, petitioner may not file or rely on expert testimony, and therefore any expert testimony will be stricken and given no consideration.

The objected-to opinion testimony proffered by Petitioner is “expert” testimony under Federal Rule of Evidence 702 because, as a basis for such opinions, Messrs. Quam and Clary purport to rely on their extensive expertise and experiences as restorers and collectors of collectable automobiles. This is clearly “special” expertise that lay individuals don’t possess. Most people

don't restore and collect vintage automobiles. (Although there is no evidence that typical purchasers of model cars would routinely possess the same knowledge and expertise as persons like Messrs. Quam and Clary who have the good fortune to restore and collect *real* cars.) To try to pass this off as "lay" opinion testimony is not appropriate.

Petitioner actually admitted that Messrs. Quam and Clary are expert witnesses in Petitioner's Initial Disclosure Statement served pursuant to 37 C.F.R. 2.120(a), a copy of which is appended hereto as Appendix A¹. However, after having failed to comply with the expert disclosure process and being precluded by the Order from introducing any expert testimony, Petitioner is now attempting to re-characterize Mr. Clary and Mr. Quam as "lay" witnesses instead of experts. The Board should not be deceived by this tactic.

In her Initial Disclosure Statement under 37 C.F.R. 2.120(a), Petitioner touted Thomas Clary was a potential expert witness, stating in part as follows:

Mr. Clary may also offer expert testimony as to the continuing popularity and fame of the YENKO name in the field of high-performance automobiles, and to the likelihood of damage to its commercial value from unauthorized infringers.

Also in her Initial Disclosure Statement under 37 C.F.R. 2.120(a), petitioner listed Lester Quam as a potential expert witness, stating in part as follows:

¹ This copy of Petitioner's Initial Disclosure Statement was previously filed by Petitioner as Appendix A to Petitioner's Opposition To Respondent's Motion To Strike Testimonial Declarations (filed May 19, 2011).

He may also offer expert testimony as to the continuing popularity and fame of the YENKO name in the field of high-performance automobiles, and to the effects of dilution and damage to commercial value caused by unauthorized infringement, including but not limited to Revell's manufacture and sale of YENKO replica model cars under a purported license from the Respondent.

Thus, having touted Messrs. Quam and Clary as experts in her initial disclosure, Petitioner should not now be permitted to characterize their opinions as lay opinions.

If Petitioner *had* served timely expert disclosures identifying Messrs. Clary and Quam as expert witnesses, the Board would have set dates for expert discovery and Respondent would have followed the appropriate procedures for expert discovery including expert depositions. Also, Respondent would most certainly have sought to exclude the noticed “expert” testimony from Messrs. Quam and Clary on numerous grounds, including but not necessarily limited to bias and lack of qualification. Furthermore, had Petitioner gone through the proper procedures to notice and qualify Messrs. Clary and Quam as expert witnesses, Respondents would have retained their own experts who would have conducted appropriate surveys of relevant consumers or otherwise developed an objective basis for their own expert opinion testimony. However, Respondents saw no reason to do so given that Petitioner provided no expert disclosure and was not expected to rely on any expert testimony.

Regarding the bias of these witnesses, the testimony of record clearly establishes that Thomas Clary is Petitioner's purported "licensee," advisor, informant and friend. It also clearly establishes that Mr. Quam is actually one of Petitioner's attorneys who has represented Petitioner in relation to this very dispute. As one of Petitioner's attorneys, Mr. Quam is not only a biased witness, he stands in a fiduciary relationship with Petitioner and is duty-bound to zealously advocate her position. Thus, their opinions on the issues in dispute are obviously biased and of no evidentiary value.

Regarding their lack of qualification, neither Mr. Quam nor Mr Clary purport to have any special skill, knowledge, training or expertise relating to the design, manufacture, promotion, marketing, valuation or collecting of the model cars at issue in this case. Nor do they have any purported special skill, knowledge, training or expertise relating consumers who purchase such model cars. Real cars and model cars are quite different. Simply because Messrs. Quam and Clary restore and collect *real* cars doesn't mean they know anything at all about *model* cars or what goes on in the minds of typical consumers who purchase model cars. Furthermore, they have established no qualifications or factual/experiential basis for their purported opinions regarding trademark significance, name recognition of persons long deceased, trademark valuation, perceptions/motivations of consumers of toy or model cars, likelihood of confusion, inevitability of confusion or any other issue in dispute in this proceeding. They do not cite or rely on any data, survey, poll, consumer interview, market analysis, instances of actual confusion, scientific consumer profiling or other empirical or objective evidence as a basis for their opinions. They are simply friends and agents of Petitioner who have seen fit to render their unsupported opinions on ultimate issues in this case in an obvious effort to make up for the total lack of actual supporting evidence in the record.

Because Messrs. Quam and Clary were not timely disclosed as intended expert witnesses, Respondent has been wrongfully prevented from using the available procedures for expert discovery, seeking to prevent their opinion testimony on the issues in dispute and/or obtaining Respondent's own expert testimony to rebut these baseless, self-serving opinions. To allow their proffered opinion testimony to come in via the back door under the guise of "lay" opinion would be prejudicial to Respondent and simply wrong. The Board's Order was clear. Petitioner should be required to comply with that order.

Additionally, given that their opinions are unsupported by any objective evidence, the opinions of Messrs. Clary and Quam should be given no weight insofar as they purport to address ultimate issues such as whether consumers of model cars recognize or even know of the prior existence of Donald Yenke the man (as opposed to Yenke Chevrolets, the cars) or that consumers of model cars are somehow confused as to the source of those model cars. In his treatise, Professor McCarthy addresses this point as follows:

Thus, an expert should not be permitted to in effect testify that: "I know what I'm talking about and if I were you (judge or jury), I'd find that there was a likelihood of confusion and infringement in this case." Such a witness may be an expert as to the workings of the gizmo industry and the natures of customers who buy and use gizmos. But such a witness is not an expert as to the probable confused perceptions of customers who buy Gizmos identified by the similar marks involved in this case. Especially if the goods or services

involved are ordinary consumer items familiar to most people, a jury does not need an expert's opinion on the ultimate factual issue in the case: is there a likelihood of confusion.

4 McCarthy on Trademarks and Unfair Competition §23:2.75

Accordingly, Respondents respectfully request that the re-filed testimonial declarations and the objected-to expert opinion testimony be stricken and not considered by the Board in this case.

April 27, 2012

STOUT, UXA, BUYAN & MULLINS, LLP

/Robert D. Buyan/

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APPENDIX A

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

Terri Yenko Gould, Executor,)	
)	
Petitioner)	
)	
v.)	Cancellation 92052197
)	
SuperCar Collectibles, Limited)	
)	
Registrant)	
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PETITIONER'S INITIAL DISCLOSURE STATEMENT

Pursuant to Rule 2.120(a) of the Rules of Practice In Trademark Cases (2007) and the Board's Scheduling Order of March 15, 2010, Petitioner hereby makes the following initial disclosures.

1. WITNESSES. Petitioner may call one or more of the following evidentiary witnesses in support of its petition. A brief summary of the expected testimony of each witness is provided.

a) Terri Yenko Gould, 4662 White Avenue, Encino, CA 91316. Ms. Gould is expected to testify that: she is the daughter of Donald Frank Yenko, and as a young girl worked with her father in preparing YENKO automobiles in the 1960s; that upon her father's death in March, 1987 she became executor of his estate; that she is the sole legal representative of the Estate for all purposes; that neither she nor the Estate have ever granted permission or license to others to utilize the name and mark YENKO (other than the Yenko Sportscar Club); and that she has been approached on several occasions to grant such permission but has consistently refused.

b) Thomas Clary, 306 Water Street, Alton, MO 65606. Mr. Clary is expected to testify that he founded the Yenko Sportscar Club in 1998 pursuant to written permission and license from the Yenko Estate; that the Club developed and continues to enjoy a large following

of automobile enthusiasts; and that the Club tracks and keeps records of all YENKO automobiles and of their present owners and locations. Mr. Clary may also offer expert testimony as to the continuing popularity and fame of the YENKO name in the field of high-performance automobiles, and to the likelihood of damage to its commercial value from unauthorized infringers.

c) Lester Quam, 3240 W. Irving Park Road, Chicago, IL 60618. Mr. Quam is expected to offer personal testimony of his experiences as a long-time owner and enthusiast of YENKO automobiles. He may also offer expert testimony as to the continuing popularity and fame of the YENKO name in the field of high-performance automobiles, and to the effects of dilution and damage to commercial value caused by unauthorized infringement, including but not limited to Revell's manufacture and sale of YENKO replica model cars under a purported license from the Respondent.

2. Edward J. Cunneen, 143 West View Street, Lombard, IL 60148. Mr. Cunneen is expected to offer personal testimony that he has over many years been involved in the hobby of owning and collecting automobiles, particularly YENKO automobiles, having written at least one book on the subject; and that he has often served as an expert in inspecting and documenting YENKO automobiles. He may also offer expert testimony as to the continuing popularity and fame of the YENKO name in the field of high-performance automobiles.

3. DOCUMENTS. Petitioner may offer into evidence one or more of the below-listed documents, copies of which are provided herewith:

a) Last will and testament of Donald Frank Yenke (Exhibit 1, to be provided when available).

b) A letter of permission (license) dated January 26, 1998 from the Estate of Donald Frank Yenke to the Yenke Sportscar Club of Alton, Missouri (Exhibit 2).

c) Representative documents demonstrating the continuing fame and reputation of Donald Frank Yenke and the name YENKO, including but not limited to the following:

- YENKO general history (Exhibit 3)
- YENKO detailed history of models, years, and production numbers (Exhibit 4)
- YENKO Production History, 1966-1981 (Exhibit 5)
- Motor Trend CLASSIC magazine, Spring 2010 special edition – cover and eight internal pages of photos and text (Exhibit 6)
- POPULAR MECHANICS magazine article reprint, Spring 1997 (Exhibit 7)
- ROTTEN TOMATOES Internet movie review, “The Fast And The Furious”, 2009 (Exhibit 8)
- THE FAST LANE Internet advertisement for replica Yenke Camaro S/C, Spring 2010 (Exhibit 9)
- CAR TECH advertisement for book “YENKO, The Man, The Machines, The Legend”, 2010 (Exhibit 10)
- Revell Model Kit No. 85-4237 '69 Chevy Nova “YENKO” (photos, Exhibit 11)
- Photo Group Exhibit: YENKO Cars At November 2009 Chicago Show (Exhibit 12)
- Photo: YENKO Model Cars At November 2009 Chicago Show (Exhibit 13)
- Photo Group Exhibit: Models of Historic YENKO High Performance Cars (Exhibit 14)
- Letter, attorney Bullwinkel to Revell, Inc., February 12, 2010 (Exhibit 15)
- Letter, attorney Bullwinkel to Sullivan, December 11, 2009 (Exhibit 16)
- Pennsylvania Statutes, Sec. 8316 (Exhibit 17)
- California Civil Code, Sections 3334, 990 (Exhibit 18)

George E. Bullwinkel
Attorney for Petitioner

Date: June 14, 2010

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CERTIFICATE OF SERVICE

George E. Bullwinkel, an attorney of record, hereby certifies that one copy of the foregoing PETITIONER'S INITIAL DISCLOSURE STATEMENT was served by mailing, first class postage prepaid, on June 14, 2010 to the following:

Scott W. Johnson and
Heather J. Kliebenstein
Merchant & Gould P.C.
3200 IDS Center
80 Sough Eighth Street
Minneapolis, MN 55402-2215

Attorneys for Respondent

George E. Bullwinkel

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **RESPONDENTS' REPLY TO PETITIONER'S RESPONSE TO RESPONDENTS' OBJECTIONS AND MOTION TO RE-SRIKE** has been served on George E. Bullwinkel, Esq. by mailing said copy on April 27, 2012, via first Class Mail, postage prepaid to:

GEORGE E. BULLWINKEL
ATTORNEY AT LAW
330 BIG RAIL DR
NAPERVILLE, IL 60540

/Robert D. Buyan/

Robert D. Buyan