

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

In the Matter of Trademark Application Serial No. 76/026,184  
For the Mark: FARM LIVING  
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Reiman Publications, LLC. :

Opposer

v.

Farm Living, Inc. :

Applicant

Opposition No. 91/150,075

**APPLICANT'S TRIAL BRIEF**

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Description of Record

Applicant responds to Opposer’s Description of the Record by objecting to the admissibility of any Exhibits, including Opposer’s Exhibits 16-24, which purport to reflect Opposer’s Farm & Ranch Living magazine sales. Opposer utilizes outside vendors to track this information and failed to establish the reliability or authenticity of the sales figures these vendors reported to Opposer.

As Applicant explains in detail in its Objection set forth in the Appendix to this Brief, Opposer does not itself track the sales, whether in quantity or revenues, of any of its magazines, including Farm & Ranch Living. Opposer did not establish the admissibility of the outside vendor reports, although it had numerous opportunities to do so. On November 26, 2002, the Board granted Opposer an extension of its trial period through January 20, 2003. Opposer waited until the last day to depose its accounting manager, Judith A. Wolf, who testified concerning the outside vendor reports. Presumably, Opposer’s attorneys learned this information when they interviewed Ms. Wolf before the deposition. Nonetheless, Opposer never offered those third party reports into evidence, and never deposed the outside vendors to establish the reliability and authenticity of their records.

Opposer will likely contend, as it did at Ms. Wolf’s deposition, that the sales figures provided by its outside vendors is not hearsay because it is contained within Opposer’s own business records. As explained in detail in the Appendix, that argument ignores the double hearsay rule. The vendors’ sales figures do not automatically become verified and authenticated by their inclusion into Opposer’s records.

In sum, Opposer has not established the reliability of the Farm & Ranch Living magazine sales figures furnished to it by third party vendors, and thus that information is hearsay. Opposer therefore must be precluded from offering any evidence, whether written or oral, concerning its sales both quantity and dollar amount of Farm & Ranch Living magazine.

### Argument

1. There is no likelihood of confusion between Applicant's FARM LIVING mark and Opposer's FARM & RANCH LIVING mark.
  - a. Opposer disclaimed the terms "FARM" and "RANCH" in its registration.

Opposer was required to disclaim the descriptive words "FARM" and "RANCH" in its application. See Applicant's Notice of Reliance, no. 5, attaching Opposer's file wrapper. Opposer does not have an exclusive right in the disclaimed word "FARM" nor the disclaimed word "RANCH," except in the precise relation and association as they appear in the mark. 3. J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 19:63 at 19-152 (4th ed. 2003).

Moreover, by disclaiming "FARM" and "RANCH", Opposer has conceded that the words "FARM" and "RANCH" are descriptive because a disclaimer of a part of a composite mark is a concession that the disclaimed part is descriptive. 3. J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 19:65 at 19-156 (4th ed. 2003) (citing In re Ampco Foods, Inc., 227 U.S.P.Q. 331 (T.T.A.B. 1985)). The disclaimed matter is "given less weight in determining likelihood of confusion." McCarthy, §19-65 (citing SMS, Inc. v. Byn-Mar, Inc., 228 U.S.P.Q. 219 (T.T.A.B. 1985)).

- b. Substantial evidence exists of third party uses of similar marks on magazines.

Applicant has submitted in its Notice of Reliance 123 trademark registrations and applications (Notice of Reliance, nos. 6-129) and 59 magazines and publications (Notice of Reliance, nos. 130-188; Supplement to Notice of Reliance, no. 1) to show common third party use of the words “Farm,” “Ranch” and/or “Living” as well as the design symbol “&”.<sup>1</sup>

As evidenced by the marks and publications, it is undisputed that there are at least 25 marks and publications in use with the term “FARM” in the title. These are as follows:

AMERICA WEST FARM & RANCH DELTA FARM PRESS FARM BUREAU FARM CHEMICALS INTERNATIONAL FARM COLLECTOR FARM COUNTRY TRADER BUY SELL TRADE FARM & FIRESIDE FARM & RANCH FARM EQUIPMENT FARM FAMILY AMERICA FARM FORUM FARM FUTURES FARM INDUSTRY NEWS	FARM JOURNAL FARM PRESS FARM PROFIT FARM SHOW FARM SUPPLIER FARM SUPPLY RETAILING FARMWEEK ROCKY MOUNTAIN FARM & RANCH SMALL FARM TODAY TEXAS FARM & RANCH THE NEW FARM WESTERN FARM PRESS
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Four of these magazines even include the term “FARM & RANCH”.<sup>2</sup>

FARM & RANCH  
 AMERICA WEST FARM & RANCH  
 ROCKY MOUNTAIN FARM & RANCH  
 TEXAS FARM & RANCH

<sup>1</sup> Third party registrations “are useful to demonstrate the sense in which a term is used in ordinary parlance and they can show that a particular term has been adopted by those engaged in a certain field or industry and that said term has less than arbitrary significance with respect to certain goods or services.” *In re Dayco Products-Eagle Motive Inc.*, 9 U.S.P.Q.2d 1910 (T.T.A.B. 1988). In addition to the third party registrations, Applicant has attached to its Notice of Reliance corresponding magazine covers or internet publications where applicable bearing the registered third party marks, which demonstrates they are actually in use. These printed publications are self-authenticating under 37 CFR § 2.122(e). In addition, the internet publications were properly authenticated by Applicant’s witness. (Thomason, p. 24-27). See *Raccioppi v. Apogee, Inc.*, 47 U.S.P.Q.2d 1368, 1370 (T.T.A.B. 1998) (noting that “depositions may be used during the testimony period to introduce” and authenticate documents).

<sup>2</sup> These magazines and marks are owned by FARM & RANCH PUBLISHING, LLC of Houston, Texas.

Marks and publications with the word "LIVING" are even more ubiquitous. Applicant has identified at least 77 of them as listed below:

ALASKA LIVING APARTMENT LIVING GUIDE ASPEN LIVING AUTHENTIC LIVING BACKYARD LIVING BETTER LIVING MAGAZINE BUDGET LIVING CABIN LIFE, CABIN LIVING CAROLINA LIVING CASUAL LIVING CELEBRATED LIVING COASTAL LIVING COMFORTABLE LIVING CONFIDENT LIVING COOPERATIVE LIVING COTTAGE LIVING COUNTRY LIVING CREATIVE LIVING DELICIOUS LIVING EASY LIVING EVERYDAY LIVING FAIRWAY LIVING FAMILY LIVING FAMILY LIVING MAGAZINE FLORIDA LIVING GARDEN LIVING GEORGIA LIVING GOLF COURSE LIVING GRACIOUS LIVING HAMPTONS LIVING HOMES & LIVING KENTUCKY LIVING LAKE LIVING LIFE & LIVING LIVING LOG HOME LIVING LUXURY LIVING MANUFACTURED HOME LIVING MARTHA STEWART LIVING	MATURE LIVING MEN'S LIVING METROLIVING MICHIGAN LIVING MIDWEST LIVING MOUNTAIN LIVING NAPA VALLEY LIVING NAPLES LIVING ORGANIC LIVING POOL & SPA LIVING PRIME LIVING PSYCHIC LIVING RANCH & RURAL LIVING RESIDENT LIVING RESORT LIVING RURAL LIVING SANTA FE LIVING SAVVY LIVING SEA RAY LIVING 2 <sup>ND</sup> HOME LIVING SENIOR LIVING GUIDE SENIOR LIVING RESOURCE MAGAZINE SOUTHERN LIVING SPA HEALTHY LIVING, TRAVEL & RENEWAL SPA LIVING TENNESSEE LIVING TEXAS HOME & GARDEN LIVING TODAY'S LIVING VAIL LIVING VERMONT LIVING VIRGINIA LIVING VITAL LIVING WEEKEND LIVING WESTERN LIVING WHOLE LIVING WINE COUNTRY LIVING WOMEN'S LIVING
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Of particular interest are marks and publications which coexist on the principal register and in the market place which include overlapping terms as follows:

ART & ANTIQUES  
THE MAGAZINE ANTIQUES

ARTS & CRAFTS  
CRAFTS

CARIBBEAN TRAVEL & LIFE  
CARIBBEAN LIFE

CITRUS & VEGETABLE MAGAZINE  
VEGETABLE  
COUNTRY  
COUNTRY LIVING  
TOWN & COUNTRY

FIELD & STREAM  
THE FIELD

FITNESS  
MUSCLE & FITNESS

FISH & GAME FINDER  
GAME & FISH MAGAZINE

GUNS & AMMO  
GUNS MAGAZINE

HOME MAGAZINE  
HOME & AWAY  
HOUSE & HOME

HORSE  
HORSE & RIDER

HOUNDS & HUNTING  
HUNTING

MASSAGE  
MASSAGE & BODYWORK

POOL & SPA LIVING  
SPA LIVING

RANCH & RURAL LIVING  
RURAL LIVING

TRAVEL  
TRAVEL & LEISURE  
LEISURE

The evidence clearly supports that Opposer's mark, as those referenced above and in the Appendix, are all in a crowded field where minor differences distinguish the marks in the market place. The marks and publications shown above all have very minor differences, which shows that they coexist and are distinct from one another.

Opposer selected a mark that falls into the category of being a mark in a crowded field, and it is inequitable to grant Opposer a scope of protection for its weak mark which is broader protection than that afforded to the other third party marks in the crowded field.

Evidence of third party use of similar marks on similar goods is admissible and relevant to show that Opposer's mark is weak and entitled to only a very narrow scope of protection. 2. J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 11:88 at 11-167 (4th ed. 2003). The words "FARM" and "LIVING" are weak in the magazine industry based on substantial third party uses of these terms for other "FARM" magazines and "LIVING" magazines. See Columbia University v. Columbia/HCA Healthcare Corp., 964 F. Supp. 733, 43 U.S.P.Q.2d 1083 (S.D.N.Y. 1997) (noting that "third party use and registrations of the name Columbia, including in the healthcare field, have diluted the strength of the Columbia mark" and that "[t]he weakness of the mark therefore weighs strongly against a finding of likelihood of confusion").

In General Mills, Inc. v. Health Valley Foods, 24 U.S.P.Q.2d 1270 (TTAB 1992), the Board allowed registration of the mark FIBER 7 FLAKES for ready to eat breakfast cereal along with Opposer's FIBER ONE mark for the same goods finding no likelihood of confusion. The Board reasoned:

We reiterate that an important factor in our analysis is the evidence of widespread use of the term "fiber" in connection with cereals and other food products. This evidence suggests that consumers have become so conditioned by the large number of FIBER marks for food products that customers are accustomed to distinguishing between different FIBER marks, even on the basis of small differences.

Id. at 1278.

In view of the evidence of numerous third party uses, Opposer's mark is weak and the differences between Applicant's mark and Opposer's mark are sufficient to avoid any confusion by the consuming public.

- c. The marks are sufficiently different in appearance, sound and commercial impression, and Opposer's mark is a weak mark.

The subject marks are composite marks. Applicant's mark is comprised of two words "FARM" and "LIVING" in visual contrast to Opposer's mark which is comprised of three words "FARM," "RANCH" and "LIVING" and a distinctive design element (&) used to represent the word "AND," commonly known as an ampersand.

Composite marks are analyzed by comparing them as a whole under the "anti-dissection" rule. This rule, which requires that marks be compared by their overall impression, negates any suggestion that likelihood of confusion is automatic, even in cases where the junior user's composite mark contains the whole of the senior's mark. Conde Nast Pub., Inc. v. Miss Quality, Inc., 507 F.2d 1404 (C.C.P.A. 1975).



In view of the respective disclaimers of "FARM" and "RANCH" in the Opposer's and Applicant's marks, the term "LIVING" would appear to be the "dominant" element of Opposer's mark, while the disclaimed elements are secondary. However, because the term "LIVING" is so commonly used by third parties in the magazine industry for "lifestyle" magazines as those of the parties, the term "LIVING" is highly diluted, weak and entitled to a very narrow scope of protection. The elements of the marks - "FARM," "RANCH" and LIVING - are weak because of the disclaimer of "FARM" and "RANCH" and the common usage of "LIVING" therefore, Opposer's composite mark as a whole is a weak mark. In a crowded field of similar marks, each member of the crowd is relatively weak in its ability to prevent use by others in the crowd. Minor differences between competing members are sufficient to prevent likelihood of confusion. General Mills, Inc. v. Health Valley Foods, 24 U.S.P.Q.2d 1270 (TTAB 1992). Notwithstanding that both parties happen to use the weak term "LIVING," a comparison of these weak composite marks supports that confusion is not likely based on the differences between the marks.

The fact that Opposer's mark is a weak mark is a significant factor in finding no likelihood of confusion. Gruner + Jahr USA Pub., et. al., 991 F.2d 1072 (2d Cir. 1993). Not only are the disclaimed portions of Opposer's mark descriptive, but the remaining portion, "LIVING", is weak because it is a term in common use in the magazine industry such that its distinctiveness in the customer's mind is blurred and reduces the likelihood of confusion. Id.

In addition, Applicant's trademark examiner found no similar registered or pending marks to bar registration after performing a search. See Notice of Reliance, no. 4, Examiner's Amendment.

The difference between the parties' marks and the weakness of Opposer's mark support the conclusion that there is no likelihood of confusion based on the differences between the appearance, sound and commercial impression of the respective marks.

d. The channels of trade differ.

By its own admission, Opposer has a narrow and idiosyncratic channel of trade which is very uncommon in the magazine industry. Opposer does not print or solicit any third party advertisements for its magazine. (Anderson, p. 62, "it's a point of distinction to other magazines; most other magazines carry advertisements"). Opposer does not accept any third party advertising and does not print a third party advertising in any of its magazines. (Anderson, p. 62). Applicant is unaware of any other third party magazines in the magazine industry which does not accept advertising. Opposer has not introduced any evidence showing other magazine publications which operate under the same formula for sales. Opposer has a unique business operation which excludes a prominent channel of trade of magazine publications. That is, Opposer does not promote itself to advertisers in channels of trade, and therefore, there will be no likelihood of confusion with Applicant, who will use this conventional method of promoting its new magazine.

Opposer, by its own admission, does not distribute, through retail channels of trade such as newsstands and magazine racks, but for a small number of magazines. (Anderson, p. 55, stating approximately 4% sold on newsstands; "vast majority sold through subscriptions"). Opposer's primary method of promoting itself and acquiring subscribers is through its direct mail subscription mailers and through its own subscription insertions in its family of magazines. (Anderson, p. 26-27, stating, there is "nobody in the magazine publication industry that [uses these marketing methods] to the scale that we do"; p. 27:10, describing Opposer's promotional techniques as "unique"). Therefore, the only consumers that see Opposer's mark or promotions using its mark are its current subscribers to Farm & Ranch Living, its current subscribers to its family of magazines or recipients of its direct mailings. But for some deminimus number, retail consumers never see Opposer's Farm

& Ranch Living mark in stores. Applicant's presence in the retail channels of newsstands and stores would therefore be a distinctive channel of trade for Opposer and there would be no likelihood of confusion.

Applicant would not likely use the same direct mail lists as Opposer based on the different target demographics of the parties' magazines. Therefore, Applicant would also be in a distinctive channel of trade for the direct mail sales. Based on all of the foregoing distinctions hereto the channels of trade, there will be no likelihood of confusion between the marks.

2. There is no evidence that Opposer's mark is well known.

Opposer bears the burden of proving by a preponderance of the evidence that a likelihood of confusion exists. 3 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 23:62 at 23-190 (4th ed. 2003). Opposer attempts to meet its burden by demonstrating in the very first section of its argument the alleged fame of its mark. Ironically, while Opposer presumably believes fame is the factor under Dupont weighing most heavily in its favor, Opposer actually has no evidence whatsoever concerning its sales of Farm & Ranch Living magazine. Therefore, Opposer has failed to meet its burden of proof.

Opposer states on page 3 of its Trial Brief that its FARM & RANCH LIVING mark "is presently used extensively in connection with the sale of magazines, books and calendars." But nowhere on the referenced pages, 33-34, does its witness, Jeffrey Anderson, describe Opposer's sales of magazines bearing the mark. Moreover, the books and calendars to which Opposer refers are titled "Iron Will," "Old Iron," and "Saddle Pals," not its magazine, "FARM AND RANCH LIVING".

Opposer states in the next sentence that, according to Exhibit 16, the average circulation of Farm & Ranch Living magazine in 2001 was “almost 430,000 issues.” Exhibit 16, however, is a U.S. Postal form completed by one of Opposer’s employees from reports Opposer’s witness could not even identify, never mind authenticate. See Anderson Deposition, 46:23.

As Applicant explained above in its Description of the Record and details below in its Appendix II, Opposer’s accounting manager, Ms. Wolf, was the one who actually compiled Opposer’s chief exhibit, Exhibit 17, reflecting Opposer’s purported sales of Farm & Ranch Living magazine. According to Ms. Wolf, Opposer does not track any of its magazine sales, whether by quantity sold or revenues earned. Its outside vendors, CDS reports and a newsstand wholesaler, furnish reports to Opposer recording sales, but those reports were never identified or offered into evidence in this proceeding. Moreover, Opposer never demonstrated the reliability or authenticity of those third party reports or the information contained within them. Therefore, Opposer’s sales figures, including its purported circulation numbers listed on Exhibit 16, are inadmissible hearsay.

Even assuming, *arguendo*, Opposer’s 430,000 circulation figure for Farm & Ranch Living magazine was admissible, that number hardly demonstrates that Farm & Ranch Living is well known, particularly when compared to Opposer’s “Taste of Home” magazine, which Opposer states on page 4 of its brief is circulated to 4.5 million subscribers. Farm & Ranch Living magazine sales are admittedly only a tenth of Opposer’s other magazine. There is no other evidence to support whether 430,000 is considered “well known.”

Finally, Opposer contends in Section I of its Argument that its sales of Farm & Ranch Living magazine in 2001 totaled \$4.5 million. However, Opposer provides no record citation for this sales figure. Presumably, Opposer is relying on Exhibit 17 summarizing its sales. However, as described above, Exhibit 17, and all exhibits reflecting Opposer’s sales, is inadmissible hearsay.

3. Applicant's witness did not admit likelihood of confusion.

Opposer's contention that Applicant admitted likelihood of confusion between the two marks is meritless for several reasons.

Applicant's attorney timely objected to the question Opposer relies upon because the question was improper. First, the question was confusingly ambiguous. The witness was first asked to assume a hypothetical new owner of FARM LIVING changed the name of the magazine to FARM & RANCH, and then made the magazine very similar to FARM & RANCH LIVING. Under these circumstances, the witness properly acknowledged that this would "mirror" FARM & RANCH LIVING, and there would be the potential for confusion, presumably because the magazines would be wholly identical.

Opposer's injection of the term "FARM LIVING" after first mentioning "Farm and Ranch" made the question confusingly ambiguous, and Opposer cannot now contend its reference in the question to "Farm and Ranch" should be ignored especially in view of the objection.

Second, the question calls for a legal conclusion. Likelihood of confusion is based on numerous factors, not just the similarity of the marks. Applicant's response should therefore be ignored.

**CONCLUSION**

Applicant has shown that the Farm & Ranch Living mark is a weak mark, which is evidenced by the disclaimer of the words "Farm" and "Ranch," by the significant third party uses of similar marks on similar magazines and publications, as well as the numerous registrations.

The differences between Applicant's mark and Opposer's mark in this crowded field, which Opposer knowingly entered, are sufficient to distinguish the marks. Based on all of the evidence and

arguments presented herein, there is no likelihood of confusion between the marks and Opposer's opposition must be denied.

## APPENDIX

### OBJECTION TO OPPOSER'S EXHIBITS 16-24 (PURPORTING TO REFLECT MAGAZINE SALES) AND MOTION TO STRIKE TESTIMONY CONCERNING OPPOSER'S MAGAZINE SALES

#### Facts

On August 22, 2002, Opposer took the trial testimony of Jeffrey Anderson, its Chief Financial Officer. Opposer attempted to introduce into evidence Exhibit 17, which is a spreadsheet purporting to reflect, inter alia, Opposer's sales of its Farm & Ranch Living magazine, measured by both quantity and dollars, from 1997 through 2001. (Anderson, p. 38, et. seq.) Mr. Anderson admitted he did not compile Exhibit 17, nor could he identify the person who did. (Anderson, p. 48:9-10; 49:10-11). Further, Mr. Anderson acknowledged that the figures reflected in the spreadsheet came from "another compilation" consisting of "numerous reports where you might have to add the numbers together." (Anderson, p. 49:6-8) Applicant timely objected to the admissibility of Exhibit 17. (Anderson, p. 49)

Opposer subsequently took, on January 20 and March 14, 2003, the trial testimony of Judith A. Wolf, its accounting manager.<sup>3</sup> The limited purpose for Ms. Wolf's testimony appears to have been to establish a proper foundation for the admissibility of Exhibit 17. Opposer failed, however, to do so.

Ms. Wolf testified on direct examination that she is the one who generated Exhibit 17. (Wolf, 1/20/03, p. 12:12-13) She stated that the information on the top line of Exhibit 17 concerning

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<sup>3</sup> Opposer conducted Ms. Wolf's trial deposition *ex parte* on January 20, the birthday of Martin Luther King, a federal holiday. In its decision on Applicant's Motion to Quash dated January 29, 2003, the Board ruled that, absent an agreement, the trial deposition should not have been conducted on that day. The Board therefore permitted Applicant to cross-examine Ms. Wolf, and to assert any objections it could have made during her direct testimony. This was

Opposer's sales of Farm & Ranch Living magazine came from a company called CDS, which is an outside vendor utilized by Opposer to track its magazine sales. (Wolf, 1/20/03, p. 9:11-18) Ms. Wolf further stated, once Opposer receives these magazine sales reports from CDS, someone in Opposer's accounting department, who does not work under Ms. Wolf's supervision, keys the information into Opposer's general ledger system. (Wolf, 1/20/03, p. 7:10-16)

On cross-examination, Ms. Wolf confirmed that the Farm & Ranch Living magazine sales information reflected on the top line of Exhibit 17 was obtained from reports generated by Opposer's outside vendors:

Q. CDS is an outside vendor Reiman uses to keep track of Reiman's Farm & Ranch Living magazine sales and revenues, correct?

A. Correct, as well as our other magazines.

Q. And on a monthly basis CDS sends Reiman a report reflecting Farm & Ranch Living magazine sales and revenues, correct?

A. Correct.

Q. That report is generated by CDS, correct?

A. Correct.

Q. After receiving that report, an accountant from the media group at Reiman keys that information into a spreadsheet, correct?

A. Correct.

Q. You do not directly supervise that person from the media group, do you?

A. No, I do not.

...

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accomplished on March 14.

FTL:1124601:3



The same individual who keys (the information) into the Excel spreadsheet also keys it into the general ledger.

(Wolf, 3/14/03, p. 101:7-102:8).

- Q. Exhibits 18 through 22 contain in part at least general ledger printouts from Reiman's system, correct?
- A. Correct.
- Q. And you then review(ed) the general ledger to create line one of the spreadsheet marked as Exhibit 17, correct?
- A. To provide certain parts of that information, correct.

(Wolf, 3/14/03, 102:15-22).

- Q. Did the quantities of sales come from CDS reports?
- A. A portion of them, yes.
- Q. And where did the other portion of the quantities come from?
- A. They came from reports received from our newsstand wholesalers.

...

[T]here's also a little bit very immaterial portion that comes from what we call single issue sales which come through from the Country Store system.

- Q. All right. So all of the quantities figures on line one (of Exhibit 17) aside from the small portion of single issue that you just mentioned from the Country Store, came from reports furnished to you by either CDS or your newspaper wholesaler, correct?
- A. Correct.
- Q. And both of those companies, CDS and your newspaper wholesaler, are outside companies, correct?
- A. Correct. And its newsstand wholesaler.

Q. Did the dollars figures represented in line one (of Exhibit 17), did that information come from CDS reports?

A. Yes.

...

The newsstand dollars would have been obtained ... from the GL, but that information comes from the newsstand wholesaler so there's a combined information in there.

Q. So would it be fair to say that if you backed out the immaterial portion of the Country Store magazine sales--

A. Uh-huh.

Q. --that all of the quantities of magazines and dollar sales of magazines ... for Farm & Ranch Living magazine, all of the information on Exhibit 17 came from either CDS reports or the newsstand wholesaler?

A. For the sales quantity and dollars.

Q. Yes.

A. That's right.

Wolf, 3/14/03, p. 103:7-105:1)

Applicant timely and repeatedly objected to Exhibits 17-23 based on hearsay and lack of foundation. (Wolf, 3/14/03, p. 3:23-25, 47:12-13, 49:15-19, 55:5-11, 85:5-87:10). Applicant also objected to any reference, in either a question or an answer, to the magazine sales figures contained in those exhibits. (Wolf, 3/14/03, p. 4-1-5:8; 55:12-16, 85:24-86:2).

## Argument

### A. EXHIBITS 16-24

Opposer obtained the Farm & Ranch Living magazine sales figures reflected in Exhibits 16-24 from records furnished by CDS and a newsstand wholesaler, two outside vendors utilized by Opposer to track this information. Opposer has presented no evidence establishing the reliability of those records, and therefore Applicant's hearsay and foundation objections to Exhibits 16-24 and corresponding testimony, should be sustained.

In Wilson v. Zapata Off-Shore Co., 939 F.2d 260 (5<sup>th</sup> Cir. 1991), one of the leading cases concerning double hearsay in business records, the Court stated:

Double hearsay in the context of a business record exists when the record is prepared by an employee with information supplied by another person. If both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(6).... However, if the source of the information is an outsider... Rule 803(6) does not, by itself, permit the admission of the business record. The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have....

Further, Federal Rule of Evidence 805 requires that all levels of hearsay satisfy exception hearsay requirements before the statement is admissible.

Id. at 271 (citations omitted; emphasis added).

For example, in TK-7 Corp. v. Estate of Barbouti, 993 F.2d 722 (10<sup>th</sup> Cir. 1993), plaintiff attempted to introduce a report prepared by its sales representative containing product and revenue projections for Venezuela and other countries. Id. at 729. The report was "based on the opinions of individuals other than" the sales representative. Id. These opinions were conveyed to the sales

representative and recorded by him in his report. Id. Citing Wilson, supra, the Court held, “There was no foundation to show that these other individuals who supplied the information to (the sales representative) were acting in the course of regularly conducted business activity of (plaintiff). As such, the exception for business records does not shield their out-of-court assertions from the rule against hearsay.” Id.; see also Boca Investorings Ptnshp. V. United States, 128 F. Supp. 2d 16, 20-21 (D. of Columbia 2000) (citing numerous double hearsay business record cases and excluding business records where source of information reflected in them and circumstances of preparation were unknown).

Ms. Wolf testified unequivocally that all of the Farm & Ranch Living magazine sales figures reflected in the general ledger printouts marked as Exhibits 18-22, and summarized on the top line of Exhibit 17, including quantity of magazines sold and dollars earned, were provided to Opposer in reports generated by CDS and a newsstand wholesaler. Both of those companies are “outside vendors.” Opposer has not presented any evidence that those outsiders’ statements as to magazine sales fall within another hearsay exception. Therefore, Exhibits 17-22 are inadmissible hearsay.

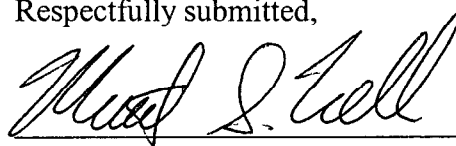
In addition, Exhibits 16, 23 and 24 both reflect Farm & Ranch Living magazine sales figures obtained from CDS’ and the newsstand wholesaler’s records. They too should be excluded.

#### B. TESTIMONY CONCERNING MAGAZINE SALES

Testimony concerning sales of Opposer’s magazines should be excluded as well. To the extent the testimony concerns the inadmissible exhibits, there is no foundation for it and it is also hearsay. To the extent a witness is testifying concerning his or her recollection of Opposer’s magazine sales, that testimony too is inadmissible based on the best evidence rule. See Fed. R. of Evid. 1001, et. seq.; Brown v. Farmer & Ochs Co., 209 F.2d 703 (6<sup>th</sup> Cir. 1954) (holding that

secondary evidence is not admissible unless proponent of testimony shows that original is lost or otherwise beyond the power of the party to produce); Weeks v. Latter-Day Saints Hospital, 418 F.2d 1035 (10<sup>th</sup> Cir. 1969) (best evidence rule precluded oral testimony concerning contents of hospital's administration rules).

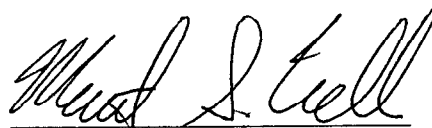
Respectfully submitted,



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#### **CERTIFICATE OF SERVICE**

I HEREBY certify that a true and correct copy of Applicant's Trial Brief has been served by U.S. mail this 14th day of November, 2003, to: Opposer's attorney, Nathan D. Jamison, Esq., Quarles & Brady, LLP, 411 East Wisconsin Avenue, Milwaukee, WI 53202-4497.



Matthew S. Nelles, Esq.

#### **CERTIFICATE OF MAILING**

I CERTIFY that on November 14, 2003 the original of Applicant's Trial Brief was sent by U.S. mail to Box TTAB, No Fee, Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513.



Matthew S. Nelles, Esq.