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Filing date: **12/04/2013**

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

Proceeding	91205331
Party	Defendant Kerry Earnhardt, Inc.
Correspondence Address	D BLAINE SANDERS ROBINSON BRADSHAW HINSON PA 101 N TRYON ST, SUITE 1900 CHARLOTTE, NC 28246 0106 UNITED STATES BSanders@RBH.com, MTilley@RBH.com
Submission	Motion for Sanctions
Filer's Name	Jennifer Carusone
Filer's e-mail	jcarusone@rbh.com, mtilley@rbh.com
Signature	/Jennifer Carusone/
Date	12/04/2013
Attachments	Motion.to.Dismiss.as.a.Sanction.for.Opposers.Failure.to.Appear.pdf(287947 bytes) Ex A - Notice of Deposition.pdf(57253 bytes) Ex. B - E-mail from LCJ to DBS.pdf(62054 bytes) Ex. C --Letter from D. Blaine Sanders.pdf(57972 bytes) Ex. D --Email from LCJ to DBS Feb 19.pdf(106225 bytes) Ex. E --E-mail from DBS to LCJ Feb. 21.pdf(86183 bytes) Ex. F --E-mail DBS to LCJ Oct. 30.pdf(81116 bytes) Ex. G -- Letter DBS to LCJ Nov 12.pdf(86063 bytes)

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

TERESA H. EARNHARDT,

Opposer,

v.

KERRY EARNHARDT, INC.,

Applicant.

TERESA H. EARNHARDT,

Opposer,

v.

KERRY EARNHARDT, INC.,

Applicant.

Opposition No.: 91205331 (parent)

Application Serial No. 85/383,910

**Trademark: EARNHARDT COLLECTION
(Intl. Class 20)**

Opposition No.: 91205338

Application Serial No. 85/391,456

**Service Mark: EARNHARDT COLLECTION
(Intl. Class 37)**

**APPLICANT'S MOTION TO DISMISS AS A SANCTION FOR OPPOSER'S
FAILURE TO APPEAR AT HER DEPOSITION
AND ALTERNATIVE SECOND MOTION TO COMPEL**

Applicant, Kerry Earnhardt, Inc. ("KEI") hereby moves pursuant to Rules 2.120(e) and 2.120(g) of the Trademark Rules of Procedure (the "Trademark Rules") for entry of an order dismissing this action as a discovery sanction against Opposer, Teresa H. Earnhardt ("Ms. Earnhardt" or "Opposer"). The basis for this request is Ms. Earnhardt has refused—since February 2013—to agree to a date for her deposition or to attend her properly noticed deposition, although this is a proceeding that she initiated. In the alternative, KEI requests an order compelling Ms. Earnhardt's attendance at her deposition. Because of the nature of this motion, this pleading also will serve as KEI's brief. As grounds for this motion, KEI shows that:

- 1) Ms. Earnhardt commenced these *inter partes* proceedings on May 16, 2012, seeking to oppose KEI's applications to register the mark EARNHARDT COLLECTION in

International Classes 30 and 37 for custom homes and furniture. (See Second Amended Notice of Opposition.) KEI is owned jointly by Kerry Earnhardt, a former NASCAR race car driver and son of the late Dale Earnhardt, and Rene Earnhardt, Kerry's wife. (See Answer, Fifth and Seventh Defenses; Applicant's Resp. to Opposer's Interrog. Nos. 3, 5.) Ms. Earnhardt, who is Kerry Earnhardt's stepmother, alleges that she owns rights in the designations DALE EARNHARDT and EARNHARDT for automobile racing exhibitions and various sports-related collectibles—though not custom homes or furniture. Despite this difference, Opposer claims that she would be damaged if KEI were issued registrations for the marks in its applications. (See Second Amended Notice of Opposition, ¶¶ 9-10, 30.)

2) Ms. Earnhardt's allegations put at issue, among other things, her use and ownership of the designations DALE EARNHARDT and EARNHARDT. Accordingly, KEI has sought to depose Ms. Earnhardt to obtain discovery into these issues and has served Ms. Earnhardt with a Notice of Deposition setting her deposition for December 5, 2013. (See Notice of Deposition, attached as **Exhibit A**.) Ms. Earnhardt's counsel, however, has informed KEI's counsel that he has been unable to obtain his client's agreement to appear for her deposition as noticed or at any alternative date. (See E-mail from Larry C. Jones to D. Blaine Sanders, dated November 26, 2013, attached as **Exhibit B**.)

3) Prior to noticing Ms. Earnhardt's deposition, KEI repeatedly sought to schedule her deposition at a mutually convenient time through agreement of the parties.

a) KEI first asked Ms. Earnhardt's counsel, Larry Jones, for available dates to schedule Ms. Earnhardt's deposition on February 4, 2013 during a telephone call between counsel. Mr. Jones responded by stating that Opposer wished to depose KEI's President, Rene Earnhardt. Each counsel was to obtain available dates for their respective client's depositions.

- b) On February 13, 2013, KEI's counsel wrote Mr. Jones, again requesting available dates for Ms. Earnhardt's deposition and providing dates for Mr. Jones to depose Rene Earnhardt. (*See* Letter from D. Blaine Sanders to Larry C. Jones, dated February 13, 2013, attached as **Exhibit C**.) Yet, instead of providing available dates for Ms. Earnhardt's deposition, Mr. Jones noticed Rene Earnhardt's deposition for February 28, 2013. In an e-mail providing KEI's counsel with a copy of that notice, Mr. Jones asked for a 60-day extension of the discovery period and stated, "if you are willing to stipulate to that extension, I would be willing to reschedule the deposition of Rene Earnhardt for a date subsequent to March 5," the then-scheduled close of the discovery period. (*See* E-mail from Larry C. Jones to D. Blaine Sanders, dated February 19, 2013, attached as **Exhibit D**.) KEI responded through counsel on February 21, 2013, once again seeking Opposer's cooperation with deposition scheduling and document production. (*See* E-mail from D. Blaine Sanders to Larry C. Jones, dated February 21, 2013, attached as **Exhibit E**.) At that same time, KEI noticed Ms. Earnhardt's deposition for March 4, 2013, to preserve its discovery rights. (*Id.*) Opposer's failure to produce documents resulted in KEI's first Motion to Compel, which eventually resulted in documents being produced.
- c) The parties subsequently agreed to reschedule the depositions of Ms. Earnhardt and Rene Earnhardt and to stipulate to a 60-day extension of the discovery period. The discovery period was further extended as a result of Opposer's filing of a Motion for Leave to Amend her Notice of Opposition on April 23, 2013, and a Motion for Partial Summary Judgment on May 28, 2013. On October 22, 2013, the Board denied Ms. Earnhardt's Motion for Partial Summary Judgment and

proceedings in this matter were resumed. The discovery period is now set to close on February 20, 2014.

d) On October 30, 2013, following the Board's decision denying Ms. Earnhardt's Motion for Partial Summary Judgment, counsel for KEI again contacted counsel for Ms. Earnhardt, seeking available dates to schedule Ms. Earnhardt's deposition. (See E-mail from D. Blaine Sanders to Larry C. Jones, dated October 30, 2013, attached as **Exhibit F**.)

4) On November 12, 2013, Mr. Jones called KEI's counsel to report that his client had not responded to his request that she provide dates when she could be deposed. Later that day, KEI served Ms. Earnhardt with a Notice of Deposition, scheduling Ms. Earnhardt's deposition for December 5, 2013. (See **Exhibit A**.) In his cover letter serving the Notice, KEI's counsel, Mr. Sanders, offered to reschedule Ms. Earnhardt's deposition if she promptly requested a different date. (See Letter from D. Blaine Sanders to Larry C. Jones, dated November 12, 2013, attached as **Exhibit G**.)

5) On November 26, 2013, Mr. Jones informed KEI's counsel that Ms. Earnhardt would not attend her deposition as noticed, stating: "**We are unable to obtain an agreement from our client to appear for her deposition on December 5, and, at this time, we have no information as to alternative dates on which Ms. Earnhardt can be available for her deposition.**" (See E-mail from Larry C. Jones to D. Blaine Sanders, dated November 26, 2013, attached as **Exhibit B** (emphasis added).)

6) Trademark Rule 2.120(g) provides, in pertinent part, that the Board may impose sanctions in the event "a party. . . fails to attend the party's . . . discovery deposition, after being served with proper notice." See 37 C.F.R. § 2.120(g)(2). These sanctions include deeming matters encompassed by the discovery "established for purpose of the action"; "prohibiting the

disobedient party from supporting or opposing designated claims or defenses”; “striking pleadings in whole or in part”; “dismissing the action or proceeding in whole or in part”; and “rendering a default judgment against the disobedient party.” *See* 37 C.F.R. §2.120(g)(1) (providing that Board may impose the sanctions set forth in Fed. R. Civ. P. 37(b)(2)).

7) The Trademark Rules, like the Federal Rules of Civil Procedure on which they are based, authorize these sanctions because a party’s failure to attend her own deposition “strikes at the very heart of the discovery system” by threatening “the fundamental assumption on which the whole apparatus of discovery was designed, that in the vast majority of instances, the discovery system will be self-executing.” *See* James W.M. Moore, MOORE’S FEDERAL PRACTICE, § 37.90 (3d Ed. 2013) (observing that outright refusals by parties to participate in discovery “halt the case development process dead in its tracks and threaten the underpinnings of the discovery system”).

8) Since early February, Opposer has been able to “halt the case development process dead in its tracks” by refusing to participate in the discovery process. *Id.* Ms. Earnhardt’s willful refusal to attend her properly-noticed deposition deprives KEI of the ability to test her allegations; unduly delays resolution of these proceedings; and unfairly prejudices KEI in its defense of Ms. Earnhardt’s claims. Moreover, though KEI has repeatedly sought in good faith to confer with Ms. Earnhardt’s counsel to secure her cooperation with her discovery obligations, she has persistently refused those overtures. Indeed, the course of this case suggests that Ms. Earnhardt’s counsel has made efforts to make her available for deposition, especially since the TTAB denied her Motion for Partial Summary Judgment (which motion itself had the effect of delaying discovery). It is plain that Ms. Earnhardt is the source of the problem.

9) Accordingly, KEI submits that the Board should dismiss Ms. Earnhardt’s oppositions and enter judgment against her in this matter as a discovery sanction pursuant to

Trademark Rule 2.120(g)(2). While dismissal is a serious sanction, it is especially appropriate given that Ms. Earnhardt initiated this opposition proceeding against her stepson's company, but now has refused to participate in discovery. It is not hard to imagine that for Ms. Earnhardt, this proceeding is about more than attempting to assert trademark rights.

10) In the alternative, in the event the Board decides that the dismissal sanction is not warranted in this instance, KEI requests that the Board issue an order compelling Ms. Earnhardt to attend her deposition, as properly noticed by KEI.

WHEREFORE, KEI requests that the Board:

- a) Dismiss Ms. Earnhardt's oppositions, with prejudice, and enter judgment against her as a discovery sanction issued pursuant to Trademark Rule 2.120(g)(2);
- b) Alternatively, issue an order compelling Ms. Earnhardt to attend her deposition upon service of a notice of deposition by KEI pursuant to Trademark Rule 2.120(e); and
- c) Grant such other and further relief as the Board deems just and appropriate.

This 4th day of December, 2013.



D. Blaine Sanders
Matthew F. Tilley
ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, North Carolina 28246-1900
Telephone: (704) 377-2536
Facsimile: (704) 373-4000
E-mail: bsanders@rbh.com; mtalley@rbh.com
Attorneys for Kerry Earnhardt, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the party listed below by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

Larry C. Jones
Carla Clements
Alston & Bird LLP
101 S. Tryon Street, Suite 4000
Charlotte, North Carolina 28280-4000

This 4th day of December, 2013



D. Blaine Sanders

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

TERESA H. EARNHARDT,

Opposer,

v.

KERRY EARNHARDT, INC.,

Applicant.

Opposition No.: 91205331 (parent)

Application Serial No. 85/383,910

**Trademark: EARNHARDT COLLECTION
(Intl. Class 20)**

TERESA H. EARNHARDT,

Opposer,

v.

KERRY EARNHARDT, INC.,

Applicant.

Opposition No.: 91205338

Application Serial No. 85/391,456

**Service Mark: EARNHARDT COLLECTION
(Intl. Class 37)**

PLEASE TAKE NOTICE that on December 5, 2013, at 9:00 a.m. and continuing thereafter until completed, at the offices of Robinson, Bradshaw & Hinson, P.A., 101 N. Tryon Street, Suite 1900, Charlotte, NC 28246, counsel for Applicant Kerry Earnhardt, Inc. will take the deposition upon oral examination of Opposer Teresa H. Earnhardt pursuant to the Rules of the Trademark Trial and Appeal Board, before a Notary Public or an officer authorized to administer oaths. This deposition will be recorded by sound, sound-and-visual, and/or stenographic means for purposes of discovery, for use at trial, and for such other purposes authorized or permitted by the rules.

This 12th day of November, 2013.



D. Blaine Sanders
bsanders@rbh.com
Matthew F. Tilley
mtilley@rbh.com
ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246-1900
(704) 377-2536

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE TO TAKE DEPOSITION** has been served upon each of the parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

Larry C. Jones
Carla H. Clements
Alston & Bird LLP
Bank of America Plaza
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280-4000

This 12th day of November, 2013.



D. Blaine Sanders

Tilley, Matthew

From: Jones, Larry <Larry.Jones@alston.com>
Sent: Tuesday, November 26, 2013 1:35 PM
To: BISanders@RBH.com
Cc: Clements, Carla; Tilley, Matthew
Subject: Deposition Notice; Earnhardt v. KEI
Attachments: Depo Notice & Letter_1.PDF

Blaine:

In response to your attached letter of November 12 and your notice of the December 5 deposition, we are unable to obtain an agreement from our client to appear for her deposition on December 5, and, at this time, we have no information as to alternative dates on which Ms. Earnhardt can be available for her deposition.

If I am provided such information, I will forward it to you promptly.

Larry C. Jones

Alston & Bird LLP
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280-4000
Direct Phone: (704) 444-1019
Direct Fax: (704) 444-1759
Email: Larry.Jones@Alston.com

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February 13, 2013

VIA E-MAIL AND FIRST CLASS MAIL

Larry C. Jones
Alston & Bird, LLP
Bank of America Plaza
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280-4000

Re: Teresa H. Earnhardt v. Kerry Earnhardt, Inc.

Dear Larry:

I am writing you about discovery. Concerning documents, Matthew and Carla have been going back and forth now for more than two weeks about Teresa's incomplete document production. Our most recent understanding is that your firm has requested the documents from Teresa, but she has not responded. This, of course, is not surprising to our client, but we must insist that Teresa comply with her discovery obligations, especially given that she initiated this proceeding. If we do not have a firm date by which the remaining documents will be produced within one week of this letter, we will have no choice but to file a motion to compel.

Regarding deposition scheduling, when I recently asked you for dates for the taking of Teresa's deposition, you stated that you wanted to take Rene's deposition. Rene is available with some flexibility the mornings of February 26, 27 or 28. Please let me know of Teresa's availability.

As you know, the March 5 discovery cutoff is approaching, so we need to make some progress.

Sincerely,

ROBINSON BRADSHAW & HINSON, P.A.



D. Blaine Sanders

Larry Jones
February 13, 2013
Page 2

DBS/ksl

cc: Kerry Earnhardt, Inc. (via email)
Matthew F. Tilley (via email)
Carla H. Clements (via email)

Tilley, Matthew

From: Jones, Larry <Larry.Jones@alston.com>
Sent: Tuesday, February 19, 2013 10:34 AM
To: Sanders, Blaine
Cc: Tilley, Matthew
Subject: Teresa H. Earnhardt v. Kerry Earnhardt, Inc.; TTAB Opposition Nos. 91205331 and 91205338
Attachments: Notice Rene Earnhardt Deposition_1.PDF

Blaine:

Attached is a courtesy copy of the "Opposer's Notice of Deposition of Rene Earnhardt." The service copy is being formally served via mail today. Inasmuch as your letter of February 13 indicated that Rene Earnhardt would be available for a deposition on either of February 26, 27 or 28, the deposition notice specifies February 28 as the date of that deposition.

In your letter of February 13, you noted that Opposer Teresa Earnhardt's document production is not yet complete, and you also inquired as to the dates on which Teresa Earnhardt could be made available for her deposition. As you may know, my associate, Carla Clements, is out of the office for two weeks on her honeymoon, and I understand that, prior to Carla leaving for her honeymoon, Teresa Earnhardt did not complete her document production or identify dates on which she would be available for a deposition

Accordingly, and inasmuch as the discovery period is currently set to close March 5, I suggest that we jointly stipulate to an extension of 60 days of the discovery period and all subsequent periods and deadlines. Further, if you are willing to stipulate to that extension, I would be willing to reschedule the deposition of Rene Earnhardt for a date subsequent to March 5.

Please let me know whether you prefer to proceed with Rene Earnhardt's deposition on February 28, as noticed. Please also let me know whether you consent to my filing of a stipulated extension of the discovery period for 60 days.

Larry C. Jones

Alston & Bird LLP
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280-4000
Direct Phone: (704) 444-1019
Direct Fax: (704) 444-1759
Email: Larry.Jones@Alston.com

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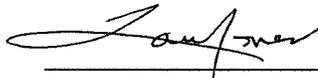
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Teresa H. Earnhardt,	§	Consolidated Opposition Nos.
	§	91205331 (parent) and 91205338
Opposer,	§	
	§	In the matter of:
vs.	§	
	§	Application Serial No. 85/383,910
Kerry Earnhardt, Inc.,	§	Mark: EARNHARDT COLLECTION
	§	(Intl. Class 20)
Applicant.	§	
	§	Application Serial No. 85/391,456
	§	Mark: EARNHARDT COLLECTION
		(Intl. Class 37)

**OPPOSER'S NOTICE OF DEPOSITION OF
RENE EARNHARDT**

PLEASE TAKE NOTICE that Opposer will take the deposition of Rene Earnhardt, President of Applicant, Kerry Earnhardt, Inc. The deposition will take place at the offices of Alston & Bird LLP, 101 S. Tryon Street, Suite 4000, Charlotte, North Carolina, at 9:00 a.m., Thursday, February 28, 2013. This deposition shall be taken by stenographic means and shall continue on the specified date until completed.

Respectfully submitted,



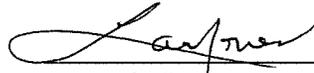
Larry C. Jones
Carla H. Clements
Alston & Bird, LLP
Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, North Carolina 28280-4000
Telephone: (704) 444-1000

Attorneys for Opposer,
Teresa H. Earnhardt

CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Opposer's Notice of Deposition of Rene Earnhardt" was duly served on Applicant by depositing a copy of same in the United States mail, first-class postage prepaid, on the 19th day of February, 2013 addressed to Applicant's attorneys of record as follows:

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



Larry C. Jones

Tilley, Matthew

From: Sanders, Blaine
Sent: Thursday, February 21, 2013 5:19 PM
To: 'larry.jones@alston.com'
Cc: Tilley, Matthew
Subject: re: Teresa H. Earnhardt v. Kerry Earnhardt, Inc.; TTAB Opposition Nos. 91205331 and 91205338
Attachments: Notice of Deposition.pdf

Larry,

Our side understands that you have a difficult and uncooperative client, and as a result we have been patient in trying to work with you. Her conduct, however, does not excuse your email below.

Even though we doubt that Teresa brought this Opposition for legitimate business reasons, we have acted consistently with normal litigation practice. We have complied with our discovery obligations and extended to you the typical courtesies of our bar, including trying to cooperate in the timing of document production and the scheduling of depositions. What we have received in return from your side is stalling and evasion, both with respect to document production and the scheduling of Teresa's deposition. You have practiced long enough to know that discovery is not a one way street.

For you to notice Rene's deposition when you have not completed document production nor given us dates for Teresa's deposition took a lot of nerve. Please withdraw your notice by the close of business on February 25 or we will move for a protective order. Because your side has failed to provide dates for Teresa's deposition, I am attaching a notice scheduling her deposition within the discovery period, to protect KEI's rights. A hard copy is in the mail. We will be willing to reschedule if your side begins cooperating in discovery.

Concerning document production, you of course know that Teresa's failure to fulfill her obligations is no excuse for non-compliance. Because you have not given us any idea of when she might comply, we have no choice but to file a motion to compel. Relatedly, I am having a hard time understanding why you brought up Carla's honeymoon—you are the senior lawyer on this case and thus primarily responsible for Teresa meeting her obligations.

As for consenting to an extension of the discovery period, I cannot see why we would do that. The reason for the extension would be that your client is unwilling to comply with her discovery obligations, and we do not have any idea if or when she might begin complying. If you need to make such a motion because of your client issues, go ahead but I do not see why we should tacitly approve. Please let me know if I am missing something here.

REDACTED - SETTLEMENT COMMUNICATIONS



Regards. Blaine

D. Blaine Sanders
Robinson Bradshaw & Hinson
101 North Tryon Street, Suite 1900

Charlotte, NC 28246

P: 704.377.8344

F: 704.373-3944

bsanders@rbh.com

www.rbh.com

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From: Jones, Larry [mailto:Larry.Jones@alston.com]

Sent: Tuesday, February 19, 2013 10:34 AM

To: Sanders, Blaine

Cc: Tilley, Matthew

Subject: Teresa H. Earnhardt v. Kerry Earnhardt, Inc.; TTAB Opposition Nos. 91205331 and 91205338

Blaine:

Attached is a courtesy copy of the "Opposer's Notice of Deposition of Rene Earnhardt." The service copy is being formally served via mail today. Inasmuch as your letter of February 13 indicated that Rene Earnhardt would be available for a deposition on either of February 26, 27 or 28, the deposition notice specifies February 28 as the date of that deposition.

In your letter of February 13, you noted that Opposer Teresa Earnhardt's document production is not yet complete, and you also inquired as to the dates on which Teresa Earnhardt could be made available for her deposition. As you may know, my associate, Carla Clements, is out of the office for two weeks on her honeymoon, and I understand that, prior to Carla leaving for her honeymoon, Teresa Earnhardt did not complete her document production or identify dates on which she would be available for a deposition

Accordingly, and inasmuch as the discovery period is currently set to close March 5, I suggest that we jointly stipulate to an extension of 60 days of the discovery period and all subsequent periods and deadlines. Further, if you are willing to stipulate to that extension, I would be willing to reschedule the deposition of Rene Earnhardt for a date subsequent to March 5.

Please let me know whether you prefer to proceed with Rene Earnhardt's deposition on February 28, as noticed. Please also let me know whether you consent to my filing of a stipulated extension of the discovery period for 60 days.

Larry C. Jones

Alston & Bird LLP

101 S. Tryon Street, Suite 4000

Charlotte, NC 28280-4000

Direct Phone: (704) 444-1019

Direct Fax: (704) 444-1759

Email: Larry.Jones@Alston.com

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Tilley, Matthew

From: Jones, Larry <Larry.Jones@alston.com>
Sent: Wednesday, October 30, 2013 2:46 PM
To: Sanders, Blaine
Cc: Tilley, Matthew; Clements, Carla
Subject: Deposition Scheduling in Earnhardt v. KEI

Blaine:

Will do--We will check with Ms. Earnhardt and revert to you with a list of dates as soon as she provides them to us.

Larry C. Jones

Alston & Bird LLP
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280-4000
Direct Phone: (704) 444-1019
Direct Fax: (704) 444-1759
Email: Larry.Jones@Alston.com

From: Sanders, Blaine [<mailto:BSanders@rbh.com>]
Sent: Wednesday, October 30, 2013 2:43 PM
To: Jones, Larry
Cc: Tilley, Matthew; Clements, Carla
Subject: Deposition Scheduling in Earnhardt v. KEI

Dear Larry,

Given that the TTAB's order on summary judgment resumes the proceedings, we'd like go ahead and set a time for Teresa's deposition. We'd like to shoot for the last two weeks in November or the first week in December. We can give you dates for Rene's deposition when we hear back from you, and we can try to schedule Rene's the day after Teresa's for efficiency's sake.

I look forward to hearing back from you soon.

Regards. Blaine

D. Blaine Sanders

Robinson Bradshaw & Hinson
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
P: 704.377.8344
F: 704.373-3944

bsanders@rbh.com
www.rbh.com

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November 12 2013

BY FIRST CLASS MAIL

Larry C. Jones
Carla H. Clements
Alston & Bird, LLP
Bank of America Plaza
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280-4000

Re: Teresa H. Earnhardt v. Kerry Earnhardt, Inc.

Dear Larry and Carla:

Given that Ms. Earnhardt has not responded to our October 30 request for deposition dates, I am enclosing a notice scheduling her deposition for December 5. If you do hear soon from Ms. Earnhardt and wish to re-schedule, please let me know. Also, if it becomes obvious to you that Ms. Earnhardt is not going to appear on December 5, please let me know and we will go ahead and file a Motion to Compel.

Thank you for your efforts to communicate concerning this issue.

Very truly yours,

ROBINSON BRADSHAW & HINSON, P.A.



D. Blaine Sanders

DBS/ksl

cc: Kerry Earnhardt, Inc. (via email)
Matthew F. Tilley (via email)

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

TERESA H. EARNHARDT,

Opposer,

v.

KERRY EARNHARDT, INC.,

Applicant.

Opposition No.: 91205331 (parent)

Application Serial No. 85/383,910

**Trademark: EARNHARDT COLLECTION
(Intl. Class 20)**

TERESA H. EARNHARDT,

Opposer,

v.

KERRY EARNHARDT, INC.,

Applicant.

Opposition No.: 91205338

Application Serial No. 85/391,456

**Service Mark: EARNHARDT COLLECTION
(Intl. Class 37)**

PLEASE TAKE NOTICE that on December 5, 2013, at 9:00 a.m. and continuing thereafter until completed, at the offices of Robinson, Bradshaw & Hinson, P.A., 101 N. Tryon Street, Suite 1900, Charlotte, NC 28246, counsel for Applicant Kerry Earnhardt, Inc. will take the deposition upon oral examination of Opposer Teresa H. Earnhardt pursuant to the Rules of the Trademark Trial and Appeal Board, before a Notary Public or an officer authorized to administer oaths. This deposition will be recorded by sound, sound-and-visual, and/or stenographic means for purposes of discovery, for use at trial, and for such other purposes authorized or permitted by the rules.

This 12th day of November, 2013.



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Matthew F. Tilley
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ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
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(704) 377-2536

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE TO TAKE DEPOSITION** has been served upon each of the parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

Larry C. Jones
Carla H. Clements
Alston & Bird LLP
Bank of America Plaza
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280-4000

This 12th day of November, 2013.



D. Blaine Sanders