

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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BUO

Mailed: June 2, 2015

**Opposition No. 91205331 (Parent)**  
Opposition No. 91205338

*Ms. Teresa H. Earnhardt*

*v.*

*Kerry Earnhardt, Inc.*

**Benjamin U. Okeke, Interlocutory Attorney:**

This case now comes up for consideration of Opposer's motion, filed February 20, 2015, to strike "*Applicant's Second Notice of Reliance, Applicant's Third Notice of Reliance*, and the materials submitted therewith," filed October 30, 2014. 67 TTABVUE 2. The Board has considered the parties' submissions and presumes the parties' familiarity with the arguments made therein. The parties' arguments will not be summarized herein except as necessary to explain the Board's decision.

Trademark Rule 2.120(j) provides for the introduction, by notice of reliance, of a discovery deposition, answer to interrogatory, admission or written disclosure. Rule 2.120(j) states:

- (1) The discovery deposition of a party or of anyone who at the time of taking the deposition was an officer, director or managing agent of a party, or a person designated by a party pursuant to Rule 30(b)(6) or Rule 31(a) of the Federal Rules of Civil Procedure, may be offered in evidence by an adverse party.

- (2) ... the discovery deposition of a witness, whether or not a party, shall not be offered in evidence unless ... upon a showing that such exceptional circumstances exist as to make it desirable, in the interest of justice, to allow the deposition to be used.

37 C.F.R. § 2.120(j)(1)-(2). *See also* TBMP § 704.09 (2014).

As pertinent here, Applicant submitted, as an exhibit in connection with its second and third notices of reliance, a copy of the deposition transcript of Judy Queen, including exhibits from that deposition. 53 TTABVUE and 54 TTABVUE. Opposer, on January 3, 2015, filed a deposition transcript of Ms. Queen, taken during Opposer's testimony period. Applicant argues that "[r]ather than testify herself, Opposer called Ms. Queen to testify about DEI's licensing program. There can be no doubt, therefore, about Ms. Queen's status as Opposer's authorized agent to speak to such matters." 69 TTABVUE 6. Applicant alleges that "Opposer owns DEI and conducts virtually all of her business through that entity." *Id.* at 2. Opposer contends that "[n]either Ms. Queen nor her employer, DEI, is a party in this proceeding," and therefore, Applicant's reliance on her *discovery* deposition testimony is inappropriate.

The Board considered a similar question in *Carefirst of Maryland Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d 1492 (TTAB 2005). In *Carefirst of Maryland Inc.*, the Board determined that it would be impractical to "get into the minute details" of the witness' employment; but that because the applicant "viewed Mr. Lewis as knowledgeable enough to submit his affidavit in support of applicant's motion for summary judgment," the applicant's motion to strike the opposer's notice of reliance containing the discovery deposition of Mr. Lewis, based upon the

argument that he was not an officer or agent of applicant, should be denied. *See Carefirst of Maryland Inc.*, 77 USPQ2d at 1498-99.

Here, we are not faced with a final decision on the merits of the case, but a motion to strike a party's notice of reliance. Therefore, inasmuch as "getting into the minute details" of Ms. Queen's employment, or determining any agency relationship she may have with Opposer, may require the Board to look beyond the face of the notice of reliance, determination of this issue appears to be particularly inappropriate under the present circumstances. *See Carl Karcher Enters. Inc. v. Carl's Bar & Delicatessen Inc.*, 98 USPQ2d 1370, 1371-72 n.2 (TTAB 2011) (it is not the Board's policy to read trial testimony or other trial evidence prior to final decision). Moreover, it is important to note that Opposer has herself offered the discovery deposition and exhibits of a non-party witness under her First and Second Notices of Reliance.<sup>1</sup> 45 TTABVUE 2-3. A discovery deposition not properly offered in evidence under Trademark Rule 2.120(j) may nevertheless be considered by the Board if the nonoffering party improperly offers a discovery deposition in the same manner. *See, e.g. Plus Prods. v. Don Hall Labs.*, 191 USPQ 584, 585 n.2 (TTAB 1976). *See also*, TBMP § 704.09.

In view of the foregoing, Opposer's motion to strike Applicant's Second and Third Notices of Reliance is **DENIED**.

Inasmuch as the proceeding has been fully briefed, briefing is **CLOSED**, and a decision will be rendered in due course.

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<sup>1</sup> Opposer submitted excerpts from the February 6, 2014, discovery deposition of Rene Earnhardt, whose relationship to the parties in this proceeding is unknown.