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

Proceeding	91206212
Party	Plaintiff Carefusion 2200, Inc.
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Date	04/21/2015
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**THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

CareFusion 2200, Inc.)	Case No. 2:15-mc-00016
)	
Plaintiff,)	(Pending Before T.T.A.B. In Trademark
)	Opposition No. 91-206,212)
v.)	
)	Judge Edmund A. Sargus
Entrotech Life Sciences, Inc.)	
)	Magistrate Judge Norah McCann King
Defendant.)	

**DR. JOHN S. FOOR, M.D.’S REPLY IN SUPPORT OF
MOTION TO QUASH OR, IN THE ALTERNATIVE, TO MODIFY
THE SECOND IMPROPER SUBPOENA ISSUED BY CAREFUSION 2200, INC.**

Dr. John S. Foor, M.D. moved to quash the first attempt by CareFusion 2200 Inc. (“CareFusion”) to serve him with a subpoena because the subpoena was procedurally defective and because it failed to provide him with a reasonable time to comply. Dr. Foor moved to quash the second attempt by CareFusion to serve him with a subpoena because it failed to provide adequate time to respond and was, therefore, improper, unreasonable and overly burdensome. In its Memorandum in Opposition, CareFusion does *not* dispute these indisputable points. In fact, CareFusion admits it “was aware that Dr. Foor was not available during that time,” but nevertheless noticed Dr. Foor’s testimony deposition. *See* Mem. In Opp. (Doc. # 5), at 3. Standing alone, CareFusion’s failure to oppose the positions stated by Dr. Foor in his Motions requires that the subpoenas be quashed. *See generally, id.*

Rather than address the merits of Dr. Foor's Motions before this Court, CareFusion has chosen to raise evidentiary issues that are for the TTAB to decide. CareFusion's positions on these issues also are wrong. CareFusion ignores Dr. Foor's testimony about his employment at the time of his discovery deposition and claims Entrotech Life Sciences, Inc. ("Entrotech") is being unreasonable and somehow engaging in "procedural shenanigans" to exclude Dr. Foor's testimony. *Id.* at 4. Entrotech is not engaged in gamesmanship related to Dr. Foor's testimony. It simply seeks to hold CareFusion in compliance with the Trademark Rules of Practice and the Federal Rules of Civil Procedure, which guide the submission of evidence, including how to properly subpoena a non-party witness before the Board.

Dr. Foor's June 17, 2014 deposition was taken for purposes of fact discovery only; he was and remains a non-party to the opposition proceeding. The fact Dr. Foor held the title of "medical director" in the past is not sufficient to satisfy the requirement under the Trademark Rules of Practice that he be an officer, director, managing agent, or person designated to testify under Fed. R. Civ. P. 30(b)(6) or 31(a)(4) *at the time of his deposition* in order for his testimony to automatically be admissible under a Notice of Reliance. 37 C.F.R § 2.120(j). Regardless of Entrotech's preliminary discovery disclosures, Dr. Foor made clear that at the time of his discovery deposition he was merely a non-salaried medical consultant for Entrotech, and nothing more. CareFusion was well aware that Dr. Foor was not an officer or "medical director" of Entrotech at the time of his discovery deposition. Specifically, while CareFusion improperly filed his discovery deposition transcript as evidence under a Notice of Reliance pursuant to 37 C.F.R § 2.120(j), it also issued an improper subpoena for his testimony deposition the same day, well aware its Notice of Reliance was ultimately doomed because Dr. Foor was *not* a director of

Entrotech at the time his deposition was taken.¹

Additionally, CareFusion does not dispute that its submission of Dr. Foor's discovery deposition to the TTAB under a Notice of Reliance was improper. Instead, it argues that it would have "preferred" to have relied on his discovery deposition via a stipulation between the parties "in order to avoid further inconvenience to Dr. Foor," *see* Mem. In Opp. Doc. 5, at 2-3, and claims that such stipulation is "common practice" before the Board, although CareFusion fails to cite any support for that position. CareFusion's preference is both self-serving and prejudicial to Entrotech for the reason that, because CareFusion did not notice Dr. Foor's discovery deposition as trial testimony, Entrotech's counsel did not cross-examine Dr. Foor. *See* 37 C.F.R. § 2.123(e)(3) ("Every adverse party shall have full opportunity to cross-examine each witness."). In essence, CareFusion seeks to either require that Entrotech allow the admission of Dr. Foor's discovery deposition without having had the opportunity to cross-examine him, or, to force Entrotech to call Dr. Foor as a testimony witness during its own testimony period to clarify any issues arising from his discovery deposition. CareFusion should not be allowed to "dictate" (to use its own words) through its procedural missteps Entrotech's trial strategy by forcing Entrotech to (a) stipulate to the admission of Dr. Foor's deposition without having had the opportunity to examine him, and/or (b) call Dr. Foor as a witness during its own testimony period, which it was not otherwise intending to do.²

Entrotech does not have to modify its trial strategy. It was CareFusion's responsibility to issue a subpoena that was procedurally sound and gave Dr. Foor a reasonable time to comply. CareFusion failed at both.

¹ The admissibility of Dr. Foor's testimony in the underlying trademark opposition action is an issue for the TTAB, not this Court. Entrotech will be separately moving the Board to strike CareFusion's Notice of Reliance with regard to Dr. Foor's fact deposition as procedurally improper under 37 C.F.R § 2.120(j) in due course.

² Entrotech never intended to take the testimony of Dr. Foor during its testimony period; indeed, Entrotech's pretrial disclosures, which it served on CareFusion on April 6, 2015, do not list Dr. Foor as a witness.

The parties currently await a decision from the Board regarding CareFusion's Motion to Extend its Testimony Period, which is potentially determinative of the Motion to Quash in this Court. Unless the Board grants an extension of the testimony period and allows CareFusion to submit additional evidence, namely Dr. Foor's testimony deposition, any additional deposition of Dr. Foor is moot. This Court need not wait, however, for the Board's decision in order to quash the subpoena for the reasons originally outlined in Dr. Foor's Motion to Quash and which CareFusion has not disputed in any way.

For the foregoing reasons, Dr. Foor respectfully requests that this Court quash, or in the alternative modify, the second improper subpoena served by CareFusion.

Respectfully submitted,

/s/ Timothy R. Bricker

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically on April 20, 2015. Notice was sent by operation of the Court's electronic filing system to all counsel who have entered an appearance and any parties who have entered an appearance through counsel. The parties may access this filing through the Court's ECF system.

/s/ Timothy R. Bricker
One of the Attorneys for Dr. John S. Foor, M.D.