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Filing date: **05/01/2015**

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

|                        |   |
|------------------------|---|
| Proceeding             | 91206212  |
| Party                  | Defendant<br>entrotech, inc.  |
| Correspondence Address | LISA M. GRIFFITH<br>FISH & RICHARDSON<br>P O BOX 1022<br>MINNEAPOLIS, MN 55440 1022<br>UNITED STATES<br>tmdoctc@fr.com, hickey@fr.com, martens@fr.com, dylan-hyde@fr.com, morris@fr.com |
| Submission             | Motion to Strike  |
| Filer's Name           | Erin M. Hickey  |
| Filer's e-mail         | tmdoctc@fr.com, hickey@fr.com, ly@fr.com, morris@fr.com   |
| Signature              | /Erin M. Hickey/  |
| Date                   | 05/01/2015  |
| Attachments            | 2015-05-01 Motion to Strike - Foor Discovery Deposition.pdf(164403 bytes )<br>2015-05-01 Declaration of ENH.pdf(503199 bytes )  |

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

In the matter of application Serial Nos.:

85/499,349 for the mark **CHLORADERM**  
85/499,345 for the mark **CHLORABSORB**  
85/499,337 for the mark **CHLORABOND**  
85/499,332 for the mark **CHLORADRAPE**

Filed on December 19, 2011

Published in the *Official Gazette* on May 29, 2012

CAREFUSION 2200, INC.,

*Opposer,*

v.

ENTROTECH LIFE SCIENCES, INC.,

*Applicant.*

Combined Opposition Proceeding No.: 91-206,212

United States Patent and Trademark Office  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

**APPLICANT'S MOTION TO STRIKE OPPOSER'S NOTICE OF RELIANCE  
OFFERING IN EVIDENCE THE DISCOVERY DEPOSITION OF NON-PARTY  
WITNESS, DR. JOHN S. FOOR, M.D., UNDER 37 C.F.R. § 2.120(j)**

Applicant Entrotech Life Sciences, Inc. ("Applicant") respectfully moves this Trademark Trial and Appeal Board (the "Board") to strike Opposer's Notice of Reliance offering in evidence the discovery deposition of non-party witness, Dr. John S. Foor, M.D., on grounds the Notice of Reliance plainly violates the Trademark Rules of Practice, which guide the admissibility of evidence in the Board's proceedings.

## LEGAL STANDARD

A party may move to strike an adversary's notice of reliance, in whole or in part, on grounds that the notice of reliance does not comply with the procedural requirements of the particular rule under which it was submitted. *See* T.B.M.P. § 532; *see also* *Boyds Collection Ltd. v. Herrington & Co.*, 65 U.S.P.Q.2d 2014, 2019-20 (T.T.A.B. 2003) (striking offering party's notice of reliance that offered in evidence testimony by affidavit when the adverse party never stipulated to the submission and admissibility of same).<sup>1</sup>

“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 under Fed. R. Civ. P. 30(b)(6) or 31(a)(4) to testify on behalf of a party) may be offered in evidence *by any adverse party*.” *See* T.B.M.P. § 704.09 (emphasis original). Otherwise, the discovery deposition of a witness, whether or not a party, ***may not be offered in evidence*** unless the parties have stipulated to its admissibility, if the offering party has established a showing of exceptional circumstances for allowing the discovery deposition to be in evidence, or if, during the offering party's testimony period, the witness was dead, outside of the United States, unable to testify because of age, illness, infirmity, or imprisonment, or could not be served with a subpoena to compel attendance at a testimonial deposition, all of which would require the Board's approval. *Id.*

## ARGUMENT

Here, Opposer's Notice of Reliance offering the discovery deposition of non-party witness, Dr. John S. Foor, M.D., which was taken under Rule 30(b)(1) of the Federal Rules of Civil Procedure, plainly does not meet the requirements of admissibility under Rule 704.09 of

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<sup>1</sup> Should the Board defer the merits of Applicant's Motion to Strike for after the final hearing on this matter, Applicant hereby reserves its right to maintain its objection to the admissibility of the discovery deposition of Dr. Foor in its trial brief and at the hearing on this matter.

the Trademark Rules of Practice and this Board should strike it from the record in this proceeding.<sup>2</sup> In particular, Dr. Foor was not “a party or ... 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” at the time his discovery deposition was taken on June 17, 2014 and none of the exceptions listed in the Rule applies – perhaps the most important of which is that Applicant refused to stipulate to the admissibility of Dr. Foor’s discovery deposition. *See* 37 C.F.R. § 2.120(j); T.B.M.P. § 704.09.

Importantly, Opposer’s Notice of Reliance has misled the Board in claiming that Dr. Foor was the “Medical Director” for Applicant on the date of his discovery deposition – June 17, 2014. Opposer is well aware that Dr. Foor did not have that position when his deposition was taken. Quite to the contrary, as Opposer is aware, Dr. Foor’s job, at the time of his discovery deposition (as well as today), is that of a respected vascular surgeon; indeed, he has an active practice and surgery schedule in Columbus, Ohio. Although Applicant identified Dr. Foor as a “medical director” in a preliminary discovery response, Dr. Foor no longer held that position when his deposition was taken on June 17, 2014, which he made very clear to Opposer’s counsel. Indeed, Dr. Foor confirmed at least twice during his discovery deposition that he was, in fact, not an employee of Applicant, but, at most, a non-salaried medical consultant from time to time:

Q. Are you employed by Entrotech Life Sciences?  
A. No.

(Deposition of Dr. John S. Foor, M.D. (“Foor Deposition”) at pg. 164:16-18)

Q. What is your current relationship with Entrotech?  
A. Right now, basically as a medical consultant.  
Q. Do you receive a salary from Entrotech?

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<sup>2</sup> Applicant requests that Dr. Foor's discovery deposition and its exhibits be stricken from the record in this proceeding.

A. I do not.

(Foor Deposition at pg. 183:10-15).

True and correct copies of the relevant excerpts from the Foor Deposition are attached hereto as **Exhibit A** to the Declaration of Erin M. Hickey, Esq. (“Hickey Decl.”). Tellingly, Opposer itself identified Dr. Foor as Applicant’s “Medical Consultant” (not a “Medical Director”) in Opposer’s Pre-Trial Disclosures served exactly one month before submitting its misleading Notice of Reliance. Attached hereto as **Exhibit B** to the Hickey Decl. is a true and correct copy of Opposer’s Pre-Trial Disclosures as served on February 5, 2015. Plainly, the role of a non-salaried medical consultant, for a witness whose primary job is that of a busy vascular surgeon, does not meet the criteria for his discovery deposition to be admissible under 37 C.F.R. § 2.120(j).

Not only was Dr. Foor not “a party or ... 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” at the time his discovery deposition was taken on June 17, 2014, but none of the exceptions for otherwise providing for the admissibility of the discovery deposition of such a witness is applicable here<sup>3</sup> (nor has Opposer tried to argue that any is in its Notice of Reliance, for that matter). Opposer also has not claimed that any “exceptional circumstances” exist, and it is very clear that Applicant declined to stipulate to the admissibility of Dr. Foor’s discovery deposition. Attached hereto as **Exhibit D** to the Hickey Decl. is a true and correct copy of the e-mail correspondence from March 3-6, 2015 between counsel for the parties

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<sup>3</sup> Notably, one of the exceptions is that the offering party cannot serve the witness with a subpoena. Quite to the contrary, Opposer served Dr. Foor with two subpoenas, the first of which was admittedly procedurally defective, after realizing that Applicant would not stipulate to the admissibility of Dr. Foor’s discovery deposition under a Notice of Reliance. Applicant promptly moved to quash both subpoenas. The United States District Court for the Southern District of Ohio – Eastern Division – granted Applicant’s Motions to Quash on April 29, 2015. A copy of that Order is annexed hereto as **Exhibit C**.

regarding Applicant's refusal to stipulate to the admissibility of Dr. Foor's discovery deposition and Opposer's last-minute attempts to subpoena his testimony deposition. As a result, Opposer's Notice of Reliance seeking to offer the discovery deposition of Dr. Foor in evidence is plainly invalid under the Trademark Rules of Practice and this Board should strike it. *See Hilson Research Inc. v. Society for Human Resource Management*, 27 U.S.P.Q.2d 1423, 1427 (T.T.A.B. 1993) (discovery deposition of non-party witness not allowed in evidence as "the simple fact is that he was no longer an officer or director at the time of his deposition"); *Houghton Mifflin Company, Inc. v. Tabb*, 2002 WL 519268, at 8, n. 6 (T.T.A.B. Apr. 3, 2002) ("Opposer's notice of reliance upon the discovery deposition of a non-party has been stricken . . . as not falling within any of the exceptions[.]"); *Marshall Field & Co. v. Mrs. Fields Cookies*, 25 U.S.P.Q.2d 1321, 1325 (T.T.A.B. 1992) (notice of reliance for discovery deposition of non-party witness stricken as "improperly filed under the rules" as there was no question that the witness was no longer an officer, director, or managing agent when his deposition was taken).

### **CONCLUSION**

Applicant respectfully requests the Board to strike Opposer's Notice of Reliance offering Dr. Foor's discovery deposition and its exhibits in evidence from the record.

Respectfully submitted,

Date: May 1, 2015

/s/ Erin M. Hickey

Lisa M. Martens

Erin M. Hickey

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Minneapolis, MN 55440-1022

Telephone: (858) 678-5070

Facsimile: (858) 678-5099

*Attorneys for Applicant,*

ENTROTECH LIFE SCIENCES, INC.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document has this 1<sup>st</sup> day of May, 2015 been mailed by electronic mail, as agreed to by counsel for the parties, to Opposer's counsel of record:

Joseph R. Dreitler, Esq.  
Mary R. True, Esq.  
DREITLER TRUE, LLC  
[jdreitler@ustrademarklawyer.com](mailto:jdreitler@ustrademarklawyer.com)  
[mtrue@ustrademarklawyer.com](mailto:mtrue@ustrademarklawyer.com)

/s/ April R. Morris  
\_\_\_\_\_

April R. Morris

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

In the matter of application Serial Nos.:

85/499,349 for the mark **CHLORADERM**  
85/499,345 for the mark **CHLORABSORB**  
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Filed on December 19, 2011

Published in the *Official Gazette* on May 29, 2012

CAREFUSION 2200, INC.,

*Opposer,*

v.

ENTROTECH LIFE SCIENCES, INC.,

*Applicant.*

Combined Opposition Proceeding No.: 91-206,212

**DECLARATION OF ERIN M. HICKEY, ESQ.**

I, Erin M. Hickey, hereby declare and state as follows:

1. I am a Principal with the law firm of Fish & Richardson P.C., which represents Applicant Entrotech Life Sciences, Inc. (“Applicant”) in this proceeding. I am duly licensed to practice law in the states of California and New York, and am authorized to practice before the Trademark Trial and Appeal Board of the United States Patent and Trademark Office. I have personal knowledge of the facts stated in this declaration and can and would testify truthfully thereto if called upon to do so.

2. Annexed hereto as **Exhibit A** are true and correct copies of pages 164 and 183 from the discovery deposition of Dr. John S. Foor, M.D. taken on June 17, 2014.

3. Annexed hereto as **Exhibit B** is a true and correct copy of Opposer's Pre-Trial Disclosures served on February 5, 2015.

4. Annexed hereto as **Exhibit C** is a true and correct copy of the Opinion and Order of the United States District Court for the Southern District of Ohio – Eastern Division – granting Applicant's Motions to Quash dated April 29, 2015.

5. Annexed hereto as **Exhibit D** is a true and correct copy of the e-mail correspondence from March 3-6, 2015 between counsel for the parties regarding Applicant's refusal to stipulate to the admissibility of Dr. Foor's discovery deposition and Opposer's last-minute attempts to subpoena his testimony deposition.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my personal knowledge and understanding.

Dated: May 1, 2015

Respectfully submitted,

**FISH & RICHARDSON P.C.**

/s/ Erin M. Hickey  
Erin M. Hickey  
*Attorney for Applicant,*  
ENTROTECH LIFE SCIENCES, INC.

# **EXHIBIT A**

1 A. [REDACTED]

2 Q. [REDACTED]

3 [REDACTED]

4 A. [REDACTED]

5 Q. [REDACTED]

6 [REDACTED]

7 A. [REDACTED] [REDACTED]

8 Q. [REDACTED] [REDACTED]

9 A. [REDACTED]

10 Q. [REDACTED]

11 A. [REDACTED]

12 Q. [REDACTED]

13 A. [REDACTED] [REDACTED]

14 [REDACTED]

15 [REDACTED] [REDACTED]

16 Q. Are you employed by Entrotech Life

17 Sciences?

18 A. No.

19 Q. [REDACTED]

20 [REDACTED]

21 A. [REDACTED]

22 Q. [REDACTED]

23 A. [REDACTED]

24 Q. [REDACTED]

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[REDACTED]

A. [REDACTED]

Q. [REDACTED]

[REDACTED]

A. [REDACTED]

[REDACTED]

[REDACTED]

Q. [REDACTED]

A. [REDACTED] [REDACTED]

Q. What is your current relationship with Entrotech?

A. Right now, basically as a medical consultant.

Q. Do you receive a salary from Entrotech?

A. I do not.

- - -

[REDACTED]

[REDACTED]

- - -

[REDACTED]

Q. [REDACTED]

[REDACTED]

A. [REDACTED]

Q. [REDACTED]

# **EXHIBIT B**

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

IN THE MATTER OF Trademark Application Serial Nos. 85/499349; 85/499345; 85/499337  
and 85/499332

DATE OF PUBLICATION: May 29, 2012

|                                |  |
|--------------------------------|--|
| CareFusion 2200, Inc.,         | :  |
|                                | :  |
| Opposer,                       | :  |
|                                | :  |
| v.                             | : <b>Combined Opposition No.: 91206212</b> |
|                                | :  |
| Entrotech Life Sciences, Inc., | :  |
|                                | :  |
| Applicant.                     | :  |

**PRETRIAL DISCLOSURES OF  
OPPOSER CAREFUSION 2200, INC.**

Pursuant to Rule 2.121(e) of the Rules of Practice of the Trademark Trial and Appeal Board and F.R.C.P. 26(a)(3), Opposer CareFusion 2200, Inc. (“CareFusion”) makes the following pretrial disclosures:

**I. Identification of individuals likely to give testimony as witnesses:**

- A. Jan Creidenberg  
Vice President, Marketing Manager  
CareFusion Corporation

Mr. Creidenberg may testify on the uses of Opposer’s topical antimicrobial products, including products bearing the CHLORA\_\_ formative marks, including information on the persons who use them, how they are used, for what purposes and what other products are often used in connection with Opposer’s products; Opposer’s advertising, marketing and promotion of Opposer’s topical antimicrobial products, including products bearing the CHLORA\_\_ formative marks; Opposer’s sales of products bearing the CHLORA\_\_ formative marks, including information on the marketing channels in which such products are advertised, marketed, promoted and/or sold and competitive antimicrobial products, and information regarding plans for the introduction of new topical antimicrobial products, including products bearing the CHLORA\_\_ formative marks.

Mr. Creidenberg may also testify regarding the business relationship between Opposer (and its related company CareFusion 213 LLC) and Applicant's related entity, Entrofoor Medical, LLC, for the purpose of Entrofoor Medical, LLC developing and manufacturing chlorhexidine drape for CareFusion 2200 to license and distribute.

B. Colleen Glynn  
Director, Marketing and Product Management  
CareFusion Corporation

Ms. Glynn may testify on how Opposer's topical antimicrobial products, including products bearing the CHLORA formative marks, are sold, to whom and their prices, and on total sales of Opposer's topical antimicrobial products, including products bearing the CHLORA\_\_ formative marks.

C. Jennifer Raeder-Devens  
Vice President, R&D Engineering Management  
CareFusion Corporation

Ms. Raeder-Devens may testify on the development and research connected with Opposer's topical antimicrobial products, and on plans for the introduction of new topical antimicrobial products, including products bearing the CHLORA\_\_ formative marks.

Ms. Raeder-Devens may also testify regarding the business relationship between Opposer and Applicant's related entity, Entrofoor Medical, LLC, for the purpose of Entrofoor Medical, LLC developing and manufacturing chlorhexidine drape for CareFusion 2200 to license and distribute.

D. Dr. John Foor, M.D.  
Medical Consultant  
Entrotech Life Sciences

Dr. Foor may testify about the recognition of the Chloraprep brand in the medical/surgical community, his personal knowledge of the Chloraprep brand, and about the formation of Entrofoor Medical, LLC and its business relationship with Opposer for the purpose of Entrofoor Medical, LLC developing and manufacturing chlorhexidine drape for CareFusion 2200 to license and distribute.

All witnesses, with the exception of Dr. Foor, are represented by counsel for CareFusion and may be contacted only through CareFusion's counsel in this matter.

## **II. Description of Documents Upon Which Opposer May Rely**

Examples of advertising, marketing and promotional materials for Opposer's topical antimicrobial products, including products bearing the CHLORA\_\_ formative marks

Evidence of advertising and marketing expenditures for Opposer's topical antimicrobial products, including products bearing the CHLORA\_\_ formative marks

Evidence regarding the dollar amount of sales of Opposer's topical antimicrobial products, including products bearing the CHLORA\_\_ formative marks

Evidence regarding the channels of trade for the sales of Opposer's topical antimicrobial products, including products bearing the CHLORA\_\_ formative marks

Examples of products bearing Opposer's CHLORA\_\_ formative marks

File history from USPTO on Opposer's CHLORA\_\_ formative marks

Documents relating to the business relationship between Opposer's related entity CareFusion 213, LLC and a related entity to Applicant, Entrofoor Medical, LLC.

Respectfully submitted,

DREITLER TRUE LLC

/Joseph R. Dreitler/

Joseph R. Dreitler

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E-mail: [mtrue@ustrademarklawyer.com](mailto:mtrue@ustrademarklawyer.com)

*Attorneys for Opposer*

*CareFusion 2200, Inc.*

Dated: February 5, 2015

**CERTIFICATE OF SERVICE**

This will certify that on the 5th day of February, 2015, a true and correct copy of the *Pretrial Disclosures of Opposer CareFusion 2200, Inc.* was served via e-mail to [hickey@fr.com](mailto:hickey@fr.com).

/Joseph R. Dreitler/  
Joseph R. Dreitler

# **EXHIBIT C**

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

CAREFUSION 2200, INC.,

Plaintiff,

vs.

Case No. 2:15-MC-16  
Judge Sargus  
Magistrate Judge King

ENTROTECH LIFE SCIENCE, INC.,

Defendant.

OPINION AND ORDER

This action arises out of a trademark opposition proceeding before the Trademark Trial and Appeal Board ("TTAB"), in which CareFusion 2200, Inc., is opposing Entrotech Life Sciences, Inc.'s applications to register trademarks for antimicrobial surgical drapes and dressings. A subpoena was issued by plaintiff's counsel on March 4, 2015, to John S. Foor, M.D., commanding Dr. Foor to appear for a deposition on March 19, 2015, at 10:00 a.m. ECF 1-1. Dr. Foor filed this action on March 11, 2015, to quash the subpoena. *Dr. John S. Foor, M.D.'s Motion to Quash or, in the Alternative, to Modify the Subpoena Issued by Carefusion 2200, Inc. ("Motion to Quash")*, ECF 1. In his motion, Dr. Foor argued that the subpoena was unduly burdensome, sought duplicative testimony, and was procedurally deficient under 35 U.S.C. § 24, because plaintiff never applied to the Clerk of Court to have the subpoena issued. Plaintiff does not contest that its March 4, 2015 subpoena was improperly issued and it did not file a response to the *Motion to Quash*.

On March 17, 2015, a subpoena was issued by the Clerk of this Court at plaintiff's behest to John S. Foor, M.D., commanding Dr. Foor

to appear for a deposition on March 23, 2015 at 9:00 a.m., "or date ordered by Court." ECF 3. Dr. Foor filed a motion to quash the subpoena on March 20, 2015. *Dr. John S. Foor, M.D.'s Motion to Quash or, in the Alternative, to Modify the Second Improper Subpoena Issued by Carefusion 2200, Inc. ("Second Motion to Quash")*, ECF 4. Dr. Foor "moves to quash the subpoena because it fails to allow a reasonable time to comply, imposes an undue burden on him, and, seeks only duplicative testimony already taken during a nearly seven-hour deposition which occurred almost nine months ago." *Id.* at p. 4. Plaintiff opposes the *Second Motion to Quash, Memorandum in Opposition to Motion of Dr. John S. Foor to Quash Subpoena ("Plaintiff's Response")*, ECF 5, and Dr. Foor has filed a reply. *Dr. Foor's Reply*, ECF 6. This matter is now ripe for consideration.

#### **I. Background**

Plaintiff deposed Dr. Foor for approximately seven hours on June 17, 2014. *Second Motion to Quash*, p. 5; *Declaration of Dr. John S. Foor, M.D.*, ECF 4-3, ¶ 4; *Plaintiff's Response*, p. 2. Plaintiff and defendant disagree whether Dr. Foor's prior deposition testimony is admissible in the TTAB proceeding. Plaintiff takes the position that the deposition testimony is admissible under TBMP Rule 704.49(1) as a discovery deposition of an adverse party. *Plaintiff's Response*, p. 3 n.6. Defendant takes the position that Dr. Foor's deposition was that of a non-officer and may be entered into evidence only upon stipulation or approval of the Board. *Id.*; *Second Motion to Quash*, pp. 5-6, 11-12.

Plaintiff asked that defendant stipulate to the admission of Dr. Foor's deposition testimony in the TTAB proceeding, but defendant refused on the basis that it did not have the opportunity to cross-examine Dr. Foor during the discovery deposition. *Second Motion to Quash*, p. 6; *Plaintiff's Response*, p. 3. Plaintiff moved for the admission of Dr. Foor's testimony in the TTAB proceeding and issued subpoenas for Dr. Foor's deposition during plaintiff's 30-day testimony period in the TTAB proceeding, which ended on March 23, 2015. *Second Motion to Quash*, pp. 4-5; *Plaintiff's Response*, p. 3. Plaintiff sought an extension of its testimony period in order to depose Dr. Foor. Defendant has either moved or intends to move to strike Dr. Foor's testimony in the TTAB proceeding. *Second Motion to Quash*, pp. 11-12. Dr. Foor, who is represented by defendant's counsel, filed the *Motion to Quash* and the *Second Motion to Quash* in this action, challenging the subpoenas issued on March 4 and 17, 2015.

**II. Standard**

Under Rule 45 of the Federal Rules of Civil Procedure, parties may command a nonparty to, *inter alia*, attend and testify at a specified time and place. Fed. R. Civ. P. 45(a)(1)(A)(iii); 35 U.S.C. § 24 ("The provisions of the Federal Rules of Civil Procedure relating to the attendance of witnesses . . . shall apply to contested cases in the Patent and Trademark Office."). Rule 45(d)(3)(A) requires that a court quash or modify a subpoena that "(i) fails to allow a reasonable time to comply; (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c); (iii) requires disclosure

of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden."

### III. Discussion

Dr. Foor argues that the March 17, 2015 subpoena, which scheduled a deposition on March 23, 2015 beginning at 9:00 a.m., should be quashed because "it fails to allow a reasonable time to comply, imposes an undue burden on him, and, seeks only duplicative testimony already taken during a nearly seven-hour deposition which occurred almost nine months ago." *Second Motion to Quash*, p. 3. The subpoena does not provide a reasonable time to comply, Dr. Foor argues, because it commanded Dr. Foor to attend a deposition beginning at 9:00 a.m. on the sixth day (or fourth business day) after the subpoena was served. According to Dr. Foor, plaintiff knew that Dr. Foor's counsel lives and works in California and that Dr. Foor's demanding schedule as a vascular surgeon rendered him unavailable for deposition on March 23, 2015. *Id.* at pp. 3-4, 9-10. The subpoena is unduly burdensome, Dr. Foor contends, because it would require him to cancel appointments and commitments on short notice, which would risk "his reputation as a vascular surgeon and unduly burden his busy schedule." *Id.* at p. 10.

Plaintiff responds that Dr. Foor's testimony is relevant to the TTAB proceeding, that Dr. Foor's prior deposition testimony is admissible in the TTAB proceeding, and that plaintiff "had no choice but to notice the date of Dr. Foor's testimony deposition for a date within its Testimony Period (which ran from February 20, 2015 through March 23, 2015), regardless of the fact that [plaintiff] was aware

that Dr. Foor was not available during that time." *Plaintiff's Response*, pp. 3-4. Plaintiff's arguments are not well taken.

Notably, plaintiff does not contend that the March 4, 2015 subpoena was properly issued, nor does it argue that the March 17, 2015 subpoena, which contemplated only three business days between the date of the subpoena and the beginning of the deposition, allowed Dr. Foor a reasonable time to comply. Many federal courts have found similar notice to be inadequate. *See, e.g., Saffady v. Chase Home Fin., Inc.*, No. 10-11965, 2011 WL 717564, at \*3 (E.D. Mich. Feb. 22, 2011) (four business days' notice for a deposition in another state is not reasonable); *Brown*, 2011 WL 321139 at \*2 ("Federal courts have also found compliance times of eight and seven days not to be reasonable."); *Mem'l Hospice, Inc. v. Norris*, No. 2:08-CV-048, 2008 WL 4844758, at \*1 (N.D. Miss. Nov. 5, 2008) (eight days' notice of deposition is not reasonable); *Donahoo v. Ohio Dep't of Youth Servs.*, 211 F.R.D. 303, 306 (N.D. Ohio 2002) ("The Court agrees with Defendant that these subpoenas in fact did not provide for a reasonable time for compliance. Deponents . . . were served within one week of their deposition dates. . . . Fed. R. Civ. P. 45(c)(2)(B) sets a reasonable time as fourteen days after service of the subpoena."); *In re Stratosphere Corp. Sec. Litig.*, 183 F.R.D. 684, 687 (D. Nev. 1999) (six days' notice for deposition is not reasonable). *See also McClendon v. TelOhio Credit Union, Inc.*, No. 2:05-CV-1160, 2006 WL 2380601, at \*2 (S.D. Ohio Aug. 14, 2006)(notice of fourteen days is presumptively reasonable). *Accord Brown v. Hendler*, No. 09-CIV-4486,

2011 WL 321139, at \*2 (S.D.N.Y. Jan. 31, 2011) ("Although Rule 45 does not define 'reasonable time,' many courts have found fourteen days from the date of service as presumptively reasonable.").

Under the circumstances presented in this case, this Court concludes that the March 17, 2015 subpoena failed to provide a reasonable time for compliance. This is particularly true because plaintiff knew that Dr. Foor's counsel was out of state and that Dr. Foor was unavailable because of his professional commitments as a vascular surgeon.

Plaintiff appears to argue that the March 17, 2015 subpoena should not be quashed because there is disagreement whether Dr. Foor's prior testimony is admissible in the TTAB proceeding and because the TTAB proceeding required plaintiff to submit Dr. Foor's testimony by March 23, 2015. However, the issue of admissibility of evidence in the TTAB proceeding is not before this Court. In any event, that issue is irrelevant to this Court's determination that the March 17, 2015 subpoena failed to provide Dr. Foor with a reasonable time to prepare for and comply with the subpoena.<sup>1</sup>

In short, the Court concludes that Dr. Foor's motions to quash, ECF 1, 4, are meritorious. Those motions are therefore **GRANTED**.

April 29, 2015

s/Norah McCann King  
Norah M<sup>c</sup>Cann King  
United States Magistrate Judge

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<sup>1</sup> Plaintiff offers no explanation why it failed to notice Dr. Foor's deposition earlier in the testimony period.

# **EXHIBIT D**

## Nancy Ly

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**From:** Erin Hickey  
**Sent:** Friday, March 06, 2015 2:56 PM  
**To:** Mary True ([mtrue@ustrademarklawyer.com](mailto:mtrue@ustrademarklawyer.com))  
**Cc:** [jdreitler@ustrademarklawyer.com](mailto:jdreitler@ustrademarklawyer.com); Tom Trofino; Elizabeth Brenckman; Katherine Reardon  
**Subject:** RE: Foor Discovery Deposition

Hi Mary,

You have (a) filed Dr. Foor's discovery deposition under a Notice of Reliance, apparently believing you can rely upon Rule 704.09(1) to do so, and (b) also issued a subpoena for Dr. Foor to testify as a witness during the last week you have available in your client's testimony period. If you believe your reliance on Rule 704.09(1) is valid, then it seems quite duplicative (not to mention, unduly burdensome) to also take his testimony deposition, doesn't it?

Most likely, you have issued the subpoena as "insurance" because you are well aware that your reliance on Rule 704.09(1) to have his discovery deposition admitted under a Notice of Reliance is wildly misplaced – both on the facts, and on the law. Having deposed Dr. Foor for nearly seven hours last June, it should be very clear to you that he has **never** acted as an officer (or, for that matter, with any title giving him authority to bind the current Applicant, Entrotech Life Sciences, Inc. or Entrotech, Inc., who originally applied to register the marks at issue) at any time, period. Moreover, Rule 704.09(1), which you have relied upon in submitting his discovery deposition under a Notice of Reliance, provides the following:

*"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."*

Even assuming, for argument's sake, that Dr. Foor somehow was an officer of Entrotech, Inc. (or Entrotech Life Sciences, Inc.) "at the time the applications [and here, I assume you mean my client's applications] were filed," which he wasn't, that wouldn't even matter. Plainly, to be admissible under Rule 704.09(1), Dr. Foor would have had to have held the position of an "officer" **on the day you deposed him**, which he didn't. To be clear, Dr. Foor has never held the position of an officer and has never held any title giving him authority to bind Entrotech Life Sciences, Inc. or Entrotech, Inc. ever, much less on June 17, 2014 when you deposed him. Given that you've already submitted his discovery deposition under a Notice of Reliance under this Rule, we will be objecting to its admissibility and moving to strike it, in its entirety, your exhibits included.

As for the subpoena you just issued today, demanding that Dr. Foor appear as a non-party, adverse witness for your client the week of March 16th, rest assured that we'll be moving to quash it. Not only have you given us unreasonable notice under the circumstances, but you are subjecting Dr. Foor to an undue burden. If you recall, the following timeline transpired from February 5, 2015 through today:

- **February 5, 2015** – You served us with your client's pre-trial disclosures, which listed three witnesses from CF who "may" testify, along with Dr. Foor who, likewise, "may" testify. As surely you're aware, the pre-trial disclosure of any witness, much less a potential one, "does not substitute for issuance of a proper notice of examination" under the Trademark Rules of Practice. In the same e-mail, you also advised that you "will be sending out the Testimony Notices early next week. FYI, the CFN witnesses will give their testimony in Chicago the week of March 16." You never mentioned a Testimony Notice of Dr. Foor or that you would be intending to have him testify during your testimony period.

- **February 12, 2015** – Late that week, not early as you had advised, you served us with Testimony Notices for the three witnesses from CF. Again, you did not serve us with a Testimony Notice for Dr. Foor, or mention him at all, much less that you would be serving a Testimony Notice for him, period.
- **February 17, 2015** – I e-mailed you, alerting you to the fact that I had just been confirmed as a speaker for a large-scale event in Austin, Texas for the week of March 16<sup>th</sup>, and asked if we could re-schedule your witnesses' testimony for the week before.
- **February 18, 2015** – You responded to my e-mail, advising that you couldn't re-schedule them, claiming: "I'm sorry, but the week of the 16<sup>th</sup> is the only week during the testimony period that all the witnesses were available. If you had let me know sooner that that week was a problem, perhaps we could have factored that in. But their calendars are set for the next month and can't be rescheduled." I advised you later that day that I had just learned the specific dates for the speaking event; that I had advised you as early as possible; and I even offered to extend your testimony period, if necessary.
- **February 19, 2015** – According to you, your client "said they are unable to reschedule."
- **February 23, 2015** – As a result, I cancelled my speaking engagement, as well as my travel accommodations, in light of your client's inability to re-schedule, and advised you that I would be attending the week of the 16<sup>th</sup>.
- **February 25, 2015** – Two days after I cancelled my other commitment, you e-mailed me, and suddenly, your client is now available to re-schedule to the week before, and can no longer be available the week of the 16<sup>th</sup>. Instead, they will be "available March 11-13."
- **February 26, 2015** – I asked you to confirm that your testimony depositions will be occurring March 11-13, such that I could cancel yet more flights and re-book, and you confirmed. I re-booked my speaking engagement, and paid a hefty price for airfare and attendance fees. I booked my airfare for March 10, to be present the day before the depositions, which you confirmed would be held "on 3/11 through 3/13. Maybe all three days, maybe just Weds and Friday."
- **March 2, 2015** – You served with me amended Testimony Notices for now only two witnesses, and now not until March 12. As a result, I had to re-book my flights again so that I wouldn't have to be there an extra day (and unnecessarily incur additional hotel costs for my client).
- **March 3, 2015** – For the first time, you mentioned Dr. Foor, asking me to stipulate to your submitting his discovery deposition as evidence under a Notice of Reliance.
- **March 4, 2015** – I declined to stipulate to this, given that I didn't have the opportunity to cross examine him then, nor did I have any idea you intended to use his deposition for this purpose –essentially, as a testimony deposition. As a courtesy, I advised you that Dr. Foor wasn't available over at least the next two weeks, given his busy schedule as a vascular surgeon. You claimed you could submit his discovery deposition properly under a Notice of Reliance, but also advised that you will issue a subpoena for his deposition.
- **March 5, 2015** – You submitted his discovery deposition under a Notice of Reliance.
- **March 6, 2015** – You issued a subpoena for Dr. Foor's testimony.

You could have noticed Dr. Foor's testimony deposition when you noticed the others, but you didn't –very likely because you didn't think you had to do it, and that you could just rely on his discovery deposition, which you realized, too late in the game, wasn't the case under the Trademark Rules of Practice. Forcing Dr. Foor to cancel appointments that he has had booked for weeks, likely months now, for important, surgical procedures, at the last minute – indeed, for the last week you have left in your testimony period – will prejudice him (and his patients) greatly. Not to mention, he is a non-

party, adverse witness, *who you already deposed for nearly seven hours*. You could have asked me in June if I would stipulate to his deposition as a testimony deposition, and I could have cross examined him at that point, to spare him the unnecessary time of a duplicative testimony deposition, and to spare my client's resources in forcing me to fly to Ohio, yet again. Not to mention, whatever information you allegedly "need" from Dr. Foor you should be able to get from your own clients.

Your lack of professional courtesy for Dr. Foor's schedule, as well as mine, are not well taken and your aggressive actions towards him are harassing. As a reminder, we represent Dr. Foor for the purposes of any testimony during this proceeding, so please refrain from contacting him directly.

Erin

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**From:** Mary True [<mailto:mtrue@ustrademarklawyer.com>]  
**Sent:** Wednesday, March 04, 2015 12:48 PM  
**To:** Erin Hickey  
**Cc:** Joseph Dreitler; Tom Trofino  
**Subject:** RE: Foor Discovery Deposition

Erin –

It is our understanding that because Dr. Foor was an officer of Applicant at the time the applications were filed, his discovery deposition can be submitted under Rule 704.09(1). We will be doing so this week. However, given your objections, we will also issue a subpoena for his deposition in Columbus during the week of March 16.

Mary

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**From:** Erin Hickey [<mailto:Hickey@fr.com>]  
**Sent:** Wednesday, March 04, 2015 3:33 PM  
**To:** Mary True  
**Cc:** Joseph Dreitler; Tom Trofino  
**Subject:** RE: Foor Discovery Deposition

Hi Mary,

I can't agree to stipulate that you can submit Dr. Foor's discovery deposition under a Notice of Reliance, given that I did not have an opportunity to cross examine him during his discovery deposition nor was I aware that you would later try to submit his discovery deposition under a Notice of Reliance (essentially, as a testimony deposition) during your client's testimony period. Also, I checked with Dr. Foor, and he is unavailable for at least the next two weeks, given his busy schedule as a vascular surgeon.

Erin

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**From:** Mary True [<mailto:mtrue@ustrademarklawyer.com>]  
**Sent:** Tuesday, March 03, 2015 8:53 AM  
**To:** Erin Hickey  
**Cc:** Joseph Dreitler; Tom Trofino  
**Subject:** Foor Discovery Deposition

Erin –

Would you agree to stipulate that we can submit Dr. Foor's discovery deposition under a Notice of Reliance? Otherwise, we will need to take his testimony during the testimony period. Should we work through you to get that scheduled?

Mary

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