

ESTTA Tracking number: **ESTTA693779**

Filing date: **09/04/2015**

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	09/04/2015
Attachments	CF v Entrotech - Memo in Opp to Motions to Strike Final with Exhib- its.pdf(223842 bytes )

**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

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

**OPPOSER’S MEMORANDUM IN OPPOSITION TO APPLICANT’S  
MOTIONS TO STRIKE DISCOVERY DEPOSITIONS OF  
JOHN HALSEY AND DR. JOHN FOOR**

Applicant has moved to strike the discovery depositions, and accompanying exhibits, of John Halsey and Dr. John Foor, taken by Opposer in this matter and filed pursuant to Rule 704.09(1), on the grounds that Mr. Halsey and Dr. Foor were not *at the time of taking the deposition* officers, directors or managing agents of Entrotech Life Sciences, Inc. While this is technically true, Applicant’s objections underscore the great lengths to which it has gone throughout these proceedings to exclude relevant fact testimony. Opposer asks the Board to exercise its equitable authority and not exclude this testimony out-of-hand, but weigh the relevance of the testimony to these proceedings as it sees fit. *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734 (TTAB 2014).

## **I. John Halsey**

In Applicant's First Amended Initial Disclosures, served on Opposer on July 30, 2014, Mr. Halsey was identified as the President of Entrotech Life Sciences, Inc. with knowledge of 1) the advertising and promotion of the goods sold and/or intended to be sold under the Entrotech Marks; 2) Applicant's actual and/or targeted customers; 3) Applicant's channels of marketing and sales; and 4) Pricing, commercialization, and any sales of products sold and/or intended to be sold under the Entrotech Marks.<sup>1</sup>

After significant difficulties in scheduling, Opposer served Applicant with Notices of Deposition for Mr. Halsey and Mr. McGuire on November 3, 2014. His deposition was scheduled for November 14, 2014, and Mr. McGuire's was scheduled for November 11, 2014. More scheduling problems ensued,<sup>2</sup> and Mr. Halsey's deposition was finally taken on December 12, 2014, and Mr. McGuire's deposition was taken on December 10, 2014.

At Mr. McGuire's December 10 deposition, Opposer learned, for the first time, that Mr. Halsey was no longer an officer of ELS:<sup>3</sup>

Q How long has Mr. Hallsy [sic] been with the company?

A Hallsy was with me for two years.

Q So did you hire him specifically -- to do what?

A To do the business development side of the equation.

Q For what?

A Of Entrotech Life Sciences.

Q Is he full-time?

A He was.

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<sup>1</sup> See First Amended Initial Disclosures, attached hereto as Exhibit A.

<sup>2</sup> See Dkt. Nos. 31, 32, 43 and 35

<sup>3</sup> McGuire Discovery Deposition at 144:8-20.

Q Is he anymore?

A No.

Q When did he stop being full-time?

A About four weeks ago.

The inequity of excluding Mr. Halsey's discovery deposition under these circumstances is manifest. Mr. Halsey was an officer of ELS at the time his deposition was initially noticed, and was likely still an officer at the time his deposition was first scheduled to take place. Excluding his deposition elevates form over substance, and serves only to preclude the Board from considering relevant fact evidence.

## **II. Dr. John Foor**

Dr. Foor is a major fact witness in this case. As set forth in Opposer's Trial Brief, it was Dr. Foor's connections with CareFusion's predecessor, Cardinal Health, that resulted in the initial meeting between Cardinal Health and Entrotech and the beginning of the incise drape project. The company that was formed to work on the project by Mr. McGuire was named EntroFoor. Dr. Foor was actively involved during the time the parties were working together, and he was at all times represented to CareFusion as the Medical Director of EntroFoor.<sup>4</sup> Mr. McGuire testified that Dr. Foor would be compensated if Opposer and Applicant ever commercialized an chlorhexidine incise drape product.<sup>5</sup>

On July 15, 2013, and again on November 8, 2013, Applicant responded to Opposer's Interrogatory No. 23 of Opposer's First Set of Interrogatories, and Amended First Set of

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<sup>4</sup> See Opposer's Trial Brief at pp. 18-25.

<sup>5</sup> McGuire Trial Testimony at 64:20-65:5.

Interrogatories (“Identify all officers and directors of both Applicant and Entrofloor”)<sup>6</sup> by identifying Dr. Foor as the “Medical Director of Applicant.”<sup>7</sup> Dr. Foor’s discovery deposition was scheduled for February 28, 2014. However, Applicant refused to produce documents relevant to whether it has a bona fide intent to use the applied-for marks in commerce as of the date of the applications, or that it had been working to develop and commercial the products since that time, necessitating a Motion to Compel filed by Opposer on February 24, 2014 [dkt. 20]. The Motion was granted, and Applicant produced eight boxes of documents on April 28, 2014 – many of which referred to Dr. Foor as Applicant’s Medical Director. Dr. Foor’s discovery deposition was rescheduled to June 17, 2014, and he testified at length about the formation of EntroFloor, its relationship with CareFusion, and the incise drape project. About five hours into his deposition, Dr. Foor stated that he was no longer employed by ELS. At no time did Counsel for Applicant inform Opposer prior to (or during) Dr. Foor’s deposition that he was no longer employed by ELS.

Not wanting to bother Dr. Foor with a testimony deposition that would cover the same topics he had already testified about in his discovery deposition, Counsel for Opposer asked Counsel for Applicant if she would stipulate to submitting Dr. Foor’s discovery deposition into the record. After consulting with her client, she refused. Applicant then successfully blocked Opposer’s attempts to subpoena Dr. Foor for a deposition during Opposer’s Testimony Period.<sup>8</sup>

Applicant has gone to extraordinary lengths to prevent Dr. Foor’s testimony from being considered by the Board in this matter. Given his importance to this case, and Applicant’s repeated representations that he was ELS’s Medical Director, it is clearly inequitable to exclude

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<sup>6</sup> Applicant initially objected to this interrogatory as oppressive, unduly burdensome, overly broad, and seeking irrelevant information.

<sup>7</sup> See Opposer’s Amended Notice of Reliance Dkt. No. 52

<sup>8</sup> See Dkt. Nos. 54-57.

this testimony simply because sometime in the period between November 8, 2013 (the date of Applicant's last interrogatory response) and June 17, 2014, Dr. Foor ceased to be employed by ELS. Applicant never updated its interrogatory responses, and never informed Opposer of Dr. Foor's change in status. Again, Applicant seeks to elevate form over substance in order to prevent the Board from considering relevant factual testimony.

For all the foregoing reasons, Opposer respectfully requests the Board to exercise its equitable authority and allow the discovery depositions of John Halsey and Dr. John Foor to be part of the Trial Record herein.

Respectfully submitted,

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*Attorneys for Opposer*

*CareFusion 2200, Inc.*

Dated: September 4, 2015

## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served via email on Counsel for Applicant, [LMartens@sheppardmullin.com](mailto:LMartens@sheppardmullin.com) this 4<sup>th</sup> day of September, 2015.



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Mary R. True

# **Exhibit A**

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

In the matter of application Serial Nos.:

Ser. No. 85/499,349 for the mark **CHLORADERM**  
Ser. No. 85/499,345 for the mark **CHLORABSORB**  
Ser. No. 85/499,337 for the mark **CHLORABOND**  
Ser. No. 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.*

Opposition No.: 91-206,212

**APPLICANT'S FIRST AMENDED INITIAL DISCLOSURES**

Pursuant to Rule 26(a) of the Federal Rules of Civil Procedure and Rule 2.120(a) of the Trademark Rules of Practice, Applicant Entrotech Life Sciences, Inc. ("Applicant") makes the following amended initial disclosures to Opposer CareFusion 2200, Inc. ("Opposer") based upon the information reasonably available to it at this time. Applicant reserves the right to supplement these disclosures.

By making these disclosures, Applicant does not represent that it is identifying every witness, document, or tangible thing possibly relevant to the claims and/or defenses that it may have in this proceeding nor does Applicant intend to waive any applicable privileges or work-product protection. Applicant expressly reserves all rights to object to the production of any of

the information below on those grounds. Applicant also reserves all rights to object to the admissibility of any of the information below.

**I. INDIVIDUALS**

Applicant currently believes that the following individuals are likely to have discoverable information that Applicant may use to support its claims and/or defenses.

<u>Name</u>	<u>Contact Information</u>	<u>Subject(s)</u>
<p>Jim McGuire  <i>Chief Executive Officer</i>  <i>Entrotech Life Sciences, Inc.</i></p>	<p>c/o Erin M. Hickey                      Fish &amp; Richardson P.C.                      12390 El Camino Real                      San Diego, CA 92130</p>	<ul style="list-style-type: none"> <li>• Nature of Applicant’s business</li> <li>• Selection and adoption of the CHLORADERM, CHLORABSORB, CHLORABOND, and CHLORADRAPE marks (the “Entrotech Marks”) and the applications to register the same with the United States Patent and Trademark Office</li> <li>• Use and/or intended use of the Entrotech Marks</li> <li>• Goods sold and/or intended to be sold under the Entrotech Marks</li> <li>• Research and development of the goods sold and/or intended to be sold under the Entrotech Marks</li> <li>• Manufacturing of the goods sold and/or intended to be sold under the Entrotech Marks</li> <li>• Advertising and promotion of the goods sold and/or intended to be sold under the Entrotech Marks</li> <li>• Applicant’s actual and/or targeted customers</li> </ul>

<u>Name</u>	<u>Contact Information</u>	<u>Subject(s)</u>
		<ul style="list-style-type: none"> <li>• Applicant’s channels of marketing and sales</li> <li>• Pricing, commercialization, and any sales of products sold and/or intended to be sold under the Entrotech Marks</li> <li>• Other uses and registrations and/or applications of CHLORA-prefix marks</li> <li>• Applicant’s history with CareFusion</li> </ul>
<p>John Halsey <i>President Entrotech Life Sciences, Inc.</i></p>	<p>c/o Erin M. Hickey Fish &amp; Richardson P.C. 12390 El Camino Real San Diego, CA 92130</p>	<ul style="list-style-type: none"> <li>• Advertising and promotion of the goods sold and/or intended to be sold under the Entrotech Marks</li> <li>• Applicant’s actual and/or targeted customers</li> <li>• Applicant’s channels of marketing and sales</li> <li>• Pricing, commercialization, and any sales of products sold and/or intended to be sold under the Entrotech Marks</li> </ul>
<p>George Holinga <i>Principal Scientist Entrotech Life Sciences, Inc.</i></p>	<p>c/o Erin M. Hickey Fish &amp; Richardson P.C. 12390 El Camino Real San Diego, CA 92130</p>	<ul style="list-style-type: none"> <li>• Nature of Applicant’s business</li> <li>• Use and/or intended use of the Entrotech Marks</li> <li>• Goods sold and/or intended to be sold under the Entrotech Marks</li> <li>• Research and development of the goods sold and/or intended to be sold under the Entrotech Marks</li> <li>• Applicant’s history with CareFusion</li> </ul>

**II. DOCUMENTS**

Applicant expects that documents in its possession, custody, and control that it may use to support its claims and/or defenses in this case will be found at Applicant's place of business in San Francisco, CA; at the corporate headquarters of Entrotech, Inc. at 1245 Kinnear Road, Columbus, OH 43212; and at the offices of Applicant's counsel. Such documents relate to each of the topics described above in Section I.

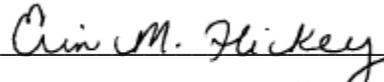
**III. DAMAGES**

The Trademark Trial and Appeal Board of the United States Patent and Trademark Office does not have jurisdiction to award monetary judgments of any sort, including damages, costs, or attorneys' fees. As a result, Applicant does not make any disclosure in this regard.

**IV. INSURANCE**

Applicant is not aware of any such insurance agreement at this time.

Date: July 30, 2014



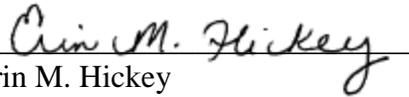
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*Attorneys for Applicant*  
ENTROTECH LIFE SCIENCES, INC.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing document was served this 30th day of July, 2014 by e-mail upon counsel for Opposer Carefusion 2200, Inc. at the following addresses:

Joseph R. Dreitler, Esq.  
Mary R. True, Esq.  
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Erin M. Hickey