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

Proceeding	91206212
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**25. 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.	:	Combined Opposition No.: 91206212
	:	
Entrotech Life Sciences, Inc.,	:	
	:	
Applicant.	:	

OPPOSER'S TRIAL BRIEF

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TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iv
I. RECORD EVIDENCE	1
II. PROCEDURAL HISTORY.....	4
III. STATEMENT OF THE CASE.....	4
IV. STATEMENT OF THE ISSUES.....	6
V. FACTS	6
A. CareFusion’s Strong Rights in the CHLORAPREP Mark	6
1. CareFusion's Federal Registrations of the CHLORAPREP Mark.....	6
2. Adoption and Use of the CHLORAPREP Mark.....	7
3. Promotion of Goods Sold Under the CHLORAPREP Mark.....	9
4. Advertising and Marketing Spend, and Sales of Chlora-branded Products.....	111
5. Previous Instances of Confusion Between ChloraPrep and Another Chlora-formative Competitive Product.....	13
6. CareFusion's Federal Registration of the CHLORASHIELD Mark.....	14
7. CareFusion's Rights in CHLORA-formative Marks for Antimicrobial Products Containing CHG for Use in Humans.....	14
B. The Relationship Between Entrotech and CareFusion	18
1. Initial Meetings Between Entrotech and CareFusion.....	18
2. The Formation of EntroFoor and Project Linus.....	20
3. The Continuation and End of Project Linus	22

4.	Entrotech’s Continued Product Development and Selection of the Chloradrape, Chloraderm, Chlorabond and Chlorabsorb trademarks	25
5.	ELS’s Federal Applications	26
VI.	ARGUMENT	27
A.	Applicable Legal Standards	27
B.	Opposer Has Established Standing	27
C.	Opposer Has Established Ownership of Valid Marks and its Prior Use and Registration of its CHLORAPREP and CHLORASHIELD Marks	28
D.	The ELS CHLORA-formative Marks are Confusingly Similar to CareFusion’s CHLORA-formative Marks.....	29
1.	CareFusion’s CHLORA-formative Marks are Strong	29
2.	The Marks at Issue are Confusingly Similar.....	31
3.	The Goods to be Sold Under the Parties’ Marks are Identical and are Presumed to be Sold in Identical Channels of Trade	33
4.	There Are No Other CHLORA-formative Marks Used on Similar Goods.....	35
5.	Opposer Has Been Vigilant in Policing its CHLORAPREP Mark.....	36
6.	Applicant's Bad-Faith Adoption Supports a Finding of Likely Confusion.....	36
VII.	CONCLUSION.....	39

TABLE OF AUTHORITIES

	<u>Page No.</u>
Cases	
<i>CBS Inc. v. Morrow</i> , 218 USPQ 198 (Fed. Cir. 1983)	34
<i>Century 21 Real Estate Corp. v. Century Life of Am.</i> , 970 F.2d 874, 877 (Fed.Cir. 1992).....	32
<i>Century 21 Real Estate Corp. v. Century Life of America</i> , 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).....	32
<i>Coach Services, Inc. v Triumph Learning LLC</i> , 668 F.3d 1356, 1368 (Fed. Cir. 2012)	32
<i>Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC</i> , 110 USPQ2d 1458 (TTAB 2014)	30
<i>Cunningham v. Laser Golf Corp.</i> , 222 F.3d 943, 55 U.S.P.Q.2d 1842 (Fed. Cir. 2000)	28
<i>Cunningham v. Laser Golf Corp.</i> , 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000)	28
<i>Edom Laboratories, Inc. v. Glenn Lichter</i> , 102 USPQ2d 1542 (TTAB 2012).....	35
<i>Federated Foods, Inc. v. Fort Howard Paper Co.</i> , 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)	35
<i>Hancock v. Am. Steel & Wire Co.</i> , 97 U.S.P.Q. 330 (CCPA 1953).....	28
<i>Harry Winston, Inc. v. Bruce Winston Gem Corp.</i> , 111 USPQ2d 1419 (TTAB 2014)	32
<i>Herbko Intern. v. Koppa Books, Inc.</i> , 308 F.3d 1156, 64 U.S.P.Q.2d 1375 (Fed. Cir. 2002)	28, 29
<i>Hewlett-Packard Co. v. Packard Press Inc.</i> , 281 F.3d 1261, 62 U.S.P.Q.2d 1001 (Fed. Cir. 2002)	33
<i>In re Abcor Dev. Corp.</i> , 588 F.2d 811, 813 (CCPA 1978).	31
<i>In re Allegiance Staffing</i> , 115 USPQ2d 1319, 1323 (TTAB 2015)	37
<i>In re Cabot Safety Intermediate Corp.</i> , 2009 TTAB LEXIS 21 (TTAB. 2009).....	34
<i>In re Chatam Int’l Inc.</i> , 380 F.3d 1340, 71 U.S.P.Q.2d 1944 (Fed. Cir. 2004).....	33
<i>In re E.I. du Pont de Nemours & Co.</i> , 177 USPQ 563, 567 (CCPA 1973)	28
<i>In re G.B.I. Tile and Stone Inc.</i> , 92 U.S.P.Q.2d 1366 (TTAB 2009).....	33
<i>In re Hughes Furniture Industries, Inc.</i> , 114 USPQ2d 1134 (TTAB 2015);.....	34

<i>In re Inca Textiles, LLC</i> , 344 Fed.Appx. 603, 606 (Fed.Cir.2009).....	32
<i>In re Strategic Partners, Inc.</i> , 102 USPQ2d 1397, 1399 (TTAB 2012).....	37
<i>In re Toshiba Medical Systems Corp.</i> , 91 U.S.P.Q.2d 1266 (TTAB 2009).....	33
<i>J & J Snack Foods Corp. v. McDonald’s Corp.</i> , 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991).....	37
<i>Jacobs v. International Multifoods Corp.</i> , 668 F.2d 1234, 212 USPQ 641, 643 (CCPA 1982).....	37
<i>Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.</i> ,963 F.2d 350, 353 (Fed. Cir. 1992).....	36
<i>King Candy Co. v. Eunice King’s Kitchen, Inc.</i> , 496 F.2d 1400, 182 U.S.P.Q. 108 (CCPA 1974).....	30
<i>L.C. Licensing Inc.v. Berman</i> , 86 USPQ2d 1883, 1890 (TTAB 2008).	37
<i>L’Oreal S.A. and L’Oreal USA, Inc. v. Marcon</i> , 102 USPQ2d 1434 (TTAB 2012).....	37
<i>Leading Jewelers Guild Inc. v. LJOW Holdings LLC</i> , 82 U.S.P.Q.2d 1901, 1905 (TTAB 2001).	32
<i>Lever Bros. Co. v. Riodela Chemical Co.</i> , 41 F.2d 408, 5 USPQ 152, 154-55 (CCPA 1930).....	37
<i>Lipton Industries, Inc. v. Ralston Purina Company</i> , 670 F.2d 1024, 213 U.S.P.Q. 185 (CCPA 1982).....	28
<i>Multi Time Machine, Inc. v Amazon.com, Inc.</i> , 115 USPQ2d 1491, 1497 (9 th Cir. 2015).....	30
<i>Nina Ricci S.A.R.L. v. E.T.F. Enters., Inc.</i> , 12 U.S.P.Q. 2d 1901 (Fed. Cir. 1989).....	28
<i>Octocom Systems Inc. v. Houston Computer Services Inc.</i> , 16 U.S.P.Q.2d 1783 (Fed. Cir. 1990).....	35
<i>Otto Roth & Co. v. Universal Foods Corp.</i> , 209 U.S.P.Q. 40 (CCPA 1981).....	29
<i>Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772</i> , 396 F.3d 1369, 1373074, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005).	33, 35
<i>Park ‘n Fly, Inc. v. Dollar Park & Fly</i> , 469 U.S. 189 (1985).....	30
<i>Planters Nut & Chocolate Co. v. Crown Nut Co., Inc.</i> , 305 F.2d 916, 924 ,134 U.S.P.Q. 504, 511 (C.C.P.A. 1962).	36
<i>Ritchie v. Simpson</i> , 50 U.S.P.Q.2d 1023 (Fed. Cir. 1999).....	28

<i>Rogers & Gallet S.A. v. Venice Trading Co., Inc.</i> , 1 U.S.P.Q.2d 1829, 1832 (T.T.A.B. 1987).	36
<i>Time Warner Entertainment Co. v. Jones</i> , 65 USPQ2d 1650 (TTAB 2002).	32
<i>Top Tobacco, L.P. v. North Atlantic Operating Co., Inc.</i> , 101 USPQ2d 1163, 1171-72 (T.T.A.B. 2011)	30
Statutes	
15 U.S.C. §1052	31
15 U.S.C. §1052(d)	6, 31, 42
15 U.S.C. §1115	33
Rules	
TBMP §309.03(c)(A)-(B)	31
Treatises	
<u>McCarthy on Trademarks and Unfair Competition</u> § 11:83 (4 th ed. 2011)	34

OPPOSER'S TRIAL BRIEF

TO THE HONORABLE UNITED STATES TRADEMARK TRIAL AND APPEAL BOARD:

Opposer, CareFusion 2200, Inc. (“CareFusion” or “Oppose”), in support of its Combined Opposition No. 91206212 to Application Nos. 85/499349 (CHLORADERM), 85/499345 (CHLORABSORB), 85/499337 (CHLORABOND) and 85/499332 (CHLORADRAPE) of Entrotech Life Sciences, Inc., (“ELS” or “Applicant”), would respectfully show the Board as follows:

I. RECORD EVIDENCE

The evidence of record consists of:

1. The trial testimony of Opposer’s witness Jennifer Raeder-Devens and accompanying exhibits, taken by Opposer on March 13, 2015 and filed herein on September 4, 2015 [Dkt. 79].
2. The trial testimony of Applicant’s witness Dr. George J. Holinga and accompanying exhibits, taken by Applicant on May 14, 2015.
3. The trial testimony of Applicant’s witness James E. McGuire and accompanying exhibits, taken by Applicant on May 12, 2015.
4. The trial testimony of Opposer’s witness Jan Creidenberg and accompanying exhibits, taken by Opposer on March 12, 2015 and filed herein on August 20, 2015 [Dkt. 77].
5. The trial testimony of Opposer’s rebuttal witness Jennifer Raeder-Devens and accompanying exhibits, taken by Opposer on June 23, 2015 and filed herein on August 20, 2015 [Dkt. 76].
6. The trial testimony of Opposer’s rebuttal witness Carol Schultz and accompanying exhibits, taken by Opposer on June 23, 2015 and filed herein on August 19, 2015 [Dkt. 75]
7. Opposer’s Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated March 5, 2015, which includes nineteen (19) articles as to show the widespread recognition of ChloroPrep within the national medical community, the unique advantages of using ChloroPrep, with its active ingredient of chlorhexidine, prior to, during, and after medical

procedures, and the great value of and goodwill associated with the ChloroPrep product [Dkt. 42].

8. Opposer's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated March 5, 2015, which includes three (3) printouts from the United States Patent and Trademark Office's TESS and ASSIGN Status databases as to show the live statuses of Registration Nos. 1930248, 4052849, and 4488745, and the current ownership of each of these registrations by Opposer, CareFusion 2200, Inc [Dkt. 43].
9. The discovery deposition of Jim McGuire and accompanying exhibits, taken by Opposer on December 10, 2014 and filed under Notice of Reliance herein on March 5, 2015 [Dkt. 44, 45, 46].
10. The discovery deposition of John Halsey and accompanying exhibits, taken by Opposer on December 12, 2014 and filed under Notice of Reliance herein on March 5, 2015 [Dkt. 44, 45, 46].
11. The discovery deposition of John Foor and accompanying exhibits, taken by Opposer on June 17, 2014 and filed under Notice of Reliance herein on March 5, 2015 [Dkt. 44, 45, 46].
12. Opposer's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated March 19, 2015, which includes one (1) printout from the United States Patent and Trademark Office's TESS and ASSIGN Status databases as to show the live status of Application No. 86473970, the current ownership of this application by Opposer, CareFusion 2200, Inc., and the continued interest in and development of Opposer's CHLORAPREP mark by Opposer [Dkt. 48].
13. Opposer's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated March 19, 2015, which includes ten (10) printouts from the United States Patent and Trademark Office's TESS and ASSIGN Status databases as to show that third-party registrations of CHLORA__ are not for goods similar to those of Opposer under its CHLORAPREP and CHLORASHIELD marks, or do not contain chlorhexidine or are not for human use [Dkt. 49].
14. Opposer's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated March 19, 2015, which includes twenty-two (22) printouts from the United States Patent and Trademark Office's TESS and ASSIGN Status databases as to show that third-party registrations for goods competitive with Opposer's CHLORAPREP and CHLORASHIELD goods and/or for goods that contain chlorhexidine as an active ingredient do not use "CHLORA" anywhere in the marks [Dkt. 50].
15. Opposer's Notice of Reliance Pursuant to 37 C.F.R. §2.120(j) dated March 19, 2015, which includes two (2) interrogatories and answers [Dkt. 51].

16. Opposer's Amended Notice of Reliance Pursuant to 37 C.F.R. §2.120(j) dated March 23, 2015, which includes two (2) interrogatories and answers [Dkt. 52].
17. Opposer's Notice of Reliance Pursuant to 37 C.F.R. §2.122(e) dated July 1, 2015, which includes one (1) article as to rebut arguments or references made in Applicant's Trial Brief that rely upon the document submitted by Applicant via Notice of Reliance as Exhibit J.1, which is page 1 of the Allnurses.com ChloroPrep Allergies blog entry [Dkt. 74].
18. Applicant's Notice of Reliance Pursuant to 37 C.F.R. § 2.120(j) dated May 21, 2015 [Dkt. 61].
19. Applicant's Notice of Reliance Pursuant to 37 C.F.R. § 2.122(e) dated May 21, 2015 [Dkt. 62].
20. Applicant's Confidential Notice of Reliance [Dkt. 63].
21. Applicant's Confidential Notice of Reliance [Dkt. 70].
22. Applicant's Notice of Reliance Pursuant to 37 C.F.R. § 2.122(e) dated May 21, 2015 [Dkt. 64].
23. Applicant's Notice of Reliance Pursuant to 37 C.F.R. § 2.122(e) dated May 21, 2015 [Dkt. 65].
24. Applicant's Notice of Reliance Pursuant to 37 C.F.R. § 2.122(e) dated May 21, 2015 [Dkt. 66].
25. Applicant's Notice of Reliance Pursuant to 37 C.F.R. § 2.122(e) dated May 21, 2015 [Dkt. 67].
26. Applicant's Notice of Reliance Pursuant to 37 C.F.R. § 2.122(e) dated May 21, 2015 [Dkt. 68].
27. Applicant's Notice of Reliance Pursuant to 37 C.F.R. § 2.122(e) dated May 21, 2015 [Dkt. 69].
29. Applicant's Notice of Reliance Pursuant to 37 C.F.R. § 2.120(j) dated May 21, 2015 [Dkt. 71].
30. The discovery deposition of Jan Creidenberg and accompanying exhibits, taken by Opposer on December 5, 2014 and filed under Notice of Reliance herein on May 21, 2015 [Dkt. 72].

II. PROCEDURAL HISTORY

On July 24, 2012, CareFusion filed its Combined Notice of Opposition to Applicant's application Serial Nos. 85/499349 (CHLORADERM), 85/499345 (CHLORABSORB), 85/499337 (CHLORABOND) and 85/499332 (CHLORADRAPE), on the basis of likelihood of confusion with CareFusion's Registration Nos. 1930248 and 4052849 for CHLORAPREP and its prior filed pending, published and allowed application Serial Nos. 85051474 and 85051477 for CHLORASHIELD. Serial No. 85051474 registered on February 25, 2014 as Registration No. 4488745. Serial No. 85051477 registered on March 11, 2014 as Registration No. 4495083. On April 14, 2014, CareFusion amended its Notice of Opposition to include the recently issued CHLORASHIELD registrations. On December 30, 2014, CareFusion filed a voluntary surrender under Section 7(e) of Registration No. 4495083. Accordingly, CareFusion opposes the above-referenced applications based on the priority of its Registration Nos. 1930248 and 4052849 for CHLORAPREP and Registration No. 4488745 for CHLORASHIELD, and the likelihood for confusion between CareFusion's registrations and Entrotech's applications for CHLORABOND, CHLORADRAPE, CHLORABSORB and CHLORADERM.

III. STATEMENT OF THE CASE

ChlorPrep® is the brand name for a line of groundbreaking antimicrobial, pre-surgical skin antiseptic preparations containing chlorhexidine gluconate ("CHG") that CareFusion and its predecessors introduced to the market in 1994. The brand has been incredibly successful, and in more than twenty years of use it has become very well-known throughout the healthcare industry. CHLORAPREP-branded products now include a wide variety of pre-surgical antiseptic preparations, covering a wide range of procedures, as well as a wide range of surface areas to be prepped for surgery. CHLORAPREP-branded products are used everywhere surgery is done, by nurses and surgeons, on patients in hospitals, outpatient surgical centers, blood banks, and even

in some non-surgical locations where vascular access is required, such as dialysis clinics. Recently, CareFusion has expanded the ChloraPrep product line to include an adhesive patch dressing impregnated with CHG, which is being sold under the name CHLORASHIELD.

As stated above, the CHLORAPREP line has become very successful. From 2003 through mid-2015, U.S. sales of CHLORAPREP-branded products have totaled nearly \$2 billion, and CareFusion and its predecessors have spent millions of dollars promoting its ChloraPrep and ChloraShield products to professionals in the healthcare community.

Applicant, Entrotech Life Sciences, Inc. (“ELS”) is quite familiar with Opposer and Opposer’s successful line of ChloraPrep products. ELS was formed in February 2012 as an affiliate of Entrotech, Inc. (“Entrotech”). Entrotech is comprised of a group of companies, primarily in the chemistry and adhesive film industries, that was founded in Columbus, Ohio in 1999. In February of 2009, prior to the formation of ELS, Entrotech’s president and CEO, Jim McGuire, formed a partnership with Dr. John Foor, which was incorporated in Ohio as EntroFoor Medical LLC. EntroFoor was formed for the purpose of working with CareFusion’s predecessor (Ohio-based Cardinal Health) in the development of an adhesive surgical incise drape impregnated with chlorhexidine that was to be sold under the name CHLORASHIELD, broadening CareFusion’s use of Chlora-formative marks for its surgery-related infection prevention products. Between 2009 and 2011, EntroFoor and CareFusion worked closely together on producing a commercially marketable incise drape. However, the parties parted ways in September 2011 without ever having obtained FDA approval or developing a commercially marketable product. Only three months after the parting, in December 2011, Entrotech, Inc. filed the four applications opposed herein for products that are identical to, and

would be directly competitive with, Opposer's ChloraPrep and ChloraShield products. The opposed applications were subsequently assigned to the newly-formed ELS in July 2012.

As the evidence and controlling legal authorities set forth herein make clear, there exists a likelihood of confusion between the parties marks; thus, ELS's applications to register Serial Nos. 85/499349 (CHLORADERM), 85/499345 (CHLORABSORB), 85/499337 (CHLORABOND) and 85/499332 (CHLORADRAPE) should be refused under Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d).

IV. STATEMENT OF THE ISSUES

CareFusion's ownership of valid trademarks in the term CHLORAPREP and CHLORASHIELD and its priority of use of those marks is well-established, including by its incontestable U.S. trademark registration of CHLORAPREP, Reg. No. 1930248. Thus, the only issue before the Board in this proceeding is whether ELS's marks, when applied to the goods in the challenged applications, are likely to cause confusion with CareFusion's use of its marks as used in connection with the goods in CareFusion's registrations, and hence should be refused registration pursuant to Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d).

V. FACTS

A. CareFusion's Strong Rights in the CHLORAPREP Mark

1. CareFusion's Federal Registrations of the CHLORAPREP Mark

CareFusion owns two valid and subsisting federal registrations for the mark CHLORAPREP for antimicrobial products:

- (a) CHLORAPREP – Registration No. 1,930,248 registered on the Principal Register on October 25, 1995 for use in connection with “topical antimicrobial solutions”; and
- (b) CHLORAPREP – Registration No. 4,052,849 registered on the Principal Register on November 11, 2011 for use in connection with “broad-spectrum antiseptic”.

Registration No. 1,930,248 is incontestable, which is conclusive evidence of the validity of the CHLRORAPREP mark, of CareFusion's ownership of the mark and of CareFusion's exclusive right to use the CHLORAPREP mark in commerce on the goods described in the registration.

2. Adoption and Use of the CHLORAPREP Mark

ChloraPrep® was developed by MediFlex, Inc., a small family-owned company based in Kansas City, Missouri and was introduced in 1994.¹ ChloraPrep is a skin antiseptic system which is made up of an antiseptic solution which contains 2 percent chlorhexidine and 70 percent isopropyl alcohol in a single-use applicator device.² ChloraPrep was the first CHG-based antiseptic skin preparation product available in the United States³ and was directly competitive with iodine-based skin antiseptics.⁴ There is now a significant body of peer-reviewed scientific research and studies demonstrating the superior efficacy and safety of CHG, many of which call out ChloraPrep by name.⁵ However, because clinicians in the surgical space were not initially familiar with CHG, MediFlex needed to do a significant amount of education to help potential customers understand the evidence behind the ChloraPrep product, and encourage them to evaluate and eventually adopt ChloraPrep as a replacement to iodine-based skin prep products.⁶

In 2007, MediFlex changed its name to Enturia, and in 2008 Enturia was acquired by Cardinal Health and the ChloraPrep line of products became part of Cardinal Health's infection prevention business unit. In September 2009, Opposer CareFusion was spun out from Cardinal

¹ See AX1 to Creidenberg Trial Testimony of Jan Creidenberg ("Creidenberg Trial Testiomny").

² Creidenberg Trial Testimony at 11:17-21.

³ The only other CHG-containing product available at the time that ChloraPrep was introduced was a skin cleansing detergent based product called Hibiclens. Hibiclens is not designed to be left on the skin because it contains detergents and surfactants. Creidenberg Trial Testimony at 12:16-25.

⁴ Id. at 13:1-5.

⁵ Opposer's Notice of Reliance [dkt. 42]. See generally Creidenberg Trial Testimony at 202:14-212:9 and OX 66-75.

⁶ Creidenberg Trial Testimony at 13:6-18.

Health as a separate public company that included the infection prevention business unit.⁷ Despite the changes in ownership, the ChloroPrep line of products has continued to be marketed under the CHLORAPREP brand, and clinicians who use ChloroPrep products have continued to recognize CHLORAPREP as a brand, even if they are unsure (or don't care) who the actual manufacturer is. As can be seen with the packaging of the current line of ChloroPrep products, there is no house mark on the packaging.⁸ As Jan Criedenberg, the Vice President and General Manager of CareFusion's Infection Prevention Business Unit, explained "They [the end users] buy ChloroPrep; they don't buy the company. And so what's important is that they can identify the product as, you know, the branded product that they use. The name CareFusion is on here [on the back of the packaging] as the manufacturer, of course, which is important information. But what they purchase and use in the clinical setting is the product, ChloroPrep."⁹

Name recognition of the CHLORAPREP mark has steadily increased over the years, due in no small part to the extensive educational and promotional efforts of Opposer and its predecessors. Between 2005, when ChloroPrep was first being introduced into the surgical space¹⁰, and 2012, unaided brand awareness of the CHLORAPREP mark went from 1% to close to 50% -- the highest unaided brand awareness of all competitors in the category.¹¹ By 2012, it was the product with the highest overall satisfaction rate and was the preferred brand among surgeons,¹² and most importantly, it had replaced the well-known iodine based 3M Betadine skin prep product as the standard of care among surgeons.¹³

⁷ Creidenberg Trial Testimony at 31:12-18. Opposer's Notice of Reliance [dkt. 43]. For the remainder of this Trial Brief, CareFusion and its predecessors in the ChloroPrep business will be collectively referred to as CareFusion.

⁸ See OX 1-11 and Criedenberg Trial Testimony at 25:2-6.

⁹ Creidenberg Trial Testimony at 26:6-14.

¹⁰ ChloroPrep had been in use in the vascular access space since 1994.

¹¹ The other competitors were Betadine, Hibiclens, DuraPrep and PDI/Chlorasrub. See OX 18 at CF10092 and OX 22 at CF 25476 and Creidenberg Trial Testimony at 34-62.

¹² OX 22 at CF 25488, 25490

¹³ OX 22 at CF25492

3. Promotion of Goods Sold Under the CHLORAPREP Mark

In order to achieve these impressive results, CareFusion has engaged for many years in a comprehensive marketing plan focused on educating clinicians about the superiority of CHG in killing germs and preventing infections, the advantages of the ChloroPrep single use delivery system, and the proper way to use the ChloroPrep products. An example of this type of evidence-based outreach can be seen in a 2007 letter from a ChloroPrep representative to a physician, which states “As part of a comprehensive program to reduce surgical site infections and the concerns associated with MRSA, your healthcare facility is evaluating ChloroPrep®, a patient preoperative skin preparation. I will be available to demonstrate the product and present important safety information on 8-6-07 through 8-8-07.” The letter goes on to provide preliminary information on the benefits of ChloroPrep’s formulation, citing to several studies, the benefits of the ChloroPrep applicators (which are illustrated at the bottom of the letter), and in citations to the superior outcomes, based on the results of (at that time) 31 published studies finding that ChloroPrep was the most effective solution for eliminating potential contaminants prior to surgery.¹⁴ Other early (2005-2008) examples of educational materials can be seen at OX 26, 27, 28, 29 and 31. One of the more ambitious of these educational pieces was the Clinical Compendium, OX 34, which was put together in 2007 by Enturia, and which set forth the evidence to date on the clinical efficacy of ChloroPrep, citing to numerous articles in peer-reviewed medical journals from several disciplines. At least 10,000 copies of the Clinical Compendium were printed for distribution to decision makers and influencers in the appropriate healthcare settings, such as infection control practitioners, infectious disease physicians, chiefs of surgery, OR directors and the like.¹⁵ CareFusion has also made training videos available to

¹⁴ See OX 24, CF10981

¹⁵ Criedenberg Trial Testimony at 94:18-96:22.

clinicians, either as DVDs for customers to keep in their libraries for ongoing training purposes, or downloadable from the carefusion.com website.¹⁶

Other educational outreach programs include CareFusion's Speakers Bureau, a faculty of thought leaders in the infection prevention space. The Speakers Bureau was initiated by MediFlex, and the speakers were individuals who had an expressed interest in healthcare acquired infections and infection prevention. ChloroPrep sales personnel would get to know these individuals, and developed an educational program that would equip them to help educate other clinicians in the medical community. These thought leaders, typically surgeons, infection control practitioners, and vascular access specialists would go speak to groups of clinicians and help educate them on issues such as healthcare-acquired infections and their clinical and economic impact, and on best practices for infection prevention, including skin prep.¹⁷ The ChloroPrep sales force also gave educational presentations and one-on-one meetings with clinicians and key decision makers on the benefits and effectiveness of ChloroPrep.¹⁸

CareFusion has made extensive use of industry trade shows as a way to promote the CHLORAPREP brand and product line to end users of the product. Since as early as 2001, CareFusion has had booths at national and international events, including AORN (Association of Perioperative Nurses), APIC (Association for Professionals in Infection Control), ICPIIC (International Conference on Prevention and Infection Control), AVA (Association for Vascular Access), SIS (Surgical Infection Society), INS (Infusion Nurses Society), AACCN (American Association of Critical Care Nurses), AABB (American Association of Blood Banks) and

¹⁶ See Creidenberg Trial Testimony at 92:5-94:14 and OX 33.

¹⁷ Creidenberg Trial Testimony at 90:21-91:17

¹⁸ Creidenberg Trial Testimony at 89:8-90:5, identifying a power point presentation (OX 32) as an example of the type of presentations given by the ChloroPrep sales force.

ANNA (American Nephrology Nurses Association).¹⁹ Effective marketing at a trade show is more than just setting up a booth with some flyers in it. CareFusion developed elaborate campaigns and themes for each show, and would have pre-show and post-show communications with attendees. Often, CareFusion would provide grants to the sponsoring organization to support educational efforts, symposia or other plenary sessions at a meeting. [REDACTED]

CareFusion has also used print and online media to advertise ChloroPrep products. At present, CareFusion advertises ChloroPrep in 15 to 20 journals on an ongoing basis, including the Infusion Nursing Society Journal, Association for Vascular Access Journal, American Journal of Infection Control, Infection Control Today, Infection Preventionist, Outpatient Surgery News, American Academy of Orthopedic Surgery Journal and the Journal of the American College of Surgeons.²¹ Online advertising has always been used to promote ChloroPrep products since at least as early as 2000, and by 2004 onward it became a staple of the media plan.²² CareFusion advertises in the electronic versions of many of the print journals in which it advertises, as well as on the carefusion.com website. Fiscal Year²³ (“FY”) 2015 impressions for online advertising (not including visits to the carefusion.com website) are approaching 2 million.²⁴

4. Advertising and Marketing Spend, and Sales of Chloro-branded Products.

The monetary investment in all these activities has been substantial. [REDACTED]

[REDACTED] was invested annually to do advertising, trade shows, online

¹⁹ Creidenberg Trial Testimony at 97:3-98:3 and OX 41.

²⁰ Creidenberg Trial Testimony at 98:7-99:1; *see generally* Creidenberg Trial Testimony at 96:23-121:24, and OX 35-49, for a discussion of CareFusion’s participation in trade shows over the years.

²¹ Creidenberg Trial Testimony at 83:5-84:18.

²² Creidenberg Trial Testimony at 85:3-8.

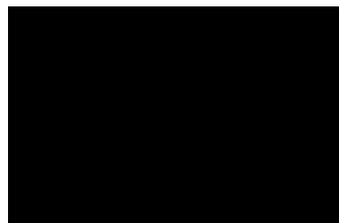
²³ CareFusion operates on a Fiscal Year (“FY”) from July 1 through June 30.

²⁴ Creidenberg Trial Testimony at 131:8-132:11.

communications, the Speakers Bureau, printed collateral, market research, work with advertising agencies, public relations, and funding of investigator led studies to further understand the characteristics and benefits of ChlorPrep. [REDACTED]

[REDACTED]

From FY 2010 through FY 2014 the total variable marketing investment in the United States²⁶ for ChlorPrep products by CareFusion was as follows:²⁷



CareFusion has tracked the marketing activities of its competitors in the ChlorPrep space (primarily, PDI, Aplicare and 3M), and has determined that competitors' sales teams are less than a third of the size of CareFusion's ChlorPrep sales team, and their promotional investment and prominence is lower.²⁸ ChlorPrep products are used in up to 90 percent of central line IV placements²⁹ and 60 percent of surgical procedures.³⁰

CareFusion sells CHLORAPREP-branded products in all 50 states (as well as in dozens of foreign countries). CareFusion sells the products to hospitals, ambulatory care centers, blood banks, dialysis centers, nursing homes and home health care providers and to companies that put

²⁵ Creidenberg Trial Testimony at 122:9-123:23.

²⁶ Variable marketing expenses do not include sale force salaries.

²⁷ OX 50; *see generally* Creidenberg Trial Testimony at 122-125.

²⁸ Creidenberg Trial Testimony at 126:14-127:9.

²⁹ According to webmd.com, "A central venous catheter, also called a central line, is a long, thin, flexible tube used to give medicines, fluids, nutrients, or blood products over a long period of time, usually several weeks or more. A catheter is often inserted in the arm or chest through the skin into a large vein."

³⁰ Creidenberg Trial Testimony. at 127:21-128:12.

together procedure kits.³¹ Sales of ChloroPrep products are substantial. Gross sales from calendar years 2003 to 2012 are as follows:³²



5. Previous Instances of Confusion Between ChloroPrep and Another Chloroformative Competitive Product.

In the mid-2000's, CareFusion (then, Enturia) began experiencing significant customer confusion between its ChloroPrep product and a competitive surgical skin prep product called ChloroScrub, which was manufactured by PDI. The parties entered into a settlement agreement in 2006, but the dispute and the confusion continued. In 2007, confusion between the two products had reached a point where CareFusion prepared a trade show presentation for the AVA (Association for Vascular Access) show for the purpose of educating the clinicians attending the show about the differences between the two products, inasmuch as the names were very similar.³⁴ As recognition of the ChloroPrep brand continued to grow, the confusion only worsened, with the company receiving misdirected complaints about ChloroScrub products.³⁵ Finally, to alleviate the marketplace confusion, PDI abandoned use of the ChloroScrub mark

³¹ See generally Criedenberg Trial Testimony at 54-58.

³² OX 16 and Criedenberg Trial Testimony at 26:18-27:25

³³ Creidenberg Trial Testimony at 29:5-20.

completely in 2011 as part of a settlement agreement with CareFusion.³⁶ Ultimately, PDI changed its product name to Prevantics.

6. CareFusion's Federal Registration of the CHLORASHIELD Mark

CareFusion owns the following valid and subsisting federal registration for the mark CHLORASHIELD for antimicrobial dressings:

(a) CHLORASHIELD – Registration No. 4,488,745, registered on the Principal Register on February 25, 2014 for use in connection with “antimicrobial catheter patch dressing.”

7. CareFusion's Rights in CHLORA—formative Marks for Antimicrobial Products Containing CHG for Use in Humans

As noted above, CareFusion was a pioneer in the category of antimicrobial skin preparations for use on humans containing the chlorhexidine molecule, CHG, it educated the medical community on the benefits of CHG and its use, and it is the dominant market player in the field.³⁷ Over the years, CHLORAPREP-branded products have expanded to a family of 11 different applicator sizes and shapes, each of which was introduced after extensive market research into end-users' wants and needs in a pre-operative or vascular entry skin antimicrobial product.³⁸ The CHLORAPREP family has also expanded to ChloraShield, a thin film patch dressing containing CHG. There are no other federal registrations of a CHLORA-formative mark for a chlorhexidine antimicrobial product for use in humans:³⁹

³⁴ Creidenberg Trial Testimony at 109:10-110:22 and OX 40. See also OX 76 for an overview of the litigation between Enturia and PDI.

³⁵ See Creidenberg Trial Testimony at 42:18-43:13; 44:2-45:25, and OX 20.

³⁶ See OX 76.

³⁷ Creidenberg Trial Testimony at 198:18-199:12.

³⁸ Creidenberg Trial Testimony at 20:2-16.

³⁹ Opposer's Notice of Reliance [dkt. 49] and Trial Testimony of Jennifer Raeder-Devens (Raeder-Devens Trial Testimony) at 43:18-47:22 and OX 80-91.

Mark	Registration No.	Registered goods	Uses
CHLORACEL	0649510	Sodium aluminum chlorhydroxy lactate and other aluminum chlorhydroxy compounds	Antiperspirants
CHLORASEPTIC	0837014	Pharmaceutical preparation for the relief of throat and mouth soreness	Sore throat pain relief lozenges and sprays
CHLORALOY	1012945	Sheets of synthetic polymeric material for construction purposes, particularly shower liners	Waterproofing membrane for floors and walls at showers, tub surrounds, and other wet areas
CHLORAZENE	1530509	Antiseptic powder	Disinfecting and reducing bacteria in baths or whirlpools
CHLORAZONE	2219205	Synthetic polymer in the form of solid slabs, strips and other pre-formed solid shapes, used to manufacture a wide variety of products intended to be in regular contact with water	Chemical-resistant rubber used in toilet bowl cleaners, seals and flappers
CHLORAGUARD	2395110	Fabric protectant, namely, dye treatment for bleach resistant protection sold as a component of carpets	Bleach resistance for carpets
CHLORADINE	3608454	Antimicrobial solution for teat dip; disinfectant for veterinary use	Disinfecting teats after cow milking; antimicrobial scrub solution for external animal use only
CHLORASEB	4012226	Antibacterial and antifungal sprays for use on pets and animals	Antiseptic spray for external dog, cat, and horse use only
CHLORAXIS	4147430	Dietary and nutritional supplements	Green coffee bean extract used in weight loss supplements

Indeed, ChloraPrep's competitors in the field of antimicrobial skin prep products use names that are quite different:⁴⁰

⁴⁰ Opposer's Notice of Reliance [dkt. 50]; Raeder-Devens Trial Testimony 37:6-12; 38:15-18.

Company	Registration No.	Mark	Goods	Active Ingredients
3M	1,529,299	DURAPREP	Preoperative antimicrobial skin preparation solution	Iodine Povacrylex and Isopropyl Alcohol
Covidien	3,367,082	MERLIN	Preoperative skin prep applicator with <i>ExCelAP</i> antimicrobial solution (by Aplicare, Inc.)	Isopropyl Alcohol and Povidone-Iodine
Aplicare	3,009,518	EXCELAP	Antiseptic solution swabsticks	Isopropyl Alcohol and Povidone-Iodine
Purdue Products	657,663	BETADINE	Surgical scrub solution	Povidone-iodine
Gremed Medical Products	3,861,339	FOAM SAFE	Antimicrobial surgical hand scrub	Chlorhexidine gluconate
Ecolab	1,498,279	SCRUB-STAT	Antimicrobial surgical hand scrub	Chlorhexidine gluconate
Mölnlycke Health Care	993,345	HIBICLENS	Antiseptic, antimicrobial skin cleanser	Chlorhexidine gluconate
Professional Disposables International, Inc.	4,411,529	PREVANTICS	Antiseptic wipes	Chlorhexidine gluconate

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴¹ Creidenberg Trial Testimony at 135:8-20 and OX 51.

[REDACTED]

⁴² Creidenberg Trial Testimony at 140:1-141:2; 141:8-15; 142:3-11.

⁴³ Creidenberg Trial Testimony. at 141:13-24; 142:21-25; Raeder-Devens Trial Testimony at 21:19-22:9. See also OX 52 at CF 00186-187; 00202-206; 00212-214.

[REDACTED]

B. The Relationship Between Entrotech and CareFusion

1. Initial Meetings Between Entrotech and CareFusion

Entrotech, Inc. was founded in 1999 by its President and CEO, Jim McGuire and is based in Columbus, Ohio (as is CareFusion’s predecessor, Cardinal Health). Entrotech is an advanced materials company that manufactures film based products, such as advanced surface protection films for the automotive industry and adhesives and films that go into hard disk drive components.⁴⁶ [REDACTED]

[REDACTED]

⁴⁴ Raeder-Devens Trial Testimony at 21:19-25.
⁴⁵ Creidenberg Trial Testimony at 145:7-146:13.
⁴⁶ Trial Testimony of Jim McGuire (McGuire Trial Testimony) at 32:17-18; 45:18-19; 44:11-13; 46:12-21.
⁴⁷ McGuire Trial Testimony at 58:24-59:5.

[REDACTED]

⁴⁸ McGuire Trial Testimony at 69:2-7; McGuire Discovery Deposition at 47:5-13.

⁴⁹ [REDACTED]

⁵⁰ McGuire Trial Testimony at 75:6-12.

⁵¹ Creidenberg Trial Testimony at 147:5-7.

⁵² Creidenberg Trial Testimony at 147:1-4.

⁵³ Creidenberg Trial Testimony at 145:4-16.

⁵⁴ Creidenberg Trial Testimony at 147:25-148:4; 148:23-24.

⁵⁵ McGuire Trial Testimony at 291:17-21.

[REDACTED]

2. The Formation of EntroFoor and Project Linus

EntroFoor Medical, LLC was incorporated in Ohio on February 11, 2009 for the purpose of developing and commercializing a surgical incise drape product with CareFusion (at that time, Cardinal Health). [REDACTED]

[REDACTED]

⁵⁶ OX 53; Creidenberg Trial Testimony at 146:14-23; 152:3-153:8.

⁵⁷ OX 54; Creidenberg Trial Testimony at 166:22-167:12.

⁵⁸ Creidenberg Trial Testimony at 159:10-23.

⁵⁹ OX 54

⁶⁰ McGuire Discovery Deposition at 61:3-4. ([REDACTED])

⁶¹ See McGuire Trial Testimony at 284:4-285:2; 286:7-9.

⁶² [REDACTED]

[REDACTED]

McGuire Discovery Deposition at 69:9-15.

⁶³ See Creidenberg Trial Testimony at 167:13-22.

⁶⁴ Creidenberg Trial Testimony at 166:1-5; 174:2-5.

⁶⁵ Creidenberg Trial Testimony at 174:2-7.

⁶⁶ See Raeder-Devens Trial Testimony at 91:14-92:17.

⁶⁷ See OX 55.

⁶⁸ Creidenberg Trial Testimony at 174:14-175:4.

⁶⁹ Creidenberg Trial Testimony at 175:5-10.

[REDACTED]

[REDACTED]

[REDACTED]

3. *The Continuation and End of Project Linus*

From February 2009 to December 2010, the parties continued with the project. In June 2010, Jennifer Raeder-Devens⁷⁴, CareFusion’s Vice President for Research & Development for

⁷⁰ Creidenberg Trial Testimony at 175:13-15. [REDACTED]
[REDACTED] McGuire Trial Testimony at 104:6-9.

⁷¹ Creidenberg Trial Testimony at 175:16-176:11.

⁷² Creidenberg Trial Testimony at 179:10-180:8.

⁷³ McGuire Trial Testimony at 293:19-22; McGuire Discovery Deposition at 73:5-12; 72:20-23. [REDACTED]

the Infection Prevention business unit, was brought into the project for the purpose of establishing a more structured relationship between the parties, including establishing a work plan with development milestones and timelines for completions of tasks.⁷⁵ As the project continued through 2010 and 2011, the parties were operating under a Mutual Confidential Disclosure Agreement, executed on November 2, 2010,⁷⁶ but never formalized terms despite numerous attempts by CareFusion.⁷⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷⁴ Ms. Raeder-Devens is a chemical engineer with degrees from MIT and Stanford. She has worked in the medical device field for twenty-five years, much of that time spent working with the chlorhexidine molecule in medical applications.

⁷⁵ Raeder-Devens Trial Testimony at 99:13-106:6 and OX 94.

⁷⁶ OX 56.

⁷⁷ See, e.g. OX 57. [REDACTED]

McGuire Trial Testimony at 113:24-114:9.

⁷⁸ Raeder-Devens Trial Testimony at 111:3-7.

⁷⁹ Raeder-Devens Trial Testimony at 92:19-94:8.

[REDACTED]

⁸⁰ Raeder-Devens Trial Testimony at 131:8-12; see also OX 99.

⁸¹ Raeder-Devens Trial Testimony at 245:22-23.

⁸² See OX 109; see generally Raeder-Devens Trial Testimony at 180:25-185:8.

⁸³ Raeder-Devens Trial Testimony at 182: 14-16; 184:10-185:8.

⁸⁴ Trial Testimony of George Holinga at 211:13-214:4; 220:18-221:10. Mr. Holinga was the project manager on the Entrotech side, and testified: [REDACTED]

⁸⁵ OX 114 at CF 25580.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4. *Entrotech's Continued Product Development and Selection of the Chloradrape, Chloraderm, Chlorabond and Chlorabsorb trademarks.*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

IMAGE DELETED

When Project Linus ended in September 2011, [REDACTED]

[REDACTED]

⁸⁶ McGuire Discovery Deposition at 118:24-119:1 and CFN Deposition Ex. 25 at ELS 10848-10860.

⁸⁷ CFN Deposition Ex. 25 at 10848.

[REDACTED] McGuire Discovery Deposition at 132:6-10.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] On December 19, 2011, Entrotech filed trademark applications for Chloradrape, Chlorabond, Chlorabsorb and Chloraderm for products that are directly competitive with Opposer’s ChloraPrep line of products.⁹¹ This is a clear display of Entrotech’s bad faith intent to trade off of Opposer’s valuable ChloraPrep brand – a brand and product category that Mr. McGuire had never even heard of prior to Entrotech’s relationship with CareFusion.

5. ELS’s Federal Applications

The four opposed applications were all filed on December 19, 2011 in the name of Entrotech, Inc. and assigned to ELS in July 2012 (“ELS’s CHLORA-formative Marks”).

CHLORADRAPE, Serial No. 85/499332 for “Surgical drapes” in Class 10

CHLORADERM, Serial No. 84/499349 for “Medical and surgical dressings” in Class 5

CHLORABOND, Serial No. 85/499337 or “Topical antimicrobial solutions for dermatologic use” in Class 5

CHLORABSORB, Serial No. 85/499345 for “Medical and surgical dressings” in Class 5

ELS has not made sales of any of these products.

⁸⁸ Creidenberg Trial Testimony at 186:24-185:13.

⁸⁹ CFN Deposition Ex. 27 at ELS 2499; McGuire Discovery Deposition at 137:23-138:11.

⁹⁰ Foor Discovery Deposition at 173:4-17.

⁹¹ Creidenberg Trial Testimony at 187:24-190:12 and OX 58. See also Raeder-Devens Trial Testimony at 32:5-34:15.

VI. ARGUMENT

A. **Applicable Legal Standards**

The party opposing registration of a mark must prove that it has standing and that there are valid grounds for refusing registration in an opposition proceeding. *Lipton Industries, Inc. v. Ralston Purina Company*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Herbko Intern. v. Koppa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375 (Fed. Cir. 2002). To prevail on its likelihood of confusion claim, CareFusion must show priority of use, which may be established by proving prior use or ownership of valid and subsisting registrations, and a likelihood of confusion between its CHLORAPREP and CHLORASHIELD Marks and ELS's CHLORA-formative Marks. See 15 U.S.C. §1052(d); TBMP §309.03(c)(A)-(B). In determining likelihood of confusion, the Board applies the factors in *In re E.I. du Pont de Nemours & Co.*, 177 USPQ 563, 567 (CCPA 1973). Different factors may play dominant roles in determining likelihood of confusion in different cases. *Nina Ricci S.A.R.L. v. E.T.F. Enters., Inc.*, 12 USPQ 2d 1901, 1903 (Fed. Cir. 1989). In assessing whether a likelihood of confusion exists, all doubts must be resolved in favor of the prior user. *Id.*, 12 USPQ2d at 1904; *Hancock v. Am. Steel & Wire Co.*, 97 USPQ 330, 333 (CCPA 1953).

B. **Opposer Has Established Standing**

CareFusion has standing to oppose and cancel ELS's CHLORA-formative Marks because CareFusion has (1) a "real interest" in the proceedings; and (2) a reasonable basis for the belief that CareFusion will suffer damage if registration of ELS's CHLORA-formative Marks is allowed. *Ritchie v. Simpson*, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999); see also *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000). CareFusion has made the registrations of its CHLORAPREP and CHLORASHIELD Marks of record in these proceedings

and has also presented substantial evidence of their prior use in connection with goods that are confusingly similar to those listed in ELS's applications. The near-identity of the marks and the fact the goods described in the applications are directly competitive with CareFusion's ChloraPrep and ChloraShield products support a reasonable basis for CareFusion's claims of likelihood of confusion and CareFusion's real interest in opposing the applications of the ELS's CHLORA-formative Marks to prevent damage to CareFusion's CHLORAPREP and CHLORASHIELD Marks, goodwill and reputation.

C. Opposer Has Established Ownership of Valid Marks and its Prior Use and Registration of its CHLORAPREP and CHLORASHIELD Marks

To establish priority, CareFusion must show proprietary rights in its CHLORAPREP and CHLORASHIELD Marks arising from "a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights." *Herbko Int'l, Inc., supra*, 64 USPQ2d at 1378; *see also Otto Roth & Co. v. Universal Foods Corp.*, 209 USPQ 40, 43 (CCPA 1981)(must prove "proprietary rights in the term [opposer] relies upon . . . whether by ownership of a registration, prior use of a technical 'trademark', prior use in advertising, prior use as a trade name, or whatever other type of use may have developed a trade identity").

CareFusion is the owner of one incontestable registration for the mark CHLORAPREP which is of record in this case.⁹² Under Section 33(b) of the Lanham Act, 15 U.S.C. §1115, an incontestable registration is "conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce." CareFusion's CHLORAPREP Registrations issued long before ELS's CHLORA-formative applications were filed on

⁹² Opposer's Notice of Reliance [dkt. 12].

December 19, 2011. CareFusion's June 10, 2010 filing date for its ITU application for CHLORASHIELD predated ELS's application dates, and the application has since registered with a claimed first use date of October 24, 2013. This in itself is sufficient to show CareFusion's priority. *Herbko, supra*, 64 USPQ2d at 1378; *Otto Roth, supra*, 209 USPQ at 43; *see also King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Based on these undisputed facts, CareFusion has priority over ELS for each of the marks at issue in these proceedings. Likewise, an incontestable registration cannot be challenged on the grounds that it is merely descriptive. *Park 'n Fly, Inc. v. Dollar Park & Fly*, 469 U.S. 189 (1985).

D. The ELS CHLORA-formative Marks are Confusingly Similar to CareFusion's CHLORA-formative Marks

1. CareFusion's CHLORAPREP Mark is Strong

When assessing the strength of a mark, the Board has noted that "both its inherent strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition of the mark" must be considered. *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458 (TTAB 2014), *citing Top Tobacco, L.P. v. North Atlantic Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (T.T.A.B. 2011); *Tea Board of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006); McCarthy on Trademarks and Unfair Competition § 11:83 (4th ed. 2011) ("The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another's use.").

A mark's inherent, or conceptual strength, "depends largely on the obviousness of its connection to the good or service to which it refers." *Multi Time Machine, Inc. v Amazon.com*,

Inc., 115 USPQ2d 1491, 1497 (9th Cir. 2015). While the prefix “chlor” may be suggestive of a product containing some form of chlorine (or chlorophyll or chloroform for that matter), CareFusion’s specific use of the “chlora” prefix to reference use of the chlorhexidine molecule is unique in the medical field. Indeed, while Applicant has submitted Notices of Reliance for numerous registrations of “Chloro” formative marks, these registrations are irrelevant inasmuch as the marks at issue here use the “chlora” prefix, and Applicant has presented no evidence that the terms are seen as interchangeable in the minds of the relevant consumers. As noted above, none of the third party registrations submitted herein for marks beginning with “chlora” are for antiseptic products for use on human beings. Likewise, there are no registrations for products that are actually competitive with ChloraPrep and ChloraShield that use the prefix “chlora”.⁹³ At a minimum, CHLORAPREP is inherently a suggestive mark which requires “imagination, thought, and perception to reach a conclusion as to the nature of the goods.” *In re Abcor Dev. Corp.*, 588 F.2d 811, 813 (CCPA 1978).

Even more importantly, however, is the marketplace strength that Opposer has achieved in its CHLORAPREP mark. Opposer has presented extensive evidence on its widespread efforts to promote name recognition for the CHLORAPREP brand over the years, including educating clinicians on the benefits of ChloraPrep through its advertising and marketing activities, its trade show participation, and through extensive contacts between ChloraPrep sales reps and customers. Opposer has spent millions of dollars promoting the CHLORAPREP brand over the years to the point that it has the highest unaided brand awareness in the category and it has replaced 3M’s well-known iodine based Betadine skin prep product as being seen as the standard of care among surgeons.⁹⁴ Sales of ChloraPrep products are approaching \$2 billion over the past

⁹³ Opposer’s Notices of Reliance [dkt. 13-14] and pgs. 16-17 *supra*.

⁹⁴ See *supra* at pgs 7-8.

twelve years. Clearly the CHLORAPREP brand, and CHLORA-formative extensions of that brand, are conceptually and commercially strong as indicators for Opposer's surgical skin prep and vascular access products containing chlorhexidine. This factor favors Opposer.

2. The Marks at Issue are Confusingly Similar

ELS seeks to register the marks CHLORADERM, CHLORADRAPE, CHLORABSORB and CHLORABOND, all of which are confusingly similar to Opposer's well-known CHLORAPREP and CHLORASHIELD marks. In evaluating the similarity of the parties' marks, the Board must determine whether the marks, "when compared in their entireties in terms of appearance, sound, and connotation, are similar or dissimilar in their overall commercial impressions. *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1659-60 (TTAB 2002). As the Federal Circuit explained:

The proper test is not a side-by-side comparison of the marks, but instead "whether the marks are sufficiently similar in terms of their commercial impression" such that persons who encounter the marks would be likely to assume a connection between the parties. *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 U.S.P.Q.2d 1901, 1905 (TTAB 2001). In this fact-specific inquiry, if the parties' goods are closely related, a lesser degree of similarity between the marks may be sufficient to give rise to a likelihood of confusion. *In re Inca Textiles, LLC*, 344 Fed.Appx. 603, 606 (Fed.Cir.2009) (citing *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed.Cir. 1992)).

Coach Services, Inc. v Triumph Learning LLC, 668 F.3d 1356, 1368 (Fed. Cir. 2012)

When marks appear on identical goods, as they do here, the degree of similarity between the marks necessary to support a finding of likelihood of confusion is less that if would be if the goods were not identical. *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419 (TTAB 2014); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

While the general rule is that marks must be viewed in their entireties, in some situations “one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark.” *Leading Jewelers Guild, supra*, 82 USPQ2d at 1905. If the dominant portion of both marks is the same, then confusion may be likely notwithstanding small differences, such as the addition of descriptive terms. *See, e.g., In re G.B.I. Tile and Stone Inc.*, 92 USPQ2d 1366 (TTAB 2009) (CAPRI COLLECTION for flooring tiles likely to be confused with CAPRI for roofing tiles, noting “the presence of the additional term “Collection” would not be likely to distinguish the marks since it would merely indicate that applicant offers a group of products under its mark.”); *In re Toshiba Medical Systems Corp.*, 91 USPQ2d 1266 (TTAB 2009) (VANTAGE TITAN for MRI diagnostic equipment held likely to be confused with TITAN for medical ultrasound device, noting that the marks are more similar than they are different and that the addition of applicant’s “product mark” to the registered mark would not avoid confusion); *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 73 USPQ2d 1689 (Fed. Cir. 2005) (VEUVE ROYALE for sparkling wine found likely to be confused with VEUVE CLICQUOT and VEUVE CLICQUOT PONSARDIN for champagne, noting that the presence of the “strong distinctive term [VEUVE] as the first word in both parties’ marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of the word ROYALE”); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 1343, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (“Viewed in their entireties with non-dominant features appropriately discounted, the marks [GASPAR’S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical”); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002) (even though applicant’s mark PACKARD TECHNOLOGIES (with

“TECHNOLOGIES” disclaimed) does not incorporate every feature of opposer’s HEWLETT PACKARD marks, similar overall commercial impression is created).

In this case, Opposer has established the renown of its CHLORAPREP mark, and it has expanded its business under CHLORA-formative marks to include products sold under the mark CHLORASHIELD. The applied-for marks all share the identical CHLORA prefix as the CHLORAPREP and CHLORASHIELD marks, and there is nothing distinctive about the suffixes of the applied-for marks. Moreover, the Board has the benefit of a prior similar marketplace experience with use of a CHLORA-formative mark on competing products, as seen by the confusion caused by the ChloraScrub product.⁹⁵ The result here is likely to be the same. “Chlora” is the most distinctive part of Opposer’s well-known CHLORAPREP mark, and given its segment share and renown in the medical industry, as well as the near-identity of the products at issue, confusion is likely.

3. *The Goods to be Sold Under the Parties’ Marks are Identical and are Presumed to be Sold in Identical Channels of Trade*

The ELS applications cover the following goods:

CHLORADRAPE, Serial No. 85/499332 for “Surgical drapes” in Class 10

CHLORADERM, Serial No. 84/499349 for “Medical and surgical dressings” in Class 5

CHLORABOND, Serial No. 85/499337 or “Topical antimicrobial solutions for dermatologic use” in Class 5

CHLORABSORB, Serial No. 85/499345 for “Medical and surgical dressings” in Class 5

These products are identical to products sold by CareFusion under its CHLROAPREP and CHLORASHIELD marks.⁹⁶ In the absence of any express limitations in the involved

⁹⁵ See *supra* at pgs.13-14.

⁹⁶ Creidenberg Trial Testimony at 187:24-190:12 and OX 58. See also Raeder-Devens Trial Testimony at 32:5-34:15.

application(s) or registration(s), the Board assumes that the channels of trade for the goods or services are those normal for such goods or services, and that the purchasers are the same. *In re Melville Corp.*, 18 USPQ2d 1387 (TTAB 1991); *In re Hughes Furniture Industries, Inc.*, 114 USPQ2d 1134 (TTAB 2015); *CBS Inc. v. Morrow*, 218 USPQ 198, 199 (Fed. Cir. 1983); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 16 USPQ2d 1783 (Fed. Cir. 1990). In this case, it is clear that ELS is looking to enter the identical market with identical goods, to be sold under a functionally identical name to compete against Opposer's "Chlora" products.

Given the similarity of the names and the similarity of the products, confusion as to source is highly likely here. "In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods." *Edom Laboratories, Inc. v. Glenn Lichter*, 102 USPQ2d 1542 (TTAB 2012), citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of the differences in the essential characteristics of the goods and differences in the marks."). In this case, the goods and marks are virtually identical. These factors favor Opposer.

4. There Are No Other CHLORA-formative Marks Used on Similar Goods

Under the sixth du Pont factor, the Board can consider "the number and nature of similar marks in use on similar goods" in making its determination of likelihood of confusion. If the evidence shows that the relevant consumers are exposed to third-party use of similar marks on similar goods, it "is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection." *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1373-74, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005). However, as noted above, there are simply no other federal registrations of CHLORA-formative marks for an antimicrobial product for use in humans. None of the third party registrations of "Chlor" marks

submitted by Applicant are for products that are similar to CareFusion’s ChloroPrep line of products. The only exposure that the relevant consumers (medical professionals) have to “Chlora” topical antimicrobial products for use on humans are CareFusion’s ChloroPrep products. This factor favors Opposer.

5. Opposer Has Been Vigilant in Policing its CHLORAPREP Mark

The CareFusion and its predecessors have vigorously policed and stopped use by third parties, such as in the PDI matter regarding PDI’s registration and use of ChloroScrub for a competitive product.⁹⁷ CareFusion has also filed a Cancellation action against Arrow International regarding their registration of the term Chlorag+ard for “antiseptic catheter surface sold as an integral component of catheters.”⁹⁸ Accordingly, the eleventh *du Pont* factor, Opposer’s right to exclude others from use of CHLORA-formative marks on competing products, favors Opposer.

6. Applicant’s Bad-Faith Adoption Supports a Finding of Likely Confusion

Likelihood of confusion can be presumed where an applicant adopts a mark with the intent to call to a purchaser’s mind a senior user’s successful mark. *Rogers & Gallet S.A. v. Venice Trading Co., Inc.*, 1 U.S.P.Q.2d 1829, 1832 (T.T.A.B. 1987). A party who knowingly adopts a mark similar to one used or registered by another for the same goods does so at his peril, *In re Shell Oil Co.*, 992 F.2d 1204, 1207, 26 U.S.P.Q.2d 1687, 1690 (Fed. Cir. 1993); as there is “no excuse for even approaching the well-known trademark of a competitor.” *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 353 (Fed. Cir. 1992), “To do so raises ‘but one inference – that of gaining advantage from the wide reputation established by [another]’.” *Planters Nut & Chocolate Co. v. Crown Nut Co., Inc.*, 305 F.2d 916, 924, 134 U.S.P.Q. 504, 511 (C.C.P.A. 1962). Moreover, the thirteenth *du Pont* factor allows the Board to weigh “any other

⁹⁷ Creidenberg Trial Testimony at 213:13-215:8 and OX 76.

⁹⁸ Creidenberg Trial Testimony at 215:16-216:3 and OX 77.

established fact probative of the effect of use.” Increasingly, the Board has looked at evidence of an applicant’s bad faith adoption of a mark as relevant evidence to a finding of likelihood of confusion, particularly when it is supported by other evidence. In this case, the evidence of Applicant’s intent and bad faith is overwhelming.

The thirteenth du Pont factor is intended to “accommodate the need for flexibility in assessing each set of facts.” *In re Strategic Partners, Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012), cited in *In re Allegiance Staffing*, 115 USPQ2d 1319, 1323 (TTAB 2015). Evidence of applicant’s bad faith adoption of this mark is relevant to the likelihood of confusion analysis. *Edom Laboratories, Inc. v. Glenn Lichter*, 102 USPQ2d 1546, 1553 (TTAB 2012); *L’Oreal S.A. and L’Oreal USA, Inc. v. Marcon*, 102 USPQ2d 1434 (TTAB 2012); citing *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1890 (TTAB 2008). See *J & J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991) (“Whether there is evidence of intent to trade on the goodwill of another is a factor to be considered, but the absence of such evidence does not avoid a ruling of likelihood of confusion.”); *Jacobs v. International Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 643 (CCPA 1982) (Nies, J., concurring opinion)(“The absence of intent to confuse would not preclude a finding of likelihood of confusion, but had such intent been shown (which it has not), it would be a factor to weigh against the newcomer.”); and *Lever Bros. Co. v. Riodela Chemical Co.*, 41 F.2d 408, 5 USPQ 152, 154-55 (CCPA 1930)(“[W]e have a right, in determining the question of likelihood of confusion or mistake, to consider the motive in adopting the mark as indicating an opinion, upon the part of one vitally interested, that confusion or mistake would likely result from the use of the mark.”).

There can be no doubt here that ELS adopted its CHLORA-formative Marks in bad faith with the intent of capitalizing on the renown of CareFusion's ChloroPrep products. Indeed, it is not farfetched to conclude that Applicant, Entrotech Life Sciences, would not exist today were it not for the longstanding relationship between Dr. John Foor and Jan Creidenberg. Mr. McGuire admitted that he had never heard of ChloroPrep and had never considered the use of chlorhexidine in a surgical drape prior to meeting Dr. Foor. He also acknowledged that Entrotech would never have gotten the October 2008 initial pitch meeting with Cardinal Health were it not for Dr. Foor's connections with Mr. Creidenberg and Cardinal Health. And although Entrotech had never developed or manufactured a product that required FDA approval prior to October 2008, CareFusion went forward in good faith with them on the incise drape project because they were excited about the project, they were impressed with the presentation, and they trusted Dr. Foor.

However, from the beginning of the relationship, Mr. McGuire displayed a lack of professional respect for CareFusion personnel.⁹⁹ He was not forthright with them, although he and his team continued to work with CareFusion to develop a product that he understood would be sold by CareFusion as an extension of its ChloroPrep line of products. Mr. McGuire and his team learned valuable industry information from the CareFusion team about design and commercialization requirements for a medical device, were paid for part of their efforts – at the same time Mr. McGuire was courting other investors.

⁹⁹ [REDACTED]

When the relationship ended, Mr. McGuire had knowledge about the development of the incise drape and related products that he wouldn't have had without the relationship with CareFusion – knowledge that helped ELS develop products that, if ever sold, will be competitive with ChloroPrep and ChloroShield products, and other product extensions contemplated by CareFusion. ELS adopted these names with full knowledge of Opposer's Marks. CareFusion is prepared to compete fairly with ELS in the marketplace. However, for ELS to enter a market space that CareFusion pioneered, using CHLORA-formative names intended to trade off the hard-earned reputation and brand recognition developed by CareFusion and its predecessors over two decades, is a clear and undeniable demonstration of bad faith.¹⁰⁰

CareFusion has many competitors in this space, and none express a need to or do business under a CHLORA-formative mark. The opposed marks were applied for in bad faith, with knowledge of CareFusion's superior rights in CHLORA-formative names for these products, with the intent to capitalize on the ready-made brand recognition of ChloroPrep. Thus, the thirteenth du Pont factor also favors Opposer.

VII. CONCLUSION

On balance, considering all of the evidence on all of the above-listed relevant factors, and giving each such factor its appropriate weight in the circumstances of this case, ELS's CHLORA-formative Marks so closely resemble CareFusion's prior used and registered CHLORAPREP and CHLORASHIELD Marks as to be likely, when used on or in connection with the goods described in the applications, to cause confusion, or to cause mistake, or to deceive, and hence, registration of its CHLORADRAPE, CHLORADERM, CHLORABSORB

¹⁰⁰ Applicant's bad faith persisted in its prosecution of this matter. The docket herein is replete with Motions to Compel and filings outlining the significant delays and obstruction presumably authorized by Applicant. Most tellingly, Applicant has gone to extraordinary lengths to keep out relevant witness testimony, including the testimony of Dr. Foor. Opposer will be addressing these issues more fully in evidentiary filings accompanying this Trial Brief.

and CHLORABOND applications should be refused under Section 2(d) of the Lanham Act; 15 U.S.C. §1052(d).

Respectfully submitted,

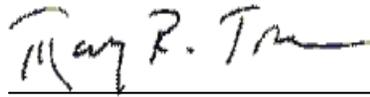
Date: September 4, 2015

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*Attorneys for the Opposer
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the following attorney of record for Applicant by electronic mail this 4th day of September 2015:
LMartens@sheppardmullin.com.

A handwritten signature in black ink, appearing to read "Mary R. True", written over a horizontal line.

Mary R. True

**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.	: Combined Opposition No.: 91206212
	:
Entrotech Life Sciences, Inc.,	:
	:
Applicant.	:

**APPENDIX A
WITNESSES CITED IN OPPOSER’S TRIAL BRIEF**

1. Jan Creidenberg - V-P & General Manager of CareFusion’s Infection Prevention Business Unit

Mr. Creidenberg has been directly and extensively involved with the marketing of ChloroPrep® from January 2006 through June 30, 2015. As the custodian of the CareFusion’s financial and corporate records regarding the ChloroPrep line of products, he provided testimony regarding CareFusion and its predecessors sales, advertising and marketing spending for ChloroPrep products, the strength of the ChloroPrep mark and its renown in the medical community, and the development of new infection prevention products in the ChloroPrep line. He has also provided direct testimony regarding CareFusion’s relationship with Entrotech in the parties’ efforts to develop a surgical incise drape containing chlorhexidine, including his personal interactions with Entrotech’s President and CEO, Jim McGuire, and on the potential for confusion between Applicant’s Chloro-formative marks and the competitive products that Entrotech hopes to develop, and Opposer’s ChloroPrep and Chlorashield products.

He has provided the following sworn testimony that is of record in this case:

Trial Testimony taken by Opposer on March 12, 2015, Dkt.77.

Exhibits introduced: Opposer’s Exhibits (“OX”) 1 - 77

Applicant’s Exhibits (“AX”) 1- 6

Cited testimony: 11:17-21; 12:16-25; 13:1-5; 13:6-18; 20:2-16; 25:2-6; 26:18-27:25; 29:5-20; 34-62; 42:18-43:13; 44:2-45:25; 83:5-84:18; 85:3-8; 89:8-90:5; 90:21-1:17; 92:5-94:14; 94:18-96:22; 96:23-121:24; 97:3- 98:3; 98:7-99:1;

109:10-110:22; 122:9-123:23; 122-125; 126:14-127:9; 127:21-128:12; 131:8-132:11; 135:8-20; 140:1-141:2; 141:8-15; 141:13-24; 142:3-11; 145:4-146:13; 146:14-23; 147:1-7; 147:25-148:4; 148:23-24; 152:3-153:8; 159:10-23; 166: 1-5; 166:22-167:12; 167:13-22; 174:2-7; 174:14-175:4; 175:5-10; 175:13-15; 175:16-176:11; 178:17-180:8; 186:23-185:13; 187:24-190:12; 198:18-199:12; 199:20-202:10; 202:14-212:9; 213:13-215:8; 215:16-216:3.

Discovery Deposition taken by Applicant on
Exhibits introduced: Opposers Rebuttal Exhibits 1-8
Cited testimony: pgs. 10-11; 21-25; 29; 32-36; 50-51

2. Jennifer Raeder-Devens, Vice President for Research & Development for Carefusion's Infection Prevention Business Unit

Ms. Raeder-Devens is a chemical engineer with degrees from MIT and Stanford. She has worked in the medical industry for more than twenty five years, much of that time spent working with the chlorhexidine molecule in medical applications. She testified about the ChloroPrep's competitors, the relationship between EntroFoor and CareFusion during the incise drape project, including EntroFoor's manufacturing difficulties and problems reaching set milestones. She also testified about the potential for confusion between CareFusion's ChloroPrep and ChloroShield products and the products ELS is developing under the applied-for marks.

She has provided the following sworn testimony that is of record in this case:

Trial Testimony taken by Opposer on March 13, 2015, Dkt. 79.
Exhibits introduced: Opposers' Exhibits OX 78-114
Cited testimony: 21:19-22:9; 32:4-34:15; 37:6-12; 38:15-18; 43:18-47:22; 91:14-92:17; 92:19-94:8; 99:13-106:6; 111:3-7; 131:8-12; 180:25-185:8; 182:14-16; 184:10-185:8; 245:22-23;

Rebuttal Testimony taken by Opposer on June 23, 2015, Dkt. 76

3. Jim McGuire, President and CEO of Entrotech, Inc.

Mr. McGuire testified about Entrotech, the formation of EntorFoor, his relationship with Dr. John Foor, and the relationship between EntroFoor and CareFusion during the incise drape project.

He has provided the following sworn testimony that is of record in this case:

Trial Testimony taken by Applicant on May 12, 2015.
Exhibits introduced: Applicant's Exhibits 1- 53
Cited testimony: 32:17-18; 44: 11-13; 45:18-19; 46:12-21; 58: 24-59:5; 69:2-7; 75:6-12; 98: 19-25; 89:14-20; 90:1-2; 113:24-114:9; 141:19-21; 291:17-21; 293:19-22

Discovery Deposition taken by Opposer on December 10, 2014, Dkt. 44
Exhibits introduced: CFN Exhibits 32-38
Cited testimony: 47:5-13; 52:7-15; 59:23-60:11; 61:3-4; 69:9-15; 72:20-23; 73:5-12; 73:13-19; 99:13-14; 116:20-24; 118:24-119:1; 132:6-10

4. Dr. John Foor, [former] Medical Director of Entrotech Life Sciences and founding member of EntroFoor Medical LLC

Dr. Foor was an early champion of ChloroPrep products and was a member of CareFusion Speaker's Bureau. He was instrumental in bringing Entrotech and CareFusion together for the development of the incise drape, and did extensive work on the project.

He has provided the following sworn testimony that is of record in this case:

Discovery Deposition taken by Opposer on June 17, 2014 Dkt. 46
Exhibits introduced: CFN Exhibits 1- 30
Cited testimony: 173:4-17

5. George Holinga, Principal Scientist, Entrotech Life Sciences

Mr. Holinga was the project lead on the incise drape project for EntroFoor. He testified about EntroFoor's work on the incise drape project and the differences in expectations between what CareFusion required and how EntroFoor wanted to run the project.

He has provided the following sworn testimony that is of record in this case:

Trial Testimony taken by Applicant on May 14, 2015.

Cited testimony: 211:13-214:4; 220:18-221:10

**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.	: Combined Opposition No.: 91206212
	:
Entrotech Life Sciences, Inc.,	:
	:
Applicant.	:

APPENDIX B
OPPOSER’S OBJECTIONS TO PORTIONS OF APPLICANT’S
NOTICES OF RELIANCE

Opposer, CareFusion 2200, Inc. hereby objects to Exhibits J1, J2, J3, E1, E2, E3, E4, E5, E6, and I1 from Applicant’s Notices of Reliance for the reasons set forth below.

- I. Exhibits E1, E2, E3, E4, E5 and E6, and testimony relating to these exhibits, should be stricken because they relate to an issue the Interlocutory Attorney (“IA”) has already deemed to be moot.

The Exhibits noted above all relate to Opposer’s Registration No. 4495083 of CHLORASHIELD for “surgical incise drapes.” Opposer filed a voluntary surrender of this registration under Section 7 on November 24, 2014. Subsequently, following a telephone conference with the IA regarding, *inter alia*, Applicant’s motion to compel discovery on this registration in which Opposer indicated that it did not intend to rely on this registration or on any common law rights in CHLORASHIELD for “surgical incise drapes”, the IA stated “Applicant’s motion to compel written discovery or deposition testimony regarding this registration and/or

any common law rights associated with the CHLORASHIELD mark for “surgical incise tape [sic]” is deemed MOOT and will be given no further consideration.” Opposer has not attempted to rely upon any claim of trademark rights to CHLORASHIELD for incise drapes. This registration is not a part of these proceedings; thus any evidence and legal argument regarding it is irrelevant and should be stricken pursuant to TBMP Rule 707.02(c), 37 CFR § 2.122.

- II. Exhibits J1, J2, J3 and I1, and testimony relating to these exhibits, should be stricken because they are irrelevant to any matter at issue in this Opposition proceeding and their prejudice outweighs any probative value.

The Exhibits listed above all related to a Department of Justice (“DOJ”) investigation of CareFusion regarding alleged improper marketing of its ChloroPrep product, and reports and press releases from 2013 and 2014 regarding the eventual settlement CareFusion reached with the DOJ to resolve the matter.¹ There was no finding of liability, and the investigation had nothing to do with Opposer’s trademark rights in the CHLORAPREP mark. Applicant’s stated reason in its Notice of Reliance for introducing this evidence is to show “the weakness of the CHLORAPREP mark and product and any goodwill Opposer alleges either may have” and “Opposer’s reputation in the industry.” Applicant’s President, Jim McGuire, also testified in his testimony deposition that after learning of this investigation through these press releases that he did not want to be associated with CareFusion’s ChloroPrep product.

As an initial matter, Applicant has presented no evidence, other than Mr. McGuire’s unsubstantiated testimony that “it’s been the talk at the medical device industry since all this

¹ Opposer objected to this evidence when Applicant first attempted to introduce it during the Discovery Deposition of Jan Creidenberg at 141:24-144:10. At that time, counsel for Opposer advised counsel for Applicant that if she wished to continue this line of questioning, she would have to show good cause to the Board of its relevance. Applicant never attempted to make such a showing to the Board and is, instead, attempting to put in this hearsay evidence through the testimony of its own witness. Opposer further objected to the introduction of this evidence, and to Mr. McGuire’s competence to testify about it, during Mr. McGuire’s Trial Testimony at 160-162.

stuff went down,”² that the reporting of the DOJ investigation has had any impact on CareFusion’s goodwill in its ChloraPrep mark and product, or that its “reputation in the industry” has been adversely affected. Thus, to the extent Applicant is relying on this evidence to argue any resulting weakness of the ChloraPrep mark, this evidence should not be accorded any weight.

Additionally, however, because this issue did not arise until several years after Mr. McGuire selected the names Chloradrape, Chlorabsorb, Chloraderm and Chlorabond for Applicant’s as-yet unsold products, it is irrelevant to any *du Pont* factor, including Applicant’s good faith in adopting these marks. Whatever probative value Mr. McGuire’s hearsay testimony about a resolved DOJ investigation on marketing practices has on defending a trademark opposition is greatly outweighed by the prejudicial effect of such testimony, which is of the type that would be excluded from a jury’s consideration under Federal Rule of Evidence 403. This is not a lawsuit alleging unfair competition. Indeed, the Board does not have jurisdiction over such issues. *Paramount Pictures Corp. v. White*, 41 USPQ2d 1768, 1171 n.5 (TTAB 1994). CareFusion’s reputation in the medical industry is irrelevant to the issue of the registrability of Applicant’s marks and this evidence and all testimony relating to it should be stricken as irrelevant and unduly prejudicial.

Respectfully submitted,

DREITLER TRUE LLC

/Joseph R. Dreitler/
Joseph R. Dreitler
Mary R. True

² McGuire Trial Testimony at 160:8-9.

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*Attorneys for Opposer
CareFusion 2200, Inc.*

Dated: June 5, 2015

CERTIFICATE OF SERVICE

This will certify that on the 5th day of June, 2015, a true and correct copy of the *Rebuttal Disclosures of Opposer CareFusion 2200, Inc.* was served via e-mail to hickey@fr.com.

/Joseph R. Dreitler/
Joseph R. Dreitler