UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: January 9, 2016

Opposition No. 91206212

Carefusion 2200, Inc.

v.

entrotech, inc.

George C. Pologeorgis,
Interlocutory Attorney:

This proceeding now comes before the Board for consideration of the following outstanding motions:[1]

1. Opposer's motion (filed March 17, 2015) to extend Opposer's testimony period;
2. Applicant's motion (filed May1, 2015 – 58 TTABVUE) to strike Opposer's notice of reliance offering in evidence the discovery deposition of alleged non-party witness, Dr. John Foor, and accompanying exhibits (*see* 46 TTABVUE);
3. Applicant's motion (filed May1, 2015 – 59 TTABVUE) to strike Opposer's notice of reliance offering in evidence the discovery deposition of alleged non-party witness, Mr. John Halsey, and accompanying exhibits (*see* 45 TTABVUE);

[1] Applicant's change of correspondence address filed on September 2, 2015 is noted. Board records have been updated accordingly.

4. Applicant's motion (filed May 21, 2015 – 60 TTABVUE) to strike Opposer's notice of reliance (*see* 42 TTABVUE) offering into evidence certain printed publications and a standalone bibliography; and
5. Opposer's motion (filed June 25, 2015) for leave to file an amended notice of reliance correcting procedural defects raised in Applicant's motion to strike filed on May 1, 2015.[2]

For purposes of this order, the Board presumes the parties' familiarity with the pleadings, the history of the proceeding and the arguments and evidence submitted with respect to motions entertained by this order.

Opposer's Motion to Extend the Close of its Testimony Period

The Board first turns to Opposer's motion to extend the close of its testimony period filed on March 13, 2015. By way of its motion, Opposer seeks to extend the close of its testimony for the sole purpose of permitting Opposer to conduct a testimony deposition of a non-party, namely, Dr. John Foor, in the event the motion to quash the subpoena for Dr. Foor is denied by the United States District Court for the Southern District of Ohio. The record demonstrates, however, that the district court granted Dr. Foor's motion to quash. *See* 57 TTABVUE. In view thereof, Opposer's motion to extend the close of its testimony period filed on March 13, 2015 is deemed moot and will be given no further consideration.

Opposer's Cross-Motion for Leave to Amend Notice of Reliance

[2] The parties' consented motion filed on April 24, 2015 to designate Exhibits B, C, and D of 54 TTABVUE as confidential is **GRANTED** to the extent that the entire filing is designated under seal as confidential because a redacted version of the submission was never filed with the Board.

The Board next turns to Opposer's cross-motion (filed June 25, 2015) for leave to amend its notice of reliance filed on March 5, 2015 (*see* 43 TTABVUE) to cure the procedural defects raised by Applicant in its motion to strike filed on May 1, 2015 (*see* 60 TTABVUE). Opposer's motion for leave to amend its notice of reliance is **GRANTED** as conceded. Trademark Rule 2.127(a). In view thereof, (1) Opposer's amended notice of reliance filed on June 25, 2015 is made part of the evidentiary record, (2) Applicant's motion to strike Opposer's notice of reliance located at 43 TTABVUE is deemed moot and will be given no further consideration, and (3) Opposer's notice of reliance filed on March 5, 2015 (*see* 42 TTABVUE) is hereby **stricken** and is no longer considered part of the evidentiary record.

Applicant's Motion to Strike Opposer's Notices of Reliance Offering Into Evidence The Discovery Depositions of Non-Party Witnesses, Messrs. Foor and Halsey

Finally, the Board turns to Applicant's motions (both filed on May 1, 2015 - *see* 58 TTABVUE and 59 TTABVUE), to strike Opposer's notices of reliance offering into evidence the discovery depositions and accompanying exhibits of two alleged non-party witnesses, namely, Mr. John Halsey and Dr. John Foor. Because it is the Board's policy not to read trial evidence or examine other trial evidence prior to final hearing, Applicant's motions to strike the aforementioned notices of reliance are deferred until final decision. *See Carl Karcher Enterprises Inc. v. Carl's Bar & Delicatessen Inc.*, 98 USPQ2d 1370, 1371-72 n.2 (TTAB 2011) (it is not the Board's policy to read trial testimony or other trial evidence prior to final decision).

As a final matter, the Board notes that certain entries filed by the parties have been filed in their entirety under seal as confidential. *See* 44 TTABVUE, 63 TTABVUE, 70 TTABVUE, 76 TTABVUVE, 77 TTABVUE, 80 TTABVUE, 88 TTABVUE, 89 TTABVUE, and 90 TTABVUE. Parties in Board proceedings often over-designate testimony and evidence as "confidential" or ""confidential attorneys' eyes only" for no apparent reason. When this happens, it is not clear to the Board what is intended to be truly "confidential" or ""confidential attorney's eyes only." Therefore, in rendering its final decision on the merits, the Board will not necessarily be bound by the parties' designation, unless the designated testimony or evidence is clearly confidential in nature. Board proceedings are designed to be publicly available and the improper designation of materials as confidential thwarts that intention. It is more difficult to make findings of fact, apply the facts to the law, and write decisions that make sense when the facts may not be discussed. The Board needs to be able to discuss the evidence of record, unless there is an overriding need for confidentiality, so that the parties and a reviewing court will know the basis of the Board's decisions.

The Board finally notes that the parties have filed their briefs on the case. A final decision on the merits will therefore be issued in due course.