UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HEFTER IMPACT TECHNOLOGIES, LLC, Plaintiff, v. SPORT MASKA INC., d/b/a REEBOK-CCM HOCKEY, Defendant.	CIVIL ACTION NO. 1:15-CV-13290

CCM'S OPPOSITION TO HIT'S EMERGENCY MOTION TO TAKE *DE BENE ESSE* DEPOSITIONS

Plaintiff Hefter Impact Technologies, LLC ("HIT") should not be able to take/re-take six depositions on the eve of trial simply because it now realizes that it (i) made a poor tactical decision to forego taking three depositions, and (ii) did a poor job interrogating three of the witnesses that it did depose. Accordingly, HIT's Motion for Leave to Take *De Bene Esse* Depositions ("HIT's Motion") should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

While HIT engages in a thinly veiled attempt to taint Sport Maska Inc., d/b/a Reebok-CCM Hockey ("CCM") by including many misleading and irrelevant assertions in the Memorandum in Support of HIT's Motion ("HIT's Memorandum"), the relevant factual and procedural background is relatively straight forward:

1. This Court initially entered a Scheduling Order, stating: "***all depositions***, other than expert depositions, must be completed by September 30, 2016" *See* Dkt. No. 32. That Order

was amended several times at HIT's request, with the last such Order requiring all depositions to be completed by November 29, 2016. *See* Dkt. Nos. 32, 38, and 67.

2. During discovery the following individuals were either deposed by HIT, or HIT made the unilateral and tactical choice to forego deposing them:

A. Philippe Martin. Mr. Martin is a helmet designer for CCM. He designed two of the helmets at issue in this case and was deposed, both individually and as a Rule 30(b(6) representative of CCM, on September 26, 2016. He lives and works in Canada.

B. Laura Gibson. Ms. Gibson is a product manager for CCM, and she was assigned to work on several of the helmets at issue in this case. She was deposed, both individually and as a Rule 30(b)(6) representative of CCM, on September 26-27, 2016. She lives and works in Canada.

C. Michel Benoit. Mr. Benoit is a former CCM employee and had dealings with HIT in connection with the contract between the parties. Mr. Benoit was deposed in his individual capacity on September 27, 2016. He lives and works in Canada.

D. Ryan Crelinsten. Mr. Crelinsten is a former product manager for CCM, and he worked on several of the helmets at issue in this case. CCM's counsel said on October 10, 2016 -- while discovery was open -- that HIT would depose Mr. Crelinsten, but HIT never noticed Mr. Crelinsten's deposition. *See* Email from G. Ruscitti to S. Davidson dated October 10, 2016 attached hereto as **Exhibit 2**. Mr. Crelinsten lives and works in Canada.

E. Sebastien Morin. Mr. Morin is a former helmet designer for CCM. He designed three of the helmets at issue in this case. CCM's counsel said on October 10,

2016 -- while discovery was open -- that HIT would depose Mr. Morin, but HIT never noticed Mr. Morin's deposition. *See id.* Mr. Morin lives and works in Canada.

F. Sidney Crosby. Mr. Crosby is one of the most famous hockey players in the world, and Ms. Gibson testified that one of the helmets at issue was based on input Mr. Crosby provided to CCM. CCM's counsel said on October 10, 2016 -- while discovery was open -- that HIT would depose Mr. Crosby, but HIT never noticed Mr. Crosby's deposition. *See id*. On information and belief, Mr. Crosby lives and works in Pennsylvania and Canada.

3. There simply is no support for HIT's assertion CCM "impede[ed] and prejudiced HIT's ability to effectively conduct appropriate and necessary discovery at every turn." HIT's Memorandum at p. 1. Indeed, it is telling that HIT did not file a single motion to compel in this case. The only real "impediment" to HIT's discovery was its own lack of diligence -- which Judge Saylor confirmed by admonishing HIT when it requested an extension of discovery in December of 2016: "I have some serious questions about the lack of diligence here, not just beginning in September, but going all the way back to February …." *See* December 2, 2016 Transcript excerpt, a copy of which is attached hereto as **Exhibit 3**.

4. HIT's assertion that Philippe Martin and Laura Gibson answered hundreds of deposition questions with "I don't know" or "I don't remember" is disingenuous. The vast majority of such responses were to questions about (i) very specific facts; (ii) that occurred 8-10 years earlier, and (iii) that concerned Rule 30(b)(6) topics on which neither had been designated to testify. As just one example, CCM refers to the following testimony where Mr. Martin was asked questions (i) about helmets he did not design, (ii) on topics on which he was not designated to testify, and (iii) dealing with events that occurred 9-10 years earlier:

Q. ***In 2007***, if you know, what was the market share for the 1052 [helmet]?
A. I don't know.

Q. [The] 852 [helmet]?
A. I don't know.

Q. [The] 652 [helmet]?
A. I don't know.

Q. [The] HT1 [helmet]?
A. I don't know.

Q. Do you know which was the most popular helmet in the NHL ***in 2007***?
A. No.

Q. [In] 2006?
A. No.

Q. What about among college and junior players?
A. No.

Q. What about youth players?
A. No.

Exhibit B to HIT's Memorandum [Dkt. No. 176-2] at pp. 77-78 (emphasis added).[1]

5. HIT's assertion that "(3) Michel Benoit; (4) Sebastien Morin; and (5) Ryan Crelinsten … ***are exclusively controlled by CCM***" (HIT's Memorandum at p. 10 (emphasis added)), is made up out of whole cloth. First, because these individuals are ***former employees*** of CCM, a fact of which HIT is well aware,[2] the notion that CCM might control them in any respect, let alone "exclusively" (whatever that means), simply makes no sense. While it is true that CCM's counsel represented Mr. Benoit at his deposition in 2016,[3] HIT was told twice last week that CCM's counsel "presently do[es] not represent any of the former CCM employees…." *See* Exhibits G and H to HIT's Memorandum [Dkt. Nos. 176-7 and 176-8].

[1] CCM further notes that neither these helmets, nor their popularity, is at issue in this case.
[2] HIT noted this (with emphasis) on page 10 of its Memorandum.
[3] CCM's counsel never represented Mr. Crelinsten or Mr. Morin. *See* Affidavit of Shepard Davidson, attached hereto as **Exhibit 1**, at ¶ 5.

6. HIT's assertion that "CCM *does* intend to call Laura Gibson, Michel Benoit, Philippe Martin and Sebastien Morin during the defense case," (HIT's Memorandum at p. 6, emphasis in original) is disingenuous and misleading. As **Exhibit E** to HIT's Motion confirms, what CCM's counsel actually said was that CCM was "***likely***" to call those individuals but that doing so "***obviously is dependent upon what evidence comes in during your case***." [Dkt. No. 176-5 (emphasis added.)] Thus, any inference that CCM ***guaranteed*** at any point in time that it ***would*** call any particular witness at trial is groundless.

ARGUMENT

I. HIT Should Not Be Permitted To Take/Re-take Depositions Over One Year After Discovery Closed

The original Scheduling Order in this case was amended several times at HIT's request, with the final version stating: "November 29, 2016 – Completion of ***all depositions*** other than expert depositions." *See* Dkt. No. 67 (emphasis added). Further, as Fed. R. Civ. P. 16(b)(4) makes clear, "[a] schedule may be modified only for good cause," and:

> Rule 16(b)'s "good cause" standard emphasizes the diligence of the party seeking the amendment. Prejudice to the opposing party remains relevant but is not the dominant criterion. "[***I***]***ndifference" by the moving party "seal[s] off this avenue of relief" irrespective of prejudice because such conduct is incompatible with the showing of diligence necessary to establish good cause***.

O'Connell v. Hyatt Hotels of Puerto Rico, 357 F.3d 152, 155 (1st Cir. 2004) (internal citations omitted, emphasis added).

In this case, HIT has not even formalistically argued, nor could it, that there is good cause for it to be able to take/re-take six depositions now, over one year after the Scheduling Order called for all such depositions to be completed. With respect to Morin, Crelinsten and Crosby, HIT knew about them during discovery, asserted that it would take their depositions and then unilaterally decided not to do so. *See* **Exhibit 2**. As such, and while HIT may now regret that

decision, this does not provide good cause to take the depositions of those individuals now. As a variety of federal courts have ruled:

> [A] party [that] makes a tactical decision during discovery to refrain from deposing a non-party witness ... takes the risk that the testimony will not be presented if the witness does not voluntarily appear. Paintiffs took that risk and they must now live with their choice. The motion to conduct additional depositions will be denied.

Energex Enters., Inc. v. Shughart, Thomson & Kilroy, P.C., No. CIV. 04-1367 PHX ROS, 2006 WL 2401245, at *7 (D. Ariz. Aug. 17, 2006) (internal quotations and citations omitted). *See also Smith v. Royal Caribbean Cruises, Ltd.*, 302 F.R.D. 688, 692 (S.D. Fla. 2014) ("Parties who make the tactical decision not to preserve deposition testimony during the discovery phase take the risk that the testimony will not be presented if the witness is unable or unwilling to appear at trial."); *Integra Lifesciences I, Ltd. v. Merck KGaA*, 190 F.R.D. 556, 559 (S.D. Cal. 1999) ("Where a party makes a tactical decision during discovery to refrain from deposing a non-party witness who is beyond the subpoena power of the court, but who has relevant information to offer in the case, that party takes the risk that the testimony will not be presented at trial if the witness does not voluntarily appear.").

As far as Gibson, Martin and Benoit are concerned, because each already has been deposed by HIT, the transcripts of those depositions can be used at trial in the same way that a "trial deposition" transcript can be used. *See, e.g.*, *Morales v. N.Y. Dep't of Labor*, No. 06-CV-899 MAD, 2012 WL 2571292, at *2 (N.D.N.Y. July 3, 2012) ("'The Federal Rules of Civil Procedure make no distinction for use of a deposition at trial between one taken for discovery purposes and one taken for use at trial ….'" (quoting *George v. Ford Motor Co.*, 2007 WL 2398806, at *11–13 (S.D.N.Y. 2007)). As such, and because HIT has not even suggested why there might be any need to re-depose any of them, the only conclusion one can draw is that HIT wants to re-depose Gibson, Martin and Benoit because it did a poor job interrogating them

previously. Plainly, that could not constitute good cause, as any contrary conclusion would mean that parties virtually always could get a second bit at the apple after discovery closed. *Cf. Global ePoint, Inc. v. GTECH Corp.*, No. CA 11-197 S, 2015 WL 113979, at *2 (D.R.I. Jan. 8, 2015) (denying leave to take trial preservation depositions because, in part, the potential deponents already had been deposed -- and despite the moving party's contention that 7,500 new documents were produced after that deposition).

II. HIT Should Not Be Permitted To Take/Retake Six Depositions Simply By Characterizing Them As Trial Preservation Depositions

Because HIT plainly cannot show good cause to modify the Scheduling Order, HIT characterizes the six depositions that it seeks to take/re-take as "trial preservation" or "*de bene esse*" depositions. This effort, while clever, is nothing more than form over substance and does not provide a justification for allowing HIT to take/re-take the six depositions at issue.

A. There Is No Distinction In The Treatment Of Discovery And Trial Preservation Depositions

As numerous courts have held, whether a deposition is formalistically denoted as a discovery deposition or a trial preservation deposition, it will be treated the same way under the Federal Rules of Civil Procedure – which only reference "depositions." *See, e.g., Henkel v. XIM Prods., Inc.*, 133 F.R.D. 556, 557 (D. Minn. 1991) (denying second deposition after discovery deadline passed, and observing "[n]either the Rules of Civil Procedure nor the Rules of Evidence make any distinction between discovery depositions and depositions for use at trial. The court concludes there is no difference."); *Kallas v. Carnival Corp.*, No. 06-20115-CIV, 2009 WL 10668180, at *3 (S.D. Fla. June 12, 2009) ("Any doubt as to the extinction of *de bene esse* depositions in modern day civil practice was then put to rest by the Eleventh Circuit's decision in *Chrysler Int'l Corp. v. Chemaly*, where the Court held that there is no distinction between *de bene esse* depositions, or trial depositions, and discovery depositions. 280 F.3d 1358, 1362 n.8

(11th Cir. 2002) ('[The] district court's identical treatment … of discovery and *de bene esse* depositions is consistent with the language of the Federal Rules of Civil Procedure ….')"); *Smith v. Royal Caribbean Cruises, Ltd.*, 302 F.R.D. 688, 690 (S.D. Fla. 2014) ("The current version of the Federal Rules of Civil Procedure now make no provision or mention whatsoever of depositions *de bene esse.* Once an action has been filed, Rules 30 through 32 recognize a "deposition" as a recorded statement of a party or witness that can be used by a party for any purpose, whether it be pure discovery, source of impeachment, or trial testimony for a case in chief. … [A] "deposition" taken once an action has commenced has but one meaning and definition: a deposition as a discovery device under Rule 30."); *Tatman v. Collins*, 938 F.2d 509, 510-11 (4th Cir. 1991) (the court would not make any distinction between *de bene esse* depositions and other depositions).

Accordingly, there is no reason why HIT should be entitled to take/re-take the six depositions at issue after the expiration of the time to do so under the Scheduling Order simply because it has claimed that they are for "trial preservation."

B. Even If There Were A Distinction Between Discovery And Trial Preservation Depositions, HIT's Request To Take/Re-Take The Six Depositions At Issue Should Be Denied

1. The Scheduling Order Required *All* Depositions, To Be Completed By November 29, 2016

Even if the depositions HIT now seeks to take could be deemed to be different than those it already has taken, this Court's Scheduling Order required the "[c]ompletion of ***all depositions***, other than expert depositions," by November 29, 2016. Dkt. No. 67 (emphasis added). Ironically, one of the cases cited by HIT notes that "[t]he court's scheduling order did not contemplate trial depositions and should not be amended to allow trial depositions absent a showing of good cause." *Bamcor LLC v. Jupiter Aluminum Corp.*, No. 2:08 CV 194, 2010 WL 4955545, at *2

(N.D. Ind. Nov. 29, 2010) (emphasis added). *See, also, Kuithe v. Gulf Caribe Mar., Inc.*, No. CIV.A. 08-0458-WS-C, 2009 WL 3711553, at *1 (S.D. Ala. Nov. 3, 2009) ("[T]he discovery deadline expired over three months ago, and the plaintiff cannot avoid the effect of that deadline by couching Gatewood's deposition as a "trial deposition."). Accordingly, for this reason, as well, HIT's Motion should be denied.

2. HIT's Implicit Contention That Because CCM Controls Morin, Crelinsten, Benoit, Gibson And Martin, HIT Should Be Entitled To Depose/Re-Depose Them Is Baseless

There literally is no basis on which this Court could conclude that CCM has any control over any of the individuals at issue. As an initial matter, Morin, Crelinsten and Benoit all are ***former*** employees of CCM. While CCM's counsel did represent Mr. Benoit at his deposition in this case, not only does that not imply that CCM controls Mr. Benoit, but, in any event, that representation has ended. *See* **Exhibit 1**, at ¶ 4. HIT also contends that CCM controls Mr. Morin because Mr. Morin signed an affidavit that CCM used on summary judgment. While Mr. Morin did sign an affidavit that CCM used on summary judgment, it simply does not follow from this that CCM controls Mr. Morin. With respect to Mr. Crelinsten, HIT does not point to anything suggesting that CCM controls him. As far as Ms. Gibson and Mr. Martin are concerned, they are current employees of CCM, but that hardly means that CCM controls them and, HIT cites nothing to support its assertion that such control exists.

Finally, even if CCM did control any or all of these people, HIT also has provided no authority suggesting that because CCM has declined to try to force these individuals to testify during HIT's case in chief, HIT, therefore, is entitled to take/re-take their depositions. Accordingly, even if CCM did control these individuals, which it does not, that does not provide a justification for ordering that they be deposed/re-deposed.

3. The Depositions Sought Should Not Be Permitted Because They Plainly Are For The Purpose Of Taking Discovery

Even in those jurisdictions where trial preservation depositions sometimes are allowed, courts have made it clear that they only allow such depositions if they genuinely are for the purpose of ***preserving*** trial testimony, and are not merely for ***gathering discovery***. *See, e.g.*, *Bamcor LLC*, 2010 WL 4955545, at *1:

> When a party opposes a trial deposition scheduled for after the close of discovery, the court must assess whether the deposition is being taken for the purpose of preserving testimony or whether it is a pretext for the party's failure to procure the deposition during the discovery period.

In this case, it is manifest that the depositions of Crelinsten, Morin and Crosby would be for discovery purposes, as HIT's counsel has no idea what they might say. *See id.*, at *2 ("[I]t is apparent that Bamcor needed to conduct further discovery to ascertain the facts within Hoerchlers' knowledge. … It would be a blatant disregard to the court's scheduling order to now allow Bamcor to conduct Hoerchler's deposition in light of its obvious need to conduct discovery of the facts Hoerchler will attest to if called as a witness."). *See also Estenfelder*, 199 F.R.D. at 355:

> As the Court noted in the *Charles* case, the attorneys already know what these witnesses will say when they testify. *Charles* at 664. Thus, when requests for "trial depositions" are presented which reflect these types of circumstances, the expressed need to preserve the testimony of the witnesses may be viewed much differently, for example, than an expressed need to preserve the testimony of an opposing party, or an un-friendly witness. The former are more likely to be true requests for "trial depositions," while the latter are more likely to be discovery depositions attempting to pose as trial depositions.

In light of the foregoing, and because (i) HIT has no idea what Morin, Crelinsten and/or Crosby would say if deposed, (ii) HIT had said during discovery that it intended to depose each of them, and (iii) HIT later chose not to depose any of them, the only conclusion one can draw is

that HIT wants to depose these individuals as "a pretext for [it's] failure to procure the deposition[s] during the discovery period." *Bamcor LLC*, 2010 WL 4955545, at *1.

Because Mr. Benoit, Ms. Gibson and Mr. Martin already have been deposed, there literally is no need to take another deposition to preserve their testimony. As noted above, the transcript of a discovery deposition is just as admissible as is the transcript of a so-called trial deposition. *See, e.g., Henkel*, 133 F.R.D. at ("Neither the Rules of Civil Procedure nor the Rules of Evidence make any distinction between discovery depositions and depositions for use at trial. The court concludes there is no difference."). Thus, the only purpose of re-deposing these individuals is because HIT now realizes that it needs ***additional*** information, *i.e.*, discovery, from them. As such, not only should these depositions be precluded for this reason, but they also should be precluded because allowing such depositions would prejudice CCM. *See Bamcor*, 2010 WL 4955545, at *2 (holding that the party opposing trial preservation depositions would be prejudiced if the depositions were allowed because "allowing Bamcor to conduct Hoerchlers' depositon may place Bamcor in a better position for cross-examining Hoerchler."). *See also*, *Lifetime Prod., Inc. v. Russell Brands*, LLC, No. 1:12-CV-00026-DN-EJF, 2016 WL 3448473, at *5 (D. Utah June 20, 2016) (noting that the party opposing trial preservations depositions will be prejudiced if the depositions are permitted because the opposing party "might have conducted its discovery differently in light of these further depositions had [the moving party] taken them during the discovery period").

4. **The Depositions of Crelinsten, Morin, Benoit, Gibson and Martin Should Not Be Ordered Because This Likely Will Delay A Trial**

The depositions of Crelinsten, Morin, Benoit, Gibson and Martin also should not be ordered because such depositions are very likely to cause a delay of the trial in this matter. Specifically, because each of these individuals is Canadian, none of them can be deposed without

the authorization of a Canadian court under the Canada Evidence Act. *See Allianz Sigorta AS v. Ameritech Indus. Inc.*, No. 2:15-cv-1665, 2016 WL 1127705, at *2-3 (E.D. Cal. March 22, 2016). Further, it is wholly unclear how long it might take for HIT to obtain the approvals that it needs from an appropriate court in Canada—especially given that HIT has not yet instituted any of the required steps.

III. HIT's Motion Should Be Denied For Reasons Of Judicial Economy

Lastly, if HIT's Motion were allowed, it would set a horrible precedent, as future litigants would be discouraged from diligently completing discovery in a thorough and timely manner. As the Southern District of California held in a context similar to this one:

> Under Defendants' theory of trial depositions, where they need not be taken during the discovery period so long as they are being used in lieu of live testimony at trial, nothing would keep the parties from waiting until after the close of discovery to take all of these "trial" depositions. This would effectively eliminate any need to conduct discovery of "unavailable" witnesses during the discovery period.

Integra Lifesciences I, Ltd. v. Merck KGaA, 190 F.R.D. 556, 559 (S.D. Cal. 1999).

CCM respectfully suggests that eliminating the need to depose "unavailable" witnesses during discovery is not, nor should it be, the rule of this Court. Rather, this Court should encourage parties to take ***all*** depositions in a diligent manner and within the time constraints set out in the Court's Scheduling Order.

CONCLUSION

For all of the foregoing reasons, CCM respectfully requests that this Court deny HIT's Motion.

Dated: February 14, 2018

Respectfully submitted,

SPORT MASKA, INC., d/b/a REEBOK-CCM HOCKEY

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on February 14, 2018.

/s/ Laura Lee Mittelman
Laura Lee Mittelman