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

U.S. Patent & TMO/TM Mail Rcpt. Dt. #57

Baxter International Inc.,	)	09-27-2002
	)	
Baxter,	)	
	)	
v.	)	Opposition No.: 91150298
	)	Application No. 76/151,380
Inviro Medical Devices, Ltd.	)	
	)	
Inviro.	)	

**BAXTER'S MOTION TO COMPEL DISCOVERY & PROTECTIVE ORDER**

In accordance with 37 C.F.R. § 2.120 (e) and T.B.M.P. § 523, Opposer, Baxter International, Inc. [hereinafter Baxter], moves this Board to (1) compel Applicant, Inviro Medical Devices, Ltd. [hereinafter Inviro] to properly respond to Baxter's interrogatories and production requests and (2) enter the protective order submitted herewith in order to facilitate the exchange of confidential documents between the parties. In accordance with 2.120(e), attached herewith is a copy of the initial interrogatories and Inviro's answers (Exhibit A) and a copy of the initial production requests and Inviro's answers (Exhibit B.)

TRADEMARK TRIAL AND APPEAL BOARD  
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Baxter has made continued attempts throughout the discovery period to gather documents and information from Inviro, and as described in more detail below, those attempts have been stalled by Inviro's continued refusals to provide information and its continued delays in entering into a protective order. Given that the discovery period is scheduled to close on September 30, 2002, and Inviro has not produced meaningful information, nor will it consent to the extension of the discovery period, Baxter recently filed a motion to extend discovery and that motion is currently pending. Inviro has

indicated its intent to oppose Baxter's motion. Therefore, Baxter, herewith, respectfully seeks this Board's assistance in compelling Inviro to complete its discovery obligations.

### **BACKGROUND—INVIRO'S DISCOVERY RESPONSES**

1. On March 15, 2002, Baxter sent Inviro Interrogatories and a Request for the Production of Documents. Inviro's responses were due on or before April 19, 2002. However, Baxter granted Inviro's numerous requests for extensions of time to answer the inquiries and ultimately, the responses were due on July 19, 2002.

2. Inviro sent Baxter its responses to the Interrogatories and Requests for Production on the due date, July 19, 2002, though no documents were actually sent to Baxter at that time, nor was any notice given as to when Baxter could expect Inviro's responsive documents. (See responses Attached hereto as Exhibits A & B.)

3. Baxter takes issue specifically with the responses given to Interrogatories No. 7, 8, 9, 13, 14, 15, and 16 because the responses are evasive and hollow.

In Interrogatories No. 7, 8, 9, 13, and 14, Baxter asks for specific information regarding: (1) the products Inviro sells or intends to sell under ULTRALINK (#7); (2) the channels of trade in which Inviro markets or intends to market its ULTRALINK products (#8); (3) Inviro's intended methods of advertising, marketing and promotion for the ULTRALINK products (#9); (4) Inviro's intended market for the ULTRALINK products (#13); and (5) the competitors of the ULTRALINK products (#14). Inviro's answer for each of these questions is basically the same. Inviro merely recites the description from its trademark application for its ULTRALINK mark in response to all questions.

For example, with regard to Baxter's question on what specific products Inviro intends to sell under ULTRALINK, it states its recitation: "medical devices, namely

cannulae, medical, hypodermic, aspiration and injection needles, ...". With regard to the channels of trade in which Inviro intends to sell its goods, it states that "[Inviro] believes the channel of trade would be one that supplies 'medical devices, namely cannulae, medical, hypodermic, aspiration and injection needles, ...'." With regard to the methods Inviro intends to market, advertise and promote its goods, it states that "[Inviro's] goods will be marketed in manners typical of the channel of trade that supplies 'medical devices, namely cannulae, medical, hypodermic, aspiration and injection needles, ...'." With regard to the market or target market of the goods Inviro intends to be sell under ULTRALINK, Inviro states that its market would be "the market for 'medical devices, namely cannulae, medical, hypodermic, aspiration and injection needles, ...'." Finally, in response to the question regarding the competitors of Inviro's ULTRALINK products, Inviro's response is "Companies that sell 'medical devices, namely cannulae, medical, hypodermic, aspiration and injection needles, ...'." (See Exhibit A.) Such responses are insufficient and counterproductive to the purpose of discovery procedures.

Even though Inviro maintains that it has not yet begun use of the mark in commerce, it is simply unbelievable to Baxter that Inviro has not researched or considered who its potential competitors are, how it will go about selling its products in the market, and who it would specifically target.

Further, in Interrogatories 15 and 16, Baxter requests information regarding when Inviro first became aware of Baxter's use of its marks and the facts and circumstances surrounding its awareness and knowledge of Baxter's business conducted in connection with its marks. Given that Baxter has used its INTERLINK mark for twelve years, and upon information and belief, its INTERLINK mark is widely recognized as emanating

from Baxter International, Inc. in the medical market to which it markets and sells, such inquiries regarding Inviro's awareness of Baxter and its use of its marks is highly relevant. Inviro's answer to both inquiries is that Inviro became aware of Baxter "at least as early as when Inviro received a copy of Baxter's opposition", which, of course, gives no indication as to how long Inviro has been aware of Baxter and its use of INTERLINK in connection with related goods.

4. Inviro produced some documents to Baxter on August 5, though the documents Inviro produced in response to the Production Requests were similarly inadequate. Inviro made no attempt to mark the documents according to what they responded to or bates stamp the documents. Further, the only documents produced consisted of publicly filed correspondence between Inviro's counsel and the PTO for a variety of LINK marks Inviro had applied for, a copy of Inviro's web page which provided no information regarding ULTRALINK products or services, a few Official Gazette excerpts dealing with third party marks, and an unmarked search report.

Finally, numerous documents that Baxter requested remain unproduced, although the written responses suggest that such documents would be forthcoming. For example, Baxter requested: (#11) documents concerning consideration of the design and appearance of ULTRALINK, including any logo considered; (#12) internal correspondence relation to Inviro's ULTRALINK application; (#14) documents sufficient to identify goods and services provided in connection with ULTRALINK; (#18) documents regarding the types of consumers, markets, and channels of trade in which Inviro intended to market, advertise or promote ULTRALINK; and (#19) all documents which Inviro consulted, referenced, used, or referred to in defining Inviro's target market.

Inviro's responses for all of the above inquiries was that all non-privileged documents would be produced, which certainly indicates that non-privileged documents related to these topics exist. (See Exhibit B.) However, nothing responsive to these requests have been produced.

### **BAXTER'S ATTEMPTS TO RESOLVE THESE ISSUES**

5. As outlined below, Baxter has made a good faith attempt to resolve the issues regarding Inviro's unacceptable and inadequate discovery responses. First, on July 25, 2002, Baxter's counsel wrote to Inviro's counsel regarding its request for supplementation of the answers provided in response to certain Interrogatories—namely Nos. 7, 8, 9, 13, 14, 15, and 16, as well as notice that the responses sent were not signed. Further, Baxter requested prompt supplementation to the production responses, given that no documents were actually produced (as of that date), and no indication was given as to when they could be expected. (Attached hereto as Exhibit C is a copy of that correspondence.)

6. Second, after having never received a written or verbal response to the letter sent on July 25<sup>th</sup>, Baxter's counsel re-sent the letter on August 7, 2002 with a "reminder" notice. (Attached hereto as Exhibit D is a copy of the reminder correspondence sent.)

7. Third, upon receiving Inviro's documents, which were also inadequate (as discussed above), Baxter's counsel took steps to arrange a conference call with Inviro's counsel to discuss the discovery issues. After numerous unsuccessful attempts at scheduling a conference call to discuss the matter, Baxter's counsel, Elizabeth Diskin had a conference call with Inviro's counsel, Duane Byers on August 22, 2002.

During that call, counsel discussed, among other matters, Baxter's belief that the documents produced and the answers initially given to the Interrogatory Requests were incomplete. With regard to the Interrogatory answers provided, Baxter's counsel reiterated its objections to certain responses, as discussed in its previous correspondence. Inviro's counsel advised that he believed the responses were proper and did not intend to supplement.

With regard to the documents Inviro produced, Baxter's counsel asked that Inviro revisit its documents to see if it had any documentation regarding marketing plans, competitors, intended products, and the like, since no such documents were produced, as requested. Inviro's counsel indicated that Inviro had no other documents, but he advised that he would revisit the issue with his client. To date, no further information has been received.

Baxter's counsel also advised that the search report received did not indicate when it was done, who conducted the search, or even what the search criteria was. Therefore, Baxter obviously found it difficult to review the search and infer what the search results meant. Inviro's counsel indicated that he had conducted the search and that he would review his records to see if there was any further information he could provide. To date, however, no further information has been received.

8. On September 13, 2002, Baxter received notice from Inviro that it considered its initial responses to Baxter's discovery complete, and to date, no further information or documents have been received on any of the above issues. (See copy of letter, attached hereto as Exhibit E).

9. As outlined above, Baxter has been actively seeking information from Inviro through its initial written interrogatories and production requests, as well as through its written and oral follow-up requests for supplementation to those answers. As of today's date, Baxter has not received any supplementation to the initial answers or documents, and the initial answers and documents received thus far, have provided no information regarding Inviro's intentions with regard to its ULTRALINK mark beyond what Baxter could have guessed when it first learned of the pending application.

10. Therefore, Baxter hereby requests this Board to compel Inviro to (1) supplement its Interrogatory answers to Nos. 7, 8, 9, 13, 14, 15, and 16, (2) immediately provide all non-privileged documents that are responsive to Baxter's requests.

#### **THE PROTECTIVE ORDER**

11. Baxter notes that it has requested potentially confidential documents from Inviro during the course of discovery and, therefore, on August 5, 2002, in conjunction with Baxter's own written responses to Inviro's discovery, Baxter sent Inviro, via Federal Express, a draft protective order for review and signature in order that the parties could then move forward with exchanging proprietary information. However, Baxter's good faith efforts at entering a protective order, with the aid of Inviro's input, have been thwarted by Inviro's continued delays.

12. First, after having received no response to the protective order sent on August 5<sup>th</sup>, Baxter's counsel followed up with Inviro's counsel on this issue on several occasions, including during the conference call between counsel on August 22<sup>nd</sup>. On each occasion, Inviro's counsel stated that Inviro was reviewing the agreement and that Inviro's counsel would be in touch in that regard.

13. Second, on August 26, 2002, after still having received no response to the protective order, Baxter's counsel wrote to Inviro's counsel regarding the same.

(Attached hereto as Exhibit F).

14. Third, on August 30, 2002, after continuing to await a response from Inviro regarding the protective order, Baxter's counsel called and spoke with Inviro's counsel regarding the same, and was, yet again, informed that Inviro was reviewing the agreement and that counsel would be in touch.

15. Finally, on September 5, 2002, Baxter's counsel reminded Inviro in written correspondence of their continued expectation of a reply to Baxter's draft protective order. (attached hereto as Exhibit G).

16. Though Inviro finally indicated an intent to deliver a new draft protective order to Baxter on September 6 (see Exhibit H), Inviro did not provide a written response to the protective order or suggested changes until September 10, 2002, more than 35 days after Inviro received Baxter's draft agreement. In the September 10 writing, Inviro suggested certain changes to the agreement, including allowing each party to have a representative review the other party's confidential documents, and noted that it sought to allow its employee and main contact, Dr. F. Ross Sharp access to Baxter's confidential documents.

17. In a written response sent to Inviro's counsel by facsimile on September 12, 2002, Baxter advised that it could not agree to allow each party to have a representative review the other's confidential documents, and took particular issue with allowing Dr. Sharp access to Baxter's confidential documents, given that he had been identified by Inviro as the only individual at Inviro Medical having information regarding

the products intended to be sold under the mark at issue. Baxter forwarded another revised protective order for review with that letter, incorporating other suggested changes by Inviro (a copy of which is attached hereto as Exhibit I).

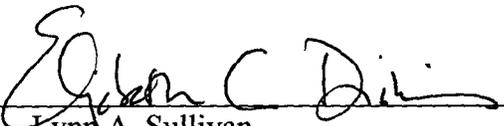
18. As of this date, Baxter has not received any response from Inviro regarding the suggested protective order. Inviro's continued delay in finalizing a protective order has not only caused Baxter to delay production of its own confidential documents, but provided an excuse under which Inviro has delayed the production of any responsive documents—assuming it intends to produce anything once the protective order is finalized.

19. Therefore, Baxter respectfully moves this Board to enter the protective order as written (in Exhibit I) and compel Inviro to produce any and all confidential documents responsive to Baxter's initial requests, in accordance with the order's terms.

Respectfully submitted,

Date:

Sept. 26, 2002



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