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

Baxter International Inc.,

Opposer,

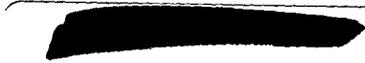
v.

Inviro Medical Devices Ltd.,

Applicant.



Opposition No. 91150298
Application No. 76/151,380



09-30-2002

U.S. Patent & TMO/c/TM Mail Rpt Dt. #61

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TRADEMARK TRIAL AND
APPEAL BOARD

**APPLICANT'S OPPOSITION TO OPPOSER'S
MOTION TO EXTENSION OF DISCOVERY CUT OFF**

Applicant, Inviro Medical Devices Ltd. ("Inviro"), hereby opposes the Motion To Extension Of Discovery Cut Off as mailed by Opposer, Baxter International Inc. ("Baxter"), on September 9, 2002. Today, Monday, September 30, 2002, is Inviro's deadline for responding to Baxter's Motion for Leave to Amend Baxter's Notice of Opposition.

Inviro opposes Baxter's extension motion for the following reasons. Baxter's motion fails to show good cause for a further ninety day extension, as required by Rule 6(b), Fed.R.Civ.P.

At the outset, Inviro notes that Baxter's motion misstates a number of facts and omits many other facts in an effort to improperly further extend this proceeding – which has already been extended for ninety days at the request of Baxter. Although Inviro courteously consented to Baxter's earlier ninety day discovery extension request, Inviro cannot consent to another discovery extension because of prejudice, cost and Baxter's gamesmanship.

The following is Inviro's statement of the real facts in this case, which reveal that Baxter is merely seeking another extension to:

- 1. excuse Baxter's delays,

2. drive up costs for Inviro, which is a small company with an "intent to use" application at issue, and
3. buy time for Baxter to conduct a survey.

All of these reasons are prejudicial to Inviro and, more importantly, do not justify a further extension of the discovery period in this case.

Facts and Argument

Baxter filed the subject opposition nearly one year ago – on October 24, 2001. This opposition concerns Inviro's "intent to use" application for the ULTRALINK trademark. Inviro has not yet used its ULTRALINK mark. *See* Exhibit 1, which is a current print out of Inviro's website. Exhibit 1 instructs the public to watch this website space for a possible future product bearing the ULTRALINK trademark. This "intent to use" information is critical to an understanding of this motion, i.e., the little information Inviro has on its "intent to use" mark was produced many months ago. Thus, discovery should close without Baxter's further delay.

The parties served their only discovery requests on each other in March 2002 – six months ago. Significantly, Inviro fully responded to Baxter's discovery by producing all of Inviro's documents and interrogatory answers in July 2002. Inviro has no other documents for its "intent to use" mark and has repeatedly told Baxter this position. Baxter has never filed any motion to compel, nor does it have any reason to file a motion to compel.

In contrast to Inviro's full disclosure in July 2002, Baxter unilaterally delayed its partial responses until August 2002. Inviro never complained about Baxter's unilateral delay. In fact, Baxter is still producing information at this time – to the detriment of Inviro, but without Inviro's complaint and without Inviro's request to further extend discovery. *See, e.g.,* Exhibits 2 and 3,

which are Baxter's late September letters that were included with two boxes of materials and over 1000 documents. Inviro is a small company that wants to minimize expense and proceed with the testimony/briefing stages of this opposition – and avoid a costly saga over this "intent to use" trademark application. Baxter, on the other hand, appears intent on driving up costs in an effort to force Inviro to withdraw its application. Inviro refuses to be bullied by this tactic.

The parties have scheduled depositions of each other. Although Inviro long ago told Baxter to depose Inviro personnel, Baxter delayed noticing depositions until just recently. See Exhibit 4, which are copies of Baxter's first and only Notices of Depositions served on September 23 and 24. Although Inviro has courteously agreed that Baxter may take these depositions after the close of discovery on September 30, and Inviro will do likewise in deposing Baxter, no other discovery need be extended. See Exhibit 5. This is permitted by the Trademark Trial and Appeal Board, i.e., the Board allows discovery depositions after the close of discovery if the parties stipulate. It is anticipated that a stipulation will soon be filed to cover the depositions occurring after the close of discovery.

As noted above, the only discovery delays in this case have been of Baxter's own choosing. None of those delays justify the further extension of discovery in this case. As stated by the Board, the delay in conducting discovery does not justify an extension. *Luemme, Inc. v. B. Plus, Inc.*, 53 USPQ2d 1758, 1760-61 (TTAB 1999) (denying plaintiff party's second motion to extend discovery).

This case is quite similar to *Luemme*. In the present case, like in *Luemme*, the Board has already granted the plaintiff party (Baxter) one extension of the discovery period for ninety days. In the present case, like in *Luemme*, the delays to date are of plaintiff Baxter's own choosing. In the present case, like in *Luemme*, plaintiff Baxter has failed to provide "detailed facts constituting good

cause" for an extension. Nor does Baxter's motion contain any exhibits in support of its misleading statements.

Baxter's other reasons for an extension are red herrings. First, Baxter argues that a Protective Order is not yet in place. Long ago (in July), Inviro's counsel proposed that the parties exchange confidential documents on an attorney's eyes only basis. To date, Baxter has strategically and repeatedly refused to do so. Apparently, Baxter wants to withhold its confidential documents from production for as long as possible. Nevertheless, Inviro has reviewed its records for its "intent to use" trademark and has not located any confidential documents, which Inviro has agreed would be produced on an attorney's eyes only basis. Thus, the Protective Order is a non-issue for any Inviro materials. Even if it were, Inviro has already signed off on Baxter's form of Protective Order and is now awaiting Baxter's signature.

Second, Baxter's filing of an amended Notice of Opposition is also a red herring. Indeed, the amended Notice of Opposition, which was consented to by Inviro, merely deletes certain improper Baxter assertions – i.e., it does not add any new words or assertions. Inviro's Answer to the remaining assertions in the amended Notice of Opposition is identical to Inviro's previous Answer, and is being filed concurrently to avoid any contrived issue. Thus, the amended Notice of Opposition is a non-issue and will not lead to any other legitimate discovery that could not have been served long ago.

Third, Baxter's belated and tentative plan to conduct a trademark survey does not justify any extension of the discovery time period. Baxter is the plaintiff party. Baxter filed this opposition nearly one year ago – in October 2001. If Baxter wanted to conduct a survey in this case, it should have done so long ago. Moreover, the further extension of the discovery period for Baxter to conduct a survey is clearly prejudicial to Inviro.

Conclusion

For the foregoing reasons, Inviro respectfully requests that the Board deny Baxter's second motion to extend discovery. Baxter has not shown good cause, nor has Baxter been diligent. Baxter is merely trying to delay and drive up costs for this matter -- to the detriment and prejudice of Inviro.

Date:

September 30, 2002



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO EXTENSION OF DISCOVERY CUT OFF was served this 30 day of Sept, 2002, via first class mail, postage prepaid, on counsel for Opposer:

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