

**ExHS**

**TTAB**

11-07-2002

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #30

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

**D**

Baxter International Inc.,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No.: 91150298
	)	Application No. 76/151,380
Inviro Medical Devices, Ltd.	)	
	)	
Applicant.	)	

**BAXTER'S REPLY BRIEF & RESPONSE TO INVIRO'S  
CROSS-MOTION TO COMPEL DISCOVERY**

Opposer, Baxter International, Inc. (hereinafter "Baxter") hereby submits its reply to Inviro's Opposition to Baxter's Motion to Compel Discovery as well as its Response to Inviro's Cross-Motion to Compel Discovery.

***REPLY IN SUPPORT OF BAXTER'S MOTION TO COMPEL***

Though Baxter realizes that the TTAB does not encourage reply briefs in support of motions, Baxter notes that the TTAB will consider reply briefs in its discretion, when the Board finds that the brief is warranted under the circumstances of a particular case, such as when it is "necessary to permit the moving party to respond to new issues raised in, or new materials submitted with, an adversary's brief in opposition to the motion; or the issue to be determined is complex or needs to be further clarified; or certain arguments against the motion should be answered so as to assist the Board in arriving at a just conclusion on the motion." T.B.M.P. § 502.03. Baxter believes that such criteria are certainly applicable here, and therefore, requests the Board's consideration of the following information:

RECEIVED  
U.S. PATENT & TRADEMARK OFFICE  
NOV 14 2002

*Protective Order Issue*

Baxter concurs with Inviro that the aspect of Baxter's initial motion, which requested this Board's intervention to enter the protective order, is now a moot issue, because, after Baxter filed its initial motion (on September 26), Inviro finally consented to the draft Baxter proposed (on September 27) and filed a stipulation for entry of that order on October 15, 2002. Baxter must note for the record, however, that it takes issue with Inviro's misstatements regarding the course of events leading up to the entry of the protective order, and notes that Inviro's Exhibit 1 (letter from Inviro's counsel) provided an inaccurate statement regarding Baxter's counsel's (Ms. Diskin) statements. Because this is no longer an issue, Baxter will not waste the Board's time by dissecting the inaccuracies at this time. Baxter would like the Board to note that on October 16, 2002, Baxter submitted its confidential documents to Inviro via Federal Express, but it has not received any confidential documents from Inviro as of the date of this writing.

*Inviro's Lack of Production or Supplementation to its Interrogatory Responses*

Inviro's response appears intent on painting a picture for this Board that this is a case of David versus Goliath and that Baxter is simply a bully trying to drive up costs and play games. Such a narrative is not only inaccurate and self-serving, but done in an effort to avoid answering the issues at hand. Baxter has been forced to file numerous motions in this case because it has been met with a brick wall at every turn as it tries to gather information from Inviro to properly analyze and assess this case.

Baxter is fully aware that Inviro has a pending "intent to use" application. Regardless of Inviro's intent to use situation, its interrogatory answers are completely

hollow, as specifically outlined in Baxter's initial motion, and it is simply not credible that a company can provide NO concrete information regarding its plans, its products, its marketing or sales goals, or its competition. Inviro's response brief does not provide any reasonable answer as to why the interrogatory answers it provided are satisfactory.

With regard to the production request, Inviro's response contains several misstatements. In fact, upon review of the response, Baxter's counsel wrote to Inviro's counsel regarding the statements made because Inviro's response so clearly indicated that "hundreds of documents" had been produced answering all of the inquiries at issue, that Baxter's counsel began to wonder if documents had been lost in transit. (See exhibit 1). In fact, through a series of e-mail correspondence thereafter, Baxter provided an exact inventory of what it had received so that Inviro's counsel could double check its records. (See exhibit 2 for letters and inventory, attached to October 23, 2002 e-mail from L. Sullivan). In an oral conference on October 23rd, Inviro's counsel confirmed that Baxter had received everything it intended to produce except for a few pages from the Inviro website, which it thereafter produced. (See exhibit 3 for letter from Inviro's counsel regarding additional documents and exhibit 4 for updated inventory of Inviro's production to date.) As the Board can see, Inviro clearly did not produce "hundreds of documents" in answer to each inquiry, but instead produced approximately thirty documents in total at the time of Inviro's response. Therefore, it is clear that the statements in Inviro's response were boldly inaccurate and Baxter has still not received ANY internal documents regarding the plans for the products to be sold under ULTRALINK, or anything else Baxter requested.

Turning to Inviro's accusations that Baxter has produced only "partial" documents, such accusations will be further addressed in its response to Inviro's cross motion (supra). However, Baxter notes for the Board that it produced significant non-confidential documents when they were due, has taken steps to constantly provide supplementation to that production as new documents are found (see exhibits 5), and upon entry of the protective order, submitted a substantial number of confidential documents response to the requests. (see exhibit 6).

Finally, Baxter would like to address Inviro's statements that it encouraged Baxter to take the depositions of certain individuals and Baxter delayed doing so. Baxter began discussions with opposing counsel in early September regarding depositions of Inviro, as soon as it was clear that Inviro did not intend to supplement its discovery responses, and it thereafter noticed up depositions of Inviro in late September. No depositions have occurred as of yet, and Baxter will address that issue in a separate writing to the Board.

In conclusion, the request to compel the Protective Order is now moot. However, all information and documents previously requested of Inviro are proper, Inviro's lack of responses are not excusable, and Baxter respectfully requests the Board to grant its motion to compel Inviro to supplement its initial interrogatory answers and document production, including its confidential documents.

***BAXTER'S RESPONSE TO INVIRO'S CROSS- MOTION TO COMPEL DOCUMENT PRODUCTION***

Inviro's cross-motion to compel production does not provide this Board with the necessary background to make an informed judgment regarding this issue. Therefore, Baxter would like to begin with a brief summary for the Board's benefit:

Baxter initially filed an opposition against Inviro on October 29, 2001, wherein it submitted in support of its position, certain legal theories regarding a “family of marks”, which included other “LINK” marks Baxter owns and uses. While those marks were the subject of the current opposition, Baxter served written discovery on Inviro, wherein it defined its “marks” as all of those marks referenced in the opposition. Inviro, thereafter, served its own discovery requests on Baxter, and used the same definition of the parties’ marks. Therefore, at the time of Inviro’s writing, it requested information and documents related to several of Baxter’s LINK marks.

Baxter, however, moved to amend this Opposition on July 18, 2002, whereby it requested removal of its “family of marks” references and all references to other LINK marks besides INTERLINK and PLASMALINK. Baxter sought such an amendment in order to streamline the case, contain costs, and focus on the main issue—its INTERLINK mark and one other arguably related mark, and Inviro’s ULTRALINK mark.

Thereafter, Inviro agreed to consent to Baxter’s pending motion if Baxter also removed PLASMALINK from the case. In a consented motion, filed on August 23, 2002, Baxter withdrew its earlier filed motion, and moved, with Inviro’s consent, to amend its Notice of Opposition in order to base its case against Inviro on its rights to INTERLINK only. Therefore, all other LINK marks owned by Baxter were removed from the case. [Baxter notes that its consented motion to amend is still pending before the Board, though Inviro has already filed its answer to the amended Notice of Opposition.]

Due to the fact that Baxter had already moved for the Board’s permission to amend its Notice of Opposition to remove these additional marks at the time it served its

responses to Inviro's discovery requests, Baxter provided Inviro with answers, information, and documents relating only to its marks still in the case. Though Inviro had defined Opposer's marks to include other LINK marks that Baxter owned, given the circumstances, it appeared prudent to focus only on the marks at issue.

Baxter has explained to Inviro and to this Board (in its motions to amend its Notice of Opposition) that it sought removal of the extraneous LINK marks referenced in order to streamline the issues in the case, contain costs, and stay focused on the real concern—Inviro's use of ULTRALINK for certain goods which compete directly with Baxter's INTERLINK goods.

Baxter is an enormous corporation with offices around the globe. Many of its marks are used by specific divisions for specific products. In fact, some of the LINK marks for which Inviro continues to seek discovery are for wholly unrelated goods—which is clear from reviewing the recitation of goods in the trademark registrations at issue. Baxter has explained to Inviro that discovery into those marks is fruitless, costly, and entirely overly burdensome. For example, Baxter has explained that its ALTRA LINK mark is used for software, the products are run by a division in Florida, and to provide discovery would involve flying down to Florida to sort through countless documents that would provide no information which could in any way effect this opposition.

The TTAB Manual of Procedure notes that “a party need not provide discovery with respect to those of its marks and goods and/or services which are not involved in the proceeding and have no relevance thereto.” T.B.M.P. § 419 (11). Inviro opines that discovery into the other Baxter LINK marks is relevant because “[i]n this case, there is a

dispute about the scope of Baxter's INTERLINK trademark, the policing of LINK marks, and the plethora of LINK mark usage or intended usage in the medical field by Baxter, Inviro and many other entities." (Cross-Motion, p.5-6.) Baxter will address these concerns in order: (1) The dispute regarding the scope of Baxter's INTERLINK trademark can be determined by discovery aimed at the INTERLINK trademark and its products, and Baxter has provided full and complete disclosure regarding its products, its advertising, its expenditures, its revenues, its licenses with third parties, its competitive information, its marketing strategies, and every other inquiry propounded upon it, with respect to the INTERLINK line of products. Delving into wholly unrelated product lines will not aid Inviro in its quest for more information. (2) Information and documents regarding Baxter's policing of LINK marks has been provided to Inviro and Baxter's legal counsel has been made available for further inquiries through deposition. The only policing of LINK marks that is relevant to this matter is the policing done with respect to the INTERLINK product line. Therefore, inquiry into any policing that other Baxter divisions with LINK marks have done, is irrelevant and not reasonably calculated to lead to discoverable information. (3) The amount of LINK mark usage is relevant with respect to third parties, and Baxter is fully aware that its case against Inviro is strengthened or weakened by the number of third parties who *directly compete* with Baxter's INTERLINK products. Further, if Inviro has been using other LINK marks which directly compete with Baxter's INTERLINK products, such information is also relevant to the opposition—and therefore, it is proper to inquire as to Inviro's rights in any other LINK marks. However, Baxter's own use of other LINK marks cannot weaken its case against Inviro, because its use of LINK marks—even for unrelated

products-- cannot cause source confusion because they all come from the same source! Therefore, Baxter's other LINK marks should not be an issue. Baxter chose not to rely on its other LINK marks in this case and Inviro agreed to their removal from the case. Therefore, pursuit of costly discovery regarding those marks should not be permitted.

Finally, it should be noted that in a conference call with opposing counsel on August 22, 2002, Baxter's counsel (E. Diskin) explained its position with regard to production of documents and answers to interrogatories regarding the other LINK marks, and stated at that time, that although irrelevant, she would be happy to forward the documentation she had discovered regarding other marks—though it was concededly very little. However, she explained that Baxter was not willing to fly to Florida or elsewhere in an effort to provide full discovery for irrelevant marks. Counsel for Inviro at that time stated that such a production would be insufficient and refused the offer.

Therefore, based on the fact that these marks were removed from the case with the consent of Inviro, and that significant production or inquiries regarding other Baxter LINK marks is overly burdensome and could not reasonably lead to discoverable information, Baxter asks this Board to deny Inviro's cross-motion.

Respectfully submitted,

Date: November 4, 2002

  
Lynn A. Sullivan  
Elizabeth C. Diskin  
LEYDIG, VOIT & MAYER, LTD.  
Two Prudential Plaza, Suite 4900  
Chicago, Illinois 60601  
312/616-5600  
Attorneys for Baxter