

ExHS

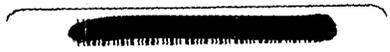
TTAB



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



12-10-2002

U.S. Patent & TMO/TM Mail Rcpt Dt. #66

**INVIRO'S MOTION TO AMEND ANSWER AND ADD  
COUNTERCLAIM FOR CANCELLATION**

02 DEC 23 11:09:30

In accordance with Rule 15(a), Fed.R.Civ.P., applicant Inviro Medical Devices Ltd. ("Inviro") hereby moves the U.S. Trademark Trial and Appeal Board ("the Board") for leave to amend its Answer by adding a counterclaim.

More specifically, Inviro seeks leave to add a counterclaim for the cancellation of the three INTERLINK trademark registrations (Registration Nos. 1,721,708, 1,812,016 and 1,821,178) that Opposer Baxter International Inc. ("Baxter") has pled as the sole basis for this opposition. During discovery, Baxter has produced information that confirms the "naked licensing" of the trademarks of these three registrations. As a result, the registrations should be cancelled.

A counterclaim to this effect has been added to Inviro's proposed amended Answer, which is attached as Exhibit A. No other changes have been made to the Answer except for the addition of the counterclaim for cancellation of the three pled registrations. Inviro's proposed amended Answer and Counterclaim identifies the deposit account to be charged for the cancellation fee.

Baxter has not consented to this motion.

3.A

**A. Justice Requires Amendment**

As stated by Rule 15 of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires." In this case, justice requires amendment. Inviro has requested on numerous occasions that Baxter produce all of its INTERLINK trademark licensing information, including an identification of its licensees and copies of its licenses and quality control documentation. Baxter's production of information confirms that Baxter has licensed the INTERLINK trademarks to numerous entities, but has not exercised any quality control.

In this regard, Baxter has licensed the INTERLINK trademark to at least the following entities:

- Becton Dickinson & Co.,
- Sanofi-Winthrop,
- The West Company, Inc.,
- IMS,
- Graseby/3M,
- Venetec, Inc. and
- Ivion Corp.

See Exhibit B, response to interrogatory 6. Although Baxter has produced written license agreements, Baxter has not produced any quality control documentation, for example, documentation showing that it ever traveled to the licensee businesses to assure proper quality control or corresponded with these businesses about quality control. In short, Baxter does not have any quality control documentation. See Exhibit C, which is a recent letter confirming that Baxter has produced all of its licensing information.

Baxter's lack of quality control amounts to "naked licensing" of the INTERLINK trademark; consequently, its registrations should be cancelled. Inviro hereby seeks leave to amend its Answer to add this counterclaim.

**B. Prompt Pleading of Counterclaim**

In accordance with Trademark Rule 2.106(b)(2)(i), if the grounds for a counterclaim are not known at the time the Answer is filed, but are learned during the course of the opposition, then the counterclaim can be pled after the grounds for the counterclaim are learned. Inviro was not aware of Baxter's naked licensing when it filed its Answer. As noted above, however, and as shown by Exhibit 4, Inviro has recently confirmed that Baxter has produced all of its licensing documents – yet no quality control documentation exists. This confirms the "naked licensing"; thus, Inviro is promptly seeking leave to amend its Answer to conform to the evidence -- or lack thereof.

**C. No prejudice**

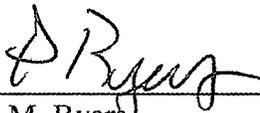
The granting of this motion will not prejudice Baxter for at least two reasons. First, this motion is being filed during the discovery period. Second, Baxter is the party who has produced the information -- or lack of information -- relevant to this motion. Thus, no prejudice will occur to Baxter by the granting of this motion.

**Conclusion**

Based on the information that has come forth through discovery in this case, the documentation -- or lack of documentation -- shows that Baxter has nakedly licensed its INTERLINK trademark to numerous entities, but has failed to exert quality control. As a result, justice requires that Inviro be permitted to amend its Answer and seek the cancellation of the three pled INTERLINK trademark registrations.

Date: \_\_\_\_\_

12/10/02



\_\_\_\_\_  
Duane M. Byers  
Nixon & Vanderhye P.C.  
1100 North Glebe Road, Suite 800  
Arlington, VA 22201-4714  
Telephone 703-816-4009  
Attorneys for Applicant

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of INVIRO'S MOTION TO AMEND ANSWER AND ADD COUNTERCLAIM FOR CANCELLATION was served this 10 day of Dec, 2002, via first class mail, postage prepaid, on counsel for Opposer:

Lynn A. Sullivan  
LEYDIG, VOIT & MAYER, LTD.  
Two Prudential Plaza - Suite 4900  
Chicago, Illinois 60601

