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

Baxter International Inc.,



Opposer,

02-27-2004

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #22

v.
Inviro Medical Devices, Ltd.
Applicant.

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

**OPPOSER'S REPLY BRIEF IN SUPPORT OF ITS
MOTION FOR LEAVE TO AMEND ITS NOTICE OF OPPOSITION****

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. In this case, Baxter believes such criteria are present, and therefore, submits this timely reply brief, in accordance with 37 CFR § 2.127.

Inviro's response to Baxter's Counter-Motion for leave to amend makes the following incorrect and misleading statements: (1) Inviro has already paid the

** Baxter previously filed this same reply brief on February 19, 2004, though it now realizes that the document was incorrectly titled—"Opposer's Reply Brief in Support of Its Motion for Oral Deposition of Applicant". Therefore, Baxter asks that the Board discard the earlier filing in favor of this correctly titled and timely filed Reply Brief in Support of Opposer's Motion for Leave to Amend its Notice of Opposition.

cancellation fee and (2) Inviro would be prejudiced because it has not taken discovery on Baxter's proposed new common law claims.

Baxter will comment on these claims in turn. First, it must be noted that Inviro filed a separate cancellation claim against all of Baxter's registrations based on alleged "naked licensing." In conjunction therewith, Inviro filed the required cancellation fee. Inviro did not pay any additional fee in connection with its proposed new basis to cancel one of Baxter's registrations, and should this Board deny Inviro's motion and grant Baxter's motion to amend, Inviro would not be financially injured.

Second, as Baxter pointed out in its own motion papers on this topic, any ability to amend its Notice of Opposition at this point would only serve to further *narrow the issues* and its basis for objecting to Inviro's registration. Though Baxter suggested that if allowed to remove its registration as a basis, it would add common law claims in conjunction with use of the mark for syringes and vial adapters (the two types of goods in the registration at issue which are currently being used), the voluminous documents and samples already produced in this case provide ample evidence of the fact that those goods are sold under the INTERLINK trademark. No additional discovery would be needed because Inviro already sought all the discovery it cared to on all claims made by Baxter, and the addition of common law claims would not really be new, since its common law rights are assumed in any of its registration rights.

In essence, Baxter's response and counter-motion did not concede to the "facts" regarding Inviro's new allegations of fraud because (1) it is an improper time for such debate, and (2) Baxter would need to take discovery in order to address Inviro's claims. This is why Baxter's proposed resolution removes the registration at issue in an effort to

move forward without prejudicing either party. Inviro, on the other hand, is intent on deflecting as much attention and focus as possible away from the central issue of this case and that is Inviro's application for ULTRALINK and Baxter's objection thereto based on its own rights to INTERLINK. As stated previously, even if Inviro could cancel the registration in question, it would not change the fact that Baxter owns rights to INTERLINK and it objects to Inviro's use of ULTRALINK. Therefore, it is appropriate in this case to grant Baxter's counter-motion to amend its Notice of Opposition and deny Inviro's motion to add another counterclaim in order to expeditiously resolve the issue and move forward.

Respectfully submitted,

Date: February 24, 2004



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CERTIFICATE OF MAILING

I hereby certify that this **OPPOSER'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO AMEND ITS NOTICE OF OPPOSITION** (along with any documents referred to as being attached or enclosed) is being deposited (in triplicate) with the United States Postal Service as first class mail in an envelope addressed to: Assistant Commissioner for Trademarks, 2900 Crystal Drive, **BOX TTAB NO FEE**, Arlington, Virginia 22202-3514 on February 24, 2004.

Date: February 24, 2004

Jessica T. Huth

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of **OPPOSER'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO AMEND ITS NOTICE OF OPPOSITION** was served via first class mail on 2/24/2004, to:

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