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

Proceeding	92046037
Party	Defendant NOVATECH SA
Correspondence Address	JOHN S. EGBERT EGBERT LAW OFFICES 412 MAIN STREET, 7TH FLOOR HOUSTON, TX 77002 UNITED STATES
Submission	Opposition/Response to Motion
Filer's Name	John S. Egbert
Filer's e-mail	mail@egbertlawoffices.com
Signature	/1811-71/
Date	12/10/2007
Attachments	1811-71 Resp to Pet's 2nd Mtn to Compel.pdf (18 pages)(1100784 bytes)

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

In the Matter of Trademark Registration No. 3,093,389
Registered on: May 16, 2006

BRYAN CORPORATION,	§	
	§	
Petitioner,	§	
	§	
v.	§	Cancellation No. 92046037
	§	
NOVATECH SA,	§	
	§	
Registrant.	§	

REGISTRANT'S RESPONSE TO PETITIONER'S MOTION TO COMPEL DISCOVERY RESPONSES

Pursuant to TBMP § 523, NOVATECH SA ("Registrant") submits this Response to BRYAN CORPORATION's ("Petitioner") Motion to Compel Registrant to supplement an interrogatory answer and argues against Petitioner's motion as follows:

DISCUSSION

1. The Board issued an Order on Petitioner's and Registrant's Motions to Compel on September 28, 2007 requesting that Registrant answer the fifth interrogatory in Petitioner's Second Set of Interrogatories. *See* [September 28, 2007 Order]. Registrant complied with the Board's Order on November 5, 2007 when it served its Supplemental Answers to Petitioner's Second Set of Interrogatories to Petitioner. *See* [Ex. 1, Supp. Ans. to 2nd Set of ROGS].

2. Registrant filed a Motion for Summary Judgment Dismissing This Cancellation Proceeding for lack of standing on November 28, 2007. *See* [Registrant's Motion for Summary Judgment]. A decision in favor of Registrant on the standing issue would eliminate the need to discuss this or any other discovery issues in this proceeding.

3. Registrant learned of Petitioner's apparent failure to receive Registrant's supplemental answers on the day Petitioner filed its Motion to Compel on November 30, 2007. Registrant immediately re-served the supplemental answers via email upon receipt of Petitioner's message. *See* [Ex. 2, November 30, 2007 email from Kevin Wilson]. Attached to Mr. Wilson's email was a complete scan of the contents of Exhibit 1. *See id.*

4. Since Registrant has served, and re-served via email, its Supplemental Answers to Petitioner's Second Set of Interrogatories, this Motion to Compel is moot and should therefore be denied by the Board.

5. Registrant believes Petitioner has attempted to use this motion as a means to delay a final decision on Registrant's Motion for Summary Judgment for lack of standing. Even after Petitioner received Registrant's supplemental answers to interrogatories for the second time, Petitioner did not notify the Board of the mootness of its motion to compel. Due to Petitioner's inaction, Registrant has now incurred unnecessary expenses in defending this motion to compel and the Board must now spend unnecessary time in making a decision on this motion to compel.

CONCLUSION

Based on the foregoing, Registrant respectfully requests that the board deny Petitioner's Motion to Compel Discovery Responses in its entirety. Registrant further requests that the Board grant Registrant's Motion for Summary Judgment Dismissing This Cancellation Proceeding for lack of standing in due course.

Respectfully submitted,

December 10, 2007
Date

/1811-71/

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Reg. No. 30,627
L. Jeremy Craft

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Houston, Texas 77002
Tel: (713)224-8080
Fax: (713)223-4873

ATTORNEYS FOR REGISTRANT
NOVATECH SA

CERTIFICATE OF SERVICE

I hereby certify that Registrant's Response to Petitioner's Motion to Compel Discovery Responses is being sent by first class mail on this 10th day of December 2007 to the attorney of record for Petitioner at the following address:

Daniel G. Jarcho
Andrew J. Park
McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
(202) 496-7756 fax
ATTORNEYS FOR PETITIONER

/1811-71/

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ATTORNEYS FOR REGISTRANT
NOVATECH SA

Our File: 1811-71

Exhibit 1

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

In the Matter of Trademark Registration No. 3,093,389
Registered on: May 16, 2006

BRYAN CORPORATION,	§	
	§	
Petitioner,	§	
	§	
v.	§	Cancellation No. 92046037
	§	
NOVATECH SA,	§	
	§	
Registrant.	§	

REGISTRANT'S SUPPLEMENTAL ANSWERS TO PETITIONER'S SECOND SET OF INTERROGATORIES

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, NOVATECH SA ("Registrant"), by its attorneys, hereby submits the following objections and supplemental answers to BRYAN CORPORATION'S ("Petitioner") Second Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. Registrant objects to Petitioner's Interrogatories to the extent they seek information subject to the attorney/client privilege, or within the attorney's work product immunity, or other grounds of immunity from discovery.

2. Registrant objects to Petitioner's Interrogatories to the extent they seek information that is unreasonably cumulative, duplicative, or obtainable from some other source that is more convenient, less burdensome, or less expensive.

3. Registrant objects to Petitioner's Interrogatories to the extent that the burden or expense of the Interrogatory outweighs its likely probative value.

4. Registrant's responses are based upon information and writings presently available to and located by Registrant and its attorneys. Registrant has not completed its investigation of the facts relating to this Cancellation, its discovery in this action, nor its preparation for trial. All the information supplied is based only on such information and documents which are presently and specifically known to Registrant. Therefore, Registrant's written responses are without prejudice to its rights to supplement or amend its written responses and to present evidence discovered hereafter at any hearing or trial.

5. Registrant objects to Petitioner's Interrogatories instructions and definitions to the extent they seek to impose burdens contrary to or in addition to those provided in the Federal Rules of Civil Procedure or the Trademark Rules of Practice. Accordingly, Registrant will produce documents identified in its responses in accordance with the applicable rules.

INTERROGATORIES

1. State whether you have ever, at any time in the past or present, sold a drug in the United States that bears the name STERITALC.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Without waving these objections or any others, Registrant responds that Registrant sold aerosol STERITALC in the United States under Investigational New Drug Application (IND) procedure in 1996.

2. If you have ever sold, at any time in the past or present, a drug bearing the name STERITALC in the United States, identify the drug, state whether the drug was approved by the

Food and Drug Administration (FDA), state the period of the sales, the dollar amount of the sales, the number of units of drugs sold, and identify the purchasers.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery of this Cancellation proceeding. Without waving these objections or any others, Registrant responds that Registrant sold aerosol STERITALC in the United States under an Investigational New Drug Application (IND) procedure in 1996. Registrant used the IND procedure to sell STERITALC brand aerosol sterile talc powder with permission from the FDA Division of Oncology. The FDA allowed registrant to send hospitals two canisters of STERITALC brand aerosol sterile talc powder per patient if a physician faxed a request to the FDA. The FDA would then assign an IND number to each request. Registrant's central file number for its facilities was number 9613846. The FDA labeler code number for Registrant was No. 62327. The FDA assigned LI 0060295 as the Drug Product Listing number for STERITALC on Registrant's form FDA 2657.

3. State whether you believe it is lawful to sell the STERITALC drug in the U.S. without FDA approval.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner.

4. State whether the drug label you submitted as evidence of the use of the STERITALC mark in connection with application Serial No. 75/076,198 is a sample of a label that was affixed to drugs sold in U.S. commerce.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner.

5. State whether your belief that you are "entitled to use" the STERITALC mark in commerce, as set forth in the Declaration you signed in connection with your application Serial No. 79/008,374, means that on the date of the Declaration you believed you have the right to sell a drug that bears the name STERITALC in U.S. commerce.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for information that is protected by the Attorney/Client privilege. Without waving these objections or any others, the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant signed a Declaration in connection with application Serial No. 79/008,374. The Declaration meant that Registrant "believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive." Registrant relies solely on the statement as it is written in the Declaration contained within the application.

6. State whether your belief that you are "entitled to use" the STERITALC mark in commerce, as set forth in the Declaration you signed in connection with your application Serial No. 79/008,374, means that on the date of the Declaration you believed you possess ownership of the name STERITALC.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration.

7. Identify and describe the facts and documents upon which you will rely to support your response to Interrogatory Nos. 6 and 7.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The STERITALC mark was filed under 66(a) as an intent to use application and was based on International Registration No. 0667961.

8. State whether it is your contention that the STERITALC mark can be used in U.S. commerce under the Lanham Act without FDA approval of the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. The interrogatory calls for information that is protected by the Attorney/Client privilege. Without waving these objections or any others, Registrant responds the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant

plans to obtain approval of the STERITALC drug by the FDA before using the STERITALC mark in U.S. commerce.

9. If it is your contention that the STERITALC mark can be used in U.S. commerce under the Lanham Act without FDA approval of the STERITALC drug, state how the STERITALC mark can be used in U.S. commerce.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. The interrogatory calls for information that is protected by the Attorney/Client privilege. Without waving these objections or any others, Registrant responds the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant plans to obtain approval of the STERITALC drug by the FDA before using the STERITALC mark in U.S. commerce.

10. State whether you made any inquiry at any time prior to the filing of your application Serial No. 79/008,374 to determine whether there may be any obstacles to the FDA approval of the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, Registrant

responds the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant plans to obtain approval of the STERITALC drug by the FDA before using the STERITALC mark in U.S. commerce and expects to obtain such approval without any problems.

11. State whether you currently have a pending FDA application for the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, Registrant responds that there is not a pending FDA application for the STERITALC drug as of the date of this Answer to Interrogatories.

12. State whether you were aware, on the date you signed the Declaration in connection with your application Serial No. 79/008,374 that Bryan Corporation had an approved NDA for STERILE TALC POWDER.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, Registrant responds that it did not learn of an approved NDA for Petitioner's sterile talc powder in a vial until after its December 28, 2004 filing date for STERITALC in International Class 005.

13. State whether you conducted an availability search to determine if any third parties have registered and/or are using a mark in the U.S. that is the same or similar to the STERITALC mark prior to the filing date of your application Serial No. 79/008,374.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege.

14. Identify and describe any and all correspondence between the FDA and you in connection with your April 17, 1997 FDA application and in connection with any other FDA applications for the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, please refer to Registrant's Responses to Petitioner's Second Set of Requests for Production.

15. Identify and describe the facts and documents upon which you will rely to support each of your three (3) affirmative defenses to the Petition to Cancel as stated in your Answer.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. Also, The interrogatory is an improper attempt to

require Registrant to list all factual assertions or contentions in this case, marshal all of its available proof, or marshal all proof Registrant intends to offer.

16. Identify and describe the facts and documents upon which you will rely to support your denial of the allegations in Paragraph 12 of the Petition to Cancel.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. Also, The interrogatory is an improper attempt to require Registrant to list all factual assertions or contentions in this case, marshal all of its available proof, or marshal all proof Registrant intends to offer.

Respectfully submitted,

November 5, 2007
Date

John S. Egbert
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(713)224-8080
(713)223-4873 fax

ATTORNEY FOR REGISTRANT
NOVATECH SA

CERTIFICATE OF SERVICE

I hereby certify that Registrant's Supplemental Answer to Petitioner's Second Set of Interrogatories is being sent by first class mail on this 5th day of November 2006 to the attorney of record for Petitioner at the following address:

Daniel G. Jarcho
Andrew J. Park
McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
(202) 496-7756 fax

ATTORNEYS FOR PETITIONER
BRYAN CORPORATION

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(713)223-4873 (Fax)

ATTORNEY FOR REGISTRANT
NOVATECH SA

JSE:ksw
Our File: 1811-71

VERIFICATION

I, Bruno Ferreyrol, officer for Registrant Novatech SA, hereby declare that I have read the foregoing Registrant's Supplemental Response to Petitioner's Second Set of Interrogatories (Nos. 1 to 16), and know the contents thereof; that said responses were prepared with the assistance and advice of counsel, upon which I have relied; that the responses set forth herein, subject to inadvertent or undiscovered errors, are based on and therefore necessarily limited by the records and information still in existence, presently recollected, and thus far discovered in the course of the preparation of the responses; that consequently, Registrant reserves the right to make any changes in its responses if it appears at any time that omissions or errors have been made therein or that more accurate information is available; and that based upon the foregoing, the undersigned declares that to the best of his knowledge, information and belief, the foregoing answers are true and correct.

DATED this 31st day of OCTOBER, 2007.

By: Bruno Ferreyrol

Title: Executive Director

Name: Ferreyrol, Bruno

Address: Novatech S.A.

1058 Voie Antiope - Zi Athélia 3

F - 13705 LA CIOTAT CEDEX

Our File: 1811-71

Exhibit 2

YAHOO! SMALL BUSINESS

Print - Close Window

Date: Fri, 30 Nov 2007 13:55:48 -0800 (PST)

From: "Kevin Wilson" <kwilson@egbertlawoffices.com>

Subject: Supplemental Responses to 2nd ROGS - Served on November 5, 2007

To: djarcho@mckennalong.com, apark@mckennalong.com

Dear Sirs:

Please find the attached Supplemental Responses to Petitioner's 2nd Set of Interrogatories. We served these on November 5, 2007. We are re-sending the documents via email for your convenience.

Obviously There should be no need to file the Motion to Compel in this proceeding.

Sincerely,
Kevin Wilson

Egbert Law Offices
State National Building
412 Main St., 7th Floor
Houston, TX 77002
Tel: (713) 224-8080 Ext. 212
Fax: (713) 223-4873

Attachments

Files:

Supp_Answers_to_2nd_Set_of_ROGS.pdf (391k)