

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 May 16, 2006

79008374

BRYAN CORPORATION,)
)
Petitioner,)
)
v.)
)
NOVATECH SA,)
)
Registrant.)
)
_____)

Cancellation No. 93460375

TRADEMARK PROCESS RECEIVED
2007 DEC 21 P 12:31
US PATENT & TRADEMARK OFFICE

**PETITIONER BRYAN CORPORATION'S REPLY IN SUPPORT OF
ITS MOTION TO COMPEL DISCOVERY RESPONSES FROM NOVATECH S.A.**

In the interrogatory at issue in this motion to compel, Bryan Corp. seeks facts elucidating the state of mind of Registrant Novatech S.A. ("Novatech") when it submitted a declaration to the U.S.P.T.O. stating that it believed it was "entitled to use" the STERITALC mark in commerce. Novatech's state of mind in executing this declaration is a central factual issue in the fraud claim asserted by Bryan Corp. Novatech initially refused to answer the interrogatory. Then, after the TTAB ordered Novatech to answer the interrogatory, it issued a belated answer that simply restates the language of the original declaration -- *i.e.*, that it was "entitled to use" the mark -- without answering the question posed in the interrogatory about its underlying state of mind -- namely whether it believed it was entitled to *sell* its STERITALC product in U.S. commerce when it declared that it was "entitled to use" the mark. Novatech's resistance in answering the interrogatory adds tacit and telling support to the fraud claim, and its production of a wholly inadequate interrogatory response certainly does not moot this motion. The TTAB should order Novatech to answer the interrogatory forthwith.



12-21-2007

DISCUSSION

As discussed more fully in Bryan Corp.'s Motion to Compel, filed November 30, 2007, Novatech must supply Bryan Corp. with an answer to its contention interrogatory (Interrogatory No. 5, Bryan Corp.'s Second Set of Interrogatories) seeking to know whether, at the time it filed its declaration in support of registration, Novatech believed it had the right to sell the drug labeled STERITALC in U.S. commerce. Novatech claims that it answered this interrogatory on November 5, 2007, thus mooted Bryan Corp.'s motion.¹ Upon reading Novatech's supplemental answer, however, it is plain that Novatech's response that Novatech "believes applicant to be entitled to use such mark in commerce. . ." does not answer the question posed:

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.

See Nov. 30 Motion to Compel Ex 1. In fact, Novatech's answer does nothing more than recite the language in its declaration to the PTO, which is completely unresponsive to the question posed as to its state of mind in executing the declaration -- whether, at the time it filed its declaration it believed it had the right to *sell* STERITALC in U.S. commerce. See Ex. 1 Novatech's Supplemental Responses to Bryan Corp.'s Second Set of Interrogatories, Interrogatory No. 5; Ex. 2, Novatech's Declaration in Support of Registration. Consequently, because Novatech has not stated whether, at the time it filed its registration it believed it had the right to *sell* the drug labeled STERITALC in U.S. commerce, Novatech has not meaningfully

¹ It should be noted that although Novatech claims it served its Supplemental Answers to Petitioner's Second Set of Interrogatories on November 5, Bryan Corp. did not receive Novatech's Supplemental Responses until November 30, when Novatech emailed the responses to counsel for Bryan Corp. at approximately 5:00 p.m. EST.

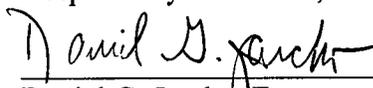
responded to Bryan Corp.'s interrogatory and is not in compliance with the Board's September 28 Order.

CONCLUSION

Based upon the foregoing, Bryan Corp. respectfully requests that the Board grant its Motion to Compel and require Novatech to meaningfully respond forthwith to Bryan Corp.'s contention interrogatory.

Dated: December 21, 2007

Respectfully submitted,



Daniel G. Jarcho, Esq.

Andrew J. Park, Esq.

Kristin H. Landis, Esq.

MCKENNA LONG & ALDRIDGE, LLP

1900 K St. NW

Washington, DC 20006

Attorneys for Petitioner Bryan Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2007, a copy of the foregoing document was served, by first class mail, postage prepaid, upon:

John S. Egbert, Esq.
Egbert Law Offices
State National Building
412 Main Street
7th Floor
Houston, TX 77002

A handwritten signature in cursive script, appearing to read "Daniel H. Joseph", is written over a horizontal line.

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.

NOVATECH SA,

Registrant.

§
§
§
§
§
§
§
§

Cancellation No. 92046037

**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, 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
Reg. No. 30,627
Egbert Law Offices
412 Main St., 7th Floor
Houston, Texas 77002
(713)224-8080
(713)223-4873 fax

ATTORNEY FOR REGISTRANT
NOVATECH SA

CERTIFICATE OF SERVICE

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



John S. Egbert
Reg. No. 30,627
L. Jeremy Craft
Egbert Law Offices, PLLC
412 Main Street, 7th Floor
Houston, Texas 77002
(713)224-8080
(713)223-4873 (Fax)

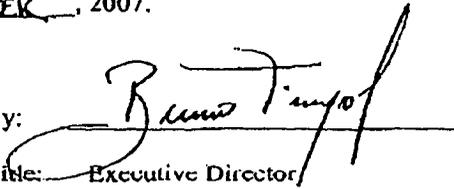
ATTORNEY FOR REGISTRANT
NOVATECH SA

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: 

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

POWER OF ATTORNEY

Applicant hereby revokes any and all previous Powers of Attorney and appoints John S. Egbert and Jeremy Craft, both members of the Bar of the State of Texas, of Egbert Law Offices, 412 Main St., 7th Floor, Houston, Texas 77002, (713) 224-8080, its attorney to prosecute this application to register, to transact all business in the Patent and Trademark Office in connection therewith, and to receive the certificate of registration.

DESIGNATION OF DOMESTIC REPRESENTATIVE

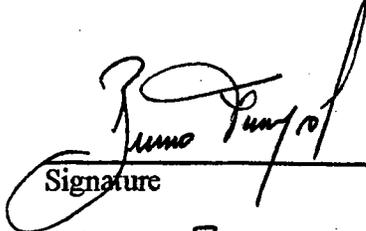
John S. Egbert and Jeremy Craft, both members of the Bar of the State of Texas, of Egbert Law Offices, 412 Main St., 7th Floor, Houston, Texas 77002, are hereby designated Applicant's representative upon whom notice or process in proceedings affecting the above-identified mark may be served.

DECLARATION

The undersigned being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. 1051(b); he/she 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 above identified 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; the facts set forth in this application are true; and all statements made of his/her own knowledge are true and all statements made on information and belief are believed to be true.

Dec. 14th, 2005
Date

Telephone Number


Signature

Bruno FERREYROL
Print or Type Name and Position

EXECUTIVE DIRECTOR


NEW BIOTECHNOLOGY FOR LIFE
Voie Antiope
Z.I. Athévia III
13705 LA CIOTAT CEDEX - France
Tél. 33(0)890 710 608 - Fax 33(0)890 710 609
www.novatech.fr

**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 May 16, 2006

BRYAN CORPORATION,)	
)	
Petitioner,)	
)	Cancellation No. 92046037
)	
v.)	
)	
NOVATECH SA,)	
)	
Registrant.)	
<hr/>		

PETITIONER BRYAN CORPORATION'S RULE 56(f) MOTION

Petitioner Bryan Corporation ("Bryan Corp."), pursuant to 37 C.F.R. § 2.127(e)(1) and Federal Rule of Civil Procedure 56(f), moves the Board to extend Bryan Corp.'s response time to Novatech S.A.'s ("Novatech's") Motion for Summary Judgment Dismissing this Cancellation Proceeding to allow Bryan Corp. to obtain needed discovery. The grounds for this motion, which are fully set forth in the accompanying Declaration of Daniel G. Jarcho, are that, because Novatech has unreasonably and in contravention of the Board's orders, refused to meaningfully respond to one of Bryan Corp.'s proper discovery requests, Bryan Corp. has not been able to fully develop the factual record with respect to Bryan Corp.'s fraud claim, on which Novatech has moved for summary judgment.

In defending against the summary judgment motion, Bryan Corp. is entitled to show that there is a genuine issue of material fact as to an element of its claim. Fraud is proven when a party is shown to have made a false statement of material fact that it knew or reasonably should have known was false. *See, e.g., Medinol Ltd. v. Neuro Vasx Inc.*, 67 U.S.P.Q.2d 1205, 1209

(T.T.A.B. 2003). Bryan Corp. alleges that Novatech committed fraud upon the United States Patent and Trademark Office (“PTO”) when it declared it had the right to use STERITALC in U.S. commerce. “If fraud can be demonstrated in the procurement of a registration, the entire resulting registration is void.” *Medinol Ltd.*, 67 U.S.P.Q.2d at 1208; 15 U.S.C. § 1141f(a).

As discussed in Daniel G. Jarcho’s attached Declaration, Bryan Corp. has, since November 2006, sought information regarding Novatech’s knowledge of its ability to use STERITALC in U.S. commerce. Specifically, Bryan Corp. requested that Novatech answer one interrogatory (Interrogatory No. 5, Second Set of Interrogatories) seeking to know whether Novatech believed at the time it declared that it had the right to use the STERITALC mark in commerce, that it had the right to sell a drug labeled STERITALC in U.S. commerce. *See* Bryan Corp.’s Nov. 30 Motion to Compel Ex. 1. Novatech, despite being ordered to provide Bryan Corp. with this information, has continually refused to meaningfully answer Bryan Corp.’s contention interrogatory.¹ *See* TTAB Sept. 28 Order. Consequently, because information directed at Novatech’s state of mind is essential to Bryan Corp.’s fraud claim (intent is an element of fraud) and because such information is exclusively within Novatech’s control, Bryan Corp. cannot meaningfully respond to Novatech’s Motion for Summary Judgment without first receiving Novatech’s adequate response to Bryan Corp.’s contention interrogatory. *See The Clorox Co. v. Armour-Dial, Inc.*, 214 U.S.P.Q. 850 (T.T.A.B. 1982); *Dunkin Donuts of America, Inc. v. Metallurgical Exoproducts Corp.*, 840 F.2d 917, U.S.P.Q.2d 1026 (Fed. Cir. 1988)

¹ As discussed fully in Bryan Corp.’s Reply to its Motion to Compel, Novatech, in response to an order by the Board compelling Novatech to respond to Bryan Corp.’s contention interrogatory, has done nothing more than recite its declaration to the PTO. A recitation of its declaration to the PTO does not answer Bryan Corp.’s question: did Novatech believe it had the right to sell a drug labeled STERITALC in U.S. commerce when it declared it had the right to use the STERITALC mark in commerce. *See* Bryan Corp.’s Reply to its Motion to Compel, Ex. 1.

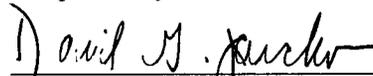
(plaintiff's Rule 56(f) discovery request allowed since evidence of defendant's intent is pertinent in a § 2 claim); *Orion Group, Inc. v. Orion Insurance Co. P.L.C.*, 12 U.S.P.Q.2d 1923, 1924-25 (T.T.A.B. 1989) (Rule 56(f) discovery request allowed since facts relating to defendant's use of mark were in defendant's control). Therefore, Bryan Corp. requests that the Board extend the time for Bryan Corp. to respond to Novatech's motion and further order Novatech to meaningfully respond to Bryan Corp.'s contention interrogatory on the issue of Novatech's knowledge of its ability to use STERITALC in U.S. commerce.

CONCLUSION

Based upon the foregoing, the Board should grant Bryan Corp. its requested Rule 56(f) relief by (1) extending Bryan Corp.'s time to respond to Novatech's Motion for Summary Judgment and (2) ordering Novatech to meaningfully respond to Bryan Corp.'s contention interrogatory on the issue of Novatech's knowledge of its ability to use STERITALC in U.S. commerce.

Dated: December 21, 2007

Respectfully submitted,



Daniel G. Jarcho, Esq.

Andrew J. Park, Esq.

Kristin H. Landis, Esq.

MCKENNA LONG & ALDRIDGE, LLP

1900 K St. NW

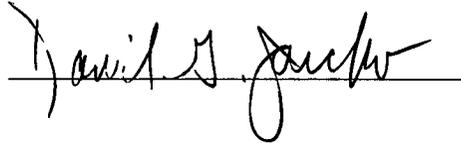
Washington, DC 20006

Attorneys for Petitioner Bryan Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2007, a copy of the foregoing Rule 56(f) Motion and Declaration of Daniel G. Jarcho were served, by first class mail, postage prepaid, upon:

John S. Egbert, Esq.
Egbert Law Offices
State National Building
412 Main Street
7th Floor
Houston, TX 77002

A handwritten signature in black ink, appearing to read "Daniel G. Jarcho", is written over a horizontal line.

**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 May 16, 2006

BRYAN CORPORATION,)	
)	
Petitioner,)	
)	Cancellation No. 92046037
)	
v.)	
)	
NOVATECH SA,)	
)	
Registrant.)	
<hr/>		

DECLARATION OF DANIEL G. JARCHO

I, Daniel G. Jarcho, declare as follows:

1. I am counsel of record for Petitioner Bryan Corporation (“Bryan Corp.”) and have been engaged in that role since Summer 2006. I have participated in all aspects of this cancellation proceeding and am knowledgeable regarding both the facts of the petition and the legal requirements required to prove the allegations in the petition.

2. On July 11, 2006, Bryan Corp. filed a petition seeking cancellation of Registrant Novatech S.A.’s (“Novatech’s”) trademark STERITALC, registered on May 16, 2006, on among other grounds, that Novatech committed fraud upon the United States Patent and Trademark Office when Novatech declared that it believed it was entitled to use the STERITALC mark in commerce.

3. For Novatech to succeed on Summary Judgment with regard to Bryan Corp.’s fraud claim, it must show that there is no genuine issue of material fact as to its state of mind

when it filed a declaration stating that it believed it was entitled to use the mark STERITALC in commerce.

4. On November 10, 2006, in an effort to discover Novatech's state of mind at the time of filing the declaration, Bryan Corp. served Novatech with a contention interrogatory (Interrogatory No. 5, Bryan Corp.'s Second Set of Interrogatories) seeking to know whether, at the time Novatech declared it believed it had the right to use the STERITALC mark in commerce, Novatech believed it had the right to sell a drug that bears the name STERITALC in U.S. commerce.

5. Novatech refused to answer Bryan Corp.'s contention interrogatory, thus prompting Bryan Corp. to file a motion to compel Novatech's response. Bryan Corp. filed its motion to compel on March 7, 2007.

6. On September 28, 2007, the Board granted Bryan Corp.'s motion to compel with respect to the contention interrogatory and ordered Novatech to supply Bryan Corp. with the information it seeks.

7. Novatech alleges that it served Bryan Corp. with supplemental interrogatory responses on November 5, 2007. Bryan Corp., however, did not receive the responses, and Bryan Corp. filed another motion to compel on November 30, 2007.

8. At approximately 5:00 p.m. EST on November 30, Bryan Corp. received via email Novatech's supplemental interrogatory responses.

9. Novatech's supplemental response to Bryan Corp.'s contention interrogatory states that "[t]he 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.””

10. Novatech’s supplemental response simply recites the language from its declaration filed with its registration. It does not provide Bryan Corp. with an answer to its question as to Novatech’s underlying state of mind when it filed the declaration.

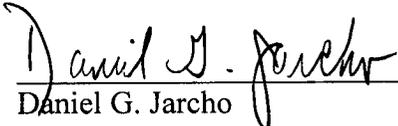
11. Novatech’s knowledge regarding its ability or inability to sell the drug labeled STERITALC in commerce is an element of Bryan Corp.’s fraud claim.

12. Novatech’s state of mind at the time of filing is solely within the control of Novatech.

13. Without the requested information Bryan Corp. cannot adequately respond to Novatech’s claim that there is no genuine issue of material fact regarding fraud.

14. Based upon the foregoing, Bryan Corp. requests that, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.127(e)(1), the Board extend Bryan Corp.’s response time to allow Bryan Corp. to obtain a meaningful response to its contention interrogatory. Further, Bryan Corp. requests that the Board again order Novatech to meaningfully respond to Bryan Corp.’s contention interrogatory.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.


Daniel G. Jarcho