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

Proceeding	92046037
Party	Plaintiff Bryan Corporation Bryan Corporation
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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, v. NOVATECH SA, Registrant.	)	Cancellation No. 92046037

BRYAN CORPORATION'S RESPONSE
IN OPPOSITION TO NOVATECH SA'S MOTION FOR
SUMMARY JUDGMENT DISMISSING THIS CANCELLATION PROCEEDING

The Board should deny Novatech SA's ("Novatech's") Motion for Summary Judgment Dismissing this Cancellation Proceeding ("Motion"). Summary judgment is not appropriate in this case because Novatech has not met its burden on summary judgment of demonstrating that Bryan Corporation ("Bryan") lacks standing. Novatech's STERITALC registration is proof positive that Novatech intends to oust Bryan as the only legitimate U.S. source for malignant pleural effusion ("MPE") sclerosing agents. Bryan has its own very real commercial interest to protect, and thus a direct and personal stake in the outcome of this proceeding.

Bryan's ability to challenge Novatech's registration in this cancellation action is not dependent on the distinctiveness of Bryan's own mark. Thus, for standing purposes, genericness is not an issue. Even if it were determinative, there is slim evidence that STERILE TALC POWDER is a generic mark. In fact, the STERILE TALC POWDER mark is not generic. Because this mark is not generic, Novatech's standing argument fails. Because Novatech based

its fraud and likelihood of confusion arguments on standing, Novatech's Motion as to those issues should also be denied.[1]

I. PROCEDURAL BACKGROUND

Novatech moved for summary judgment on November 30, 2007. As Novatech conceded and the Board acknowledged, the "the primary contention of its Motion for Summary Judgment is the issue of standing ... If Petitioner is found to lack standing, the Board will not be required to make a decision on the issues of likelihood of confusion or fraud." *See* August 29, 2008 Order at 5 (Ex. A hereto).

Resolution of the motion was delayed because Novatech failed to provide an adequate response to a key Bryan discovery request on the central issue of fraud, interrogatory No. 5. *Id.* The interrogatory required Novatech to:

> 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 that you have the right to sell a drug that bears the name STERITALC in U.S. commerce."

Novatech was ordered *twice* to fully and completely answer Interrogatory No. 5, first on October 3, 2007, and then again August 29, 2008. In its August 29 Order, the Interlocutory Attorney invited Bryan to seek sanctions if Novatech failed to comply. *See* August 29 Order at 8.

Novatech served a response to Interrogatory No. 5 on September 16, 2008, but the response was not properly verified under oath. The response also includes improper objections, and numerous qualifiers that undermine the evidentiary value of the response. *See* Novatech's Second Supplemental Answers to Petitioner's Second Set of Interrogatories at 4 (and

[1] Bryan has moved for discovery sanctions against Novatech this date in a separately filed motion. To the extent applicable, this Response discusses the issues raised by that motion, and Bryan hereby incorporates that motion by reference.

Verification) (Ex. B hereto). The Board has suspended this proceeding pending the outcome of Novatech's Motion.

II. ARGUMENT

The Board should deny Novatech's Motion because Bryan clearly has standing. The Motion should also be denied because Novatech (i) has not shown STERILE TALC POWDER to be generic; (ii) concurrent use of the STERILE TALC POWDER and STERITALC marks is apt to cause confusion; and (iii) there is likely additional fraud evidence that Novatech has not yet disclosed. At a minimum there are at least genuine issues of material fact as to all three issues.

A. Summary Judgment Standard of Review

The standard for granting summary judgment is a stringent one. On a motion for summary judgment, the burden is on the moving party to demonstrate the absence of any genuine issue of material fact, and that it is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The evidence of record and any inferences which may be drawn from the underlying undisputed facts must be viewed in the light most favorable to the non-moving party. *See Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

In considering the propriety of summary judgment, the Board may not resolve issues of material fact: it may only ascertain whether such issues are present. *See Opryland USA, Inc. v. Great American Music Show, Inc.*, 23 USPQ2d 1471, 1472 (Fed. Cir. 1993); *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993).

B. Bryan Meets and Exceeds the Board's Standing Requirements

Novatech's interpretation of the standing requirement is overly restrictive. A petition to cancel a registration may be brought by "any person who believes that he is or will be damaged ... by the registration of a mark on the principal register..." 15 U.S.C. § 1064. "Standing requires only that a party seeking cancellation of a registration have a good faith belief that it is likely to be damaged by the registration. The belief in damage can be shown by establishing a direct commercial interest." *Doyna, Ltd. v. Donya Michigan Co.*, Cancellation No. 92033012, 2005 WL 2295196, at *4 (TTAB September 6, 2005) (citing *Cunningham v. Laser Golf Corp.*, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000)); *see also* 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 20:46 (4th ed. 2001) ("McCarthy").

Contrary to what Novatech's Motion suggests, the requirement for standing in a cancellation proceeding is liberal. *See Cunningham v. Laser Golf Corp.*, 55 U.S.P.Q.2d 1842, 1844 (Fed. Cir. 2000). As the Federal Circuit's predecessor court noted, the class of persons with standing should be interpreted broadly because there is "no ex parte vehicle for removing 'dead' registrations from the register . . . except for the provisions of section 8." *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1030 (C.C.P.A. 1982) (stating that the public interest is served... in broadly interpreting the class of persons Congress intended to be allowed to institute cancellation proceedings"). Thus, all that is required is a real interest in the proceedings, *i.e.*, a personal interest in the outcome, and a reasonable basis for a belief of damage.

In its Cancellation Petition, Bryan pled that it has continuously used the mark STERILE TALC POWDER in interstate commerce since 2003. *See* Cancellation Petition at ¶14 (Ex. C) hereto). Respondent does not dispute that Bryan has used the mark STERILE TALC POWDER

in U.S. commerce. Such use satisfies the commercial interest requirement and confers standing. *See Donya*, 2005 WL 2295196, at *4 (holding that use of a mark in commerce establishes a direct commercial interest and standing to petition to cancel a mark).

As further support, Bryan has submitted the Declaration of its President, Mr. Bryan Abrano. Bryan's President confirms that on December 15, 2003, Bryan secured FDA approval for (i) the distribution of the STERILE TALC POWDER talc product in interstate commerce; and (ii) the use of the name STERILE TALC POWDER as the product name. *See* Declaration of Bryan Abrano, ¶4 (Ex. D hereto). "Bryan has been manufacturing, marketing, and selling its FDA-approved product "exclusively, continuously, and extensively in interstate commerce" since 2003. *Id.* at ¶7. Novatech's potential marketing and sale of a similar product under the confusingly similar STERITALC mark directly threatens Bryan's sales, and instills in Bryan a reasonable belief of damage. For standing purposes this is sufficient.

As the only legitimate source for MPE preventative sclerosing agents in the United States, the market for STERILE TALC POWDER brand talc product is Bryan's to lose. *See* Abrano Declaration, ¶¶ 6-9. If this does not conclusively establish Bryan's standing, it certainly raises a material factual dispute as to Bryan's interest in this proceeding.

C. The Distinctiveness of the STERILE TALC POWDER Mark is Not Relevant for Purposes of Novatech's Motion

Novatech's argument that Bryan does not have standing, because the term "STERILE TALC POWDER" is generic, appears designed to draw the Board's attention away from the central issue in this proceeding, *i.e.*, the fraudulent procurement of Novatech's registration.[2] The

[2] Bryan notes that Novatech's pleading did not specifically raise genericness as an issue to be tried in this case. Nonetheless , Bryan will address this issue.

status of the term "STERILE TALC POWDER" is irrelevant to the question of standing. Novatech confuses the issue of standing with a determination on the merits. *See* Cancellation No. 92045172, *Herbaceuticals, Inc. v. Xel Herbaceuticals, Inc.*, 86 USPQ2d 1572, 1575, and 1576 (TTAB 2008).

Even assuming the mark STERILE TALC POWDER were found to be generic, Bryan would still have standing to bring the cancellation action. A decision on the merits that may not be in a petitioner's favor does not deprive the petitioner of standing. In other words, the mere fact that a petitioner may lose a cancellation on the merits does not mean it did not have standing to bring the cancellation action in the first place. Even if distinctiveness were a prerequisite for standing, Novatech hardly has shown STERILE TALC POWDER to be a generic mark.

Genericness is a question of fact. *See Dan Robbins & Associates, Inc. v. Questor Corp.*, 599 F.2d 1009, 202 U.S.P.Q. 100 (C.C.P.A. 1979). Before a mark can be found generic, one must identify the particular type or category of goods at issue. The next step is to determine how the relevant public perceives the goods in connection with the mark. *See In re Reed Elsevier Properties, Inc.*, 482 f.3d 1376, 82 U.S.P.Q.2d 1378, 1380 (Fed. Cir. 2008) (citing *Marvin Ginn Corp. v. Int'l Assoc. of Fire Chiefs, Inc.*, 228 U.S.P.Q. 528, 530 (Fed. Cir. 1986). Because a finding of genericness can result in the loss of valuable rights, "a finding of genericness should not be found without persuasive and clear evidence that the contested term has become generic to the majority of the buyer group." McCarthy § 12.12.

Regarding the first factor, Novatech argues that because STERILE TALC POWDER is "used on goods consisting of talc powder that is sterilized and used as a sclerossing agent for the prevention of recurrent malignant pleural effusion," the mark is generic. Motion at 6. Novatech is wrong. Under the Lanham Act, a term can still qualify as a mark even if it is used to identify

goods, including "unique" products such as Bryan's. 15 U.S.C. § 45. The mere fact that a product has a unique physical characteristic is not enough to transform the trademark identifier into a generic name. *See In re Montrachet, S.A.*, 878 F.2d 375, 11 U.S.P.Q.2d 1393 (Fed. Cir. 1989).

Regarding public perception, Novatech merely points to a few dictionary definitions and articles as proof that STERILE TALC POWDER is a generic mark. This approach does not warrant summary judgment. As the Board has previously noted, dictionary definitions cannot be conclusive of genericness, "if for no other reason than that this would endow editors of such works with the power to destroy trademarks merely by defining them generally." *In re Minnetonka, Inc.*, 212 U.S.P.Q. 772, 778 (TTAB 1981). Moreover, given that (a) there is no other manufacturer than Bryan that sells a product comparable to STERILE TALC POWDER brand talc product and (b) that this product is relatively new, it is not surprising that someone might mistakenly incorporate components of Bryan's mark into a product definition. McCarthy § 12:17 (noting that it is going to be difficult to probe the public's mind regarding the generic or brand significance of a product when the public has never had occasion to consider the difference because there has always been only one seller of that thing.").

Regardless, there is evidence that members of the public do associate the STERILE TALC POWDER mark as referring solely to a Bryan product. *See* Abrano Declaration, ¶¶ 11-12. Such evidence includes views of a third party familiar with the STERILE TALC POWDER term's market place usage. *See* Declaration of James Dodds, ¶¶4-11 (Ex.E hereto). At a minimum, this raises a genuine issue of material fact as to distinctiveness of the STERILE TALC POWDER mark.

Novatech tries to analogize this case to *Rudolph Wild GMBH & Co. v. The Coca Cola Co.*, 1999 TTAB LEXIS 284, 288-89 (TTAB 1999). *Rudolph Wild* does not present a "similar fact situation." The goods, market place conditions, and procedural context involved in that case were different. The *Ruldolph Wild* case is not persuasive.

D. Novatech is Not Entitled to Summary Judgment on the Likelihood of Confusion Issue

Novatech does not premise its likelihood of confusion argument on any of the *DuPont* confusion factors, but rather its belief that the STERILE TALC POWDER mark is generic. In other words, Novatech's likelihood of confusion argument is based on Novatech's standing argument. Because Bryan has already established its standing in this matter, Novatech's Motion, which does not address, much less discuss, the issue of confusion, should be denied.

Moreover, even if the potential for confusion were assessed, this issue would likely come down in Bryan's favor. But for the letters "E" and "L," the dominant portions of the two disputed marks are the same: STERILETALC and STERITALC. Side by side these marks are virtually indistinguishable to the eye. The fact that STERITALC is a composite would not avoid a likelihood of confusion where, as here, most of the dominant portions are the same. The marks also sound alike and convey a similar commercial impression, *i.e.*, something clinical in nature. The prospective customers and trading channels are also likely to be similar, as no one but hospitals and physicians would require the parties' products. All of this suggests confusion is not only likely but inevitable. As there are no other third party marks, this only increases the likelihood of consumers coming into contact with both parties' marks.

As to evidence of actual confusion and the results of consumer surveys, these factors are a non-issue, as Bryan is currently the only U.S. seller of (MPE) preventative slcerosing agents. All things considered, the likelihood of confusion here is great. Accordingly, at least for

summary judgment purposes, with respect to likelihood of confusion, there is at least a material factual dispute.

E. Novatech is Not Entitled to Summary Judgment on the Issue of Fraud

Just as it did for the confusion issue, Novatech hinges the merits of its fraud argument on the issue of genericness. Here again, though, because a material factual dispute exists as to the genericness of the STERILE TALC POWDER mark, a material factual dispute exists as to fraud. Even if Novatech had gone beyond its standing argument and addressed the merits of the fraud claim, there would still be a material factual dispute.

Novatech's Motion suggests that for Board purposes fraud requires willfulness and intentional deceit. Motion at 12. This, however, is not consistent with current Board precedent. *See Medinol Ltd. v. Neuro Vasx Inc.*, 67 U.S.P.Q.2d. 1205, 1210 (T.T.A.B. 2003). In *Medinol* and numerous decisions thereafter, the Board has held that fraud occurs when an applicant or registrant makes a false material representation that the applicant or registrant knew **or should have known was false**. *Medinol*, 67 U.S.P.Q.2d at 1209; *see also Tequila Cazadores, S.A. de C.V. v. Tequila Centinela, S.A. de C.V.*, 2004 WL 407352, at *6 n.3. Opposition No. 91125436 (T.T.A.B. February 24, 2004) (emphasis added). Knowledge that the statement was false at the time it was made is not required nor is it the proper standard.

The Patent & Trademark Office is not in a position to investigate the truth of the facts beyond the applicant's declaration. This makes it necessary for an applicant to inquire and confirm the truth of its statements. Indeed, a registration procured by false statements irresponsibly made has justified cancellation on several occasions. *See e.g., Medinol* at 1209; *Nougat London v. Carole Garber*, 2003 WL 21206253, at *6, Cancellation No. 92040460 (T.T.A.B. May 14, 2003); *Hawaiian Moon, Inc. v. Rodney Doo*, Cancellation No. 9204219, 2004

WL 1090666, at *1 (TTAB Apr 19, 2004); *Physicians Formula Cosmetics, Inc. v. Cosmed, Inc.*, 2005 WL 847442 at *3, Cancellation No. 92040782 (T.T.A.B. March 11, 2005). Proof of specific intent to commit fraud was not required in these cases.

In this case, Novatech supplied a declaration stating that it believed itself "entitled to use" the STERITALC mark in commerce. Accordingly, during discovery, Bryan served Interrogatory No. 5 that requested Novatech to:

> 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 that you have the right to sell a drug that bears the name STERITALC in U.S. commerce."

Novatech resisted, and for nearly two years failed to adequately respond. Bryan's separately filed motion for sanctions addresses this issue. *See* FN 1 *supra*; *see also* Bryan's Motion for Sanctions (Ex F hereto).

Thus far there is no evidence that Novatech made a reasonable inquiry or sought any facts to support the statements in its declaration. The fact that Novatech had not sought, much less obtained, FDA approval when it submitted its declaration raises serious questions about Novatech's state of mind. When coupled with Novatech's failure to provide proper discovery on the issue, an inference can be drawn that Novatech "should have known" there was no basis for the representations in its declaration. *See*, e.g., *Zodiac Spirits, Inc. v. Mezini*, 2008 WL 885884, at *6-7 (T.T.A.B. Feb. 14, 2008) ("In this case, there is no explanation in the record as to why the president of Demptos and the Chief Executive Officer of Koan could not have confirmed the meaning and accuracy of the statements contained in the Statement of Use as well as the Combined Declaration of Use and Incontestability under Sections 8 and 15 before signing the declaration and prior to submission to the USPTO.). At a minimum, there is a material factual

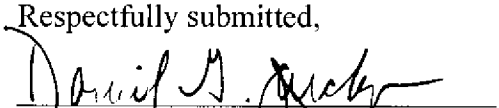
issue that needs to be resolved.

Bryan believes that Novatech's resistance to provide a properly verified discovery response is an attempt to preclude Bryan from putting forth evidence of Novatech's fraud. Bryan has therefore accepted the Board's invitation and filed a motion for discovery sanctions against Novatech on the fraud claim. In its motion, Bryan has requested the Board to enter judgment against Novatech. Due to Novatech's blatant disregard of the Board's prior rulings, the Board has grounds to infer that Novatech's registration was procured by fraud.

III. CONCLUSION

For the foregoing reasons, Bryan respectfully requests that the Board deny Novatech's Motion for Summary Judgment.

Respectfully submitted,



Dated: October 14, 2008

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Attorneys for Petitioner Bryan Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2008, a copy of the foregoing Bryan Corporation's Response in Opposition to Novatech SA's Motion for Summary Judgment Dismissing this Cancellation Proceeding 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

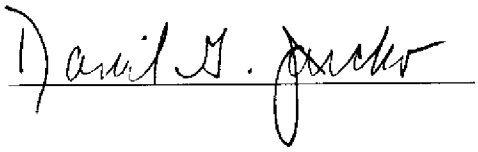

EXHIBIT A

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

MBA

Mailed: August 29, 2008

Cancellation No. 92046037

Bryan Corporation

v.

Novatech SA

Michael B. Adlin, Interlocutory Attorney:

This case now comes up for consideration of respondent's motion for summary judgment, filed November 30, 2007. Petitioner has not substantively responded to respondent's motion, but instead filed a cross-motion, pursuant to Fed. R. Civ. P. 56(f), for discovery which petitioner claims is necessary to respond to respondent's motion for summary judgment.[1] Respondent opposes the cross-motion, which is fully briefed and ready for decision. The delay in acting on it is regretted.

By way of background, respondent requests summary judgment on petitioner's claims of likelihood of confusion

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[1] On November 30, 2007, petitioner filed a motion to compel discovery responses which, because it seeks the same discovery as requested in the cross-motion, is effectively identical to and subsumed by the cross-motion. It will therefore not be further considered.

and fraud, alleging that: (1) petitioner's allegation of standing is based solely on its alleged proprietary rights in the term STERILE TALC POWDER, and because there is no genuine issue of material fact that STERILE TALC POWDER is generic for petitioner's goods, petitioner lacks standing; (2) "it is impossible for there to be a likelihood of confusion" between the mark shown in respondent's registration[2] and petitioner's alleged mark, because petitioner's "mark" is generic; and (3) there is no genuine issue of material fact with respect to petitioner's fraud claim, because petitioner "can offer no evidence" that respondent procured its registration by "false means" or that respondent falsely stated that it believed it was entitled to use its mark in commerce.

In its cross-motion, which is supported by the declaration of petitioner's counsel, petitioner alleges that because respondent "refused to meaningfully respond to one of [petitioner's] proper discovery requests, [petitioner] has not been able to fully develop the factual record with respect to [petitioner's] fraud claim, on which [respondent] has moved for summary judgment." Specifically, petitioner claims that respondent's response to petitioner's Second Set

[2] Registration No. 3093389, issued May 16, 2006 under Section 66(a), for STERITALC, in standard characters, for use in connection with "Pharmaceutical products containing talcum powder, namely, pharmaceutical preparations containing talcum powder for the treatment of malignant pleural effusions …."

of Interrogatories No. 5 is insufficient, even though the Board's order of October 3, 2007 overruled respondent's objection to this interrogatory and compelled respondent to respond to it. The interrogatory and respondent's supplemented response to it are as follows:

> 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 waiving 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."

As explained in the Board's order of October 3, 2007, petitioner's fraud claim is based on the theory that because respondent did not have approval from the U.S. Food and Drug Administration ("FDA") to sell its goods under the mark

STERITALC, its declaration that it is entitled to use the mark in commerce, submitted in support of its application for registration, was fraudulent. See also, Petition for Cancellation ¶ 13 (respondent procured its registration by fraud, in "falsely alleging in a Declaration that Registrant believed it was entitled to use the mark in commerce, when Registrant did not then and still has not obtained approval from FDA to distribute its product in commerce or to use the name STERITALC."). Petitioner claims that "because information directed at [respondent's] state of mind is essential to [petitioner's] fraud claim (intent is an element of fraud) and because such information is exclusively within [respondent's] control, [petitioner] cannot meaningfully respond to [respondent's] Motion for Summary Judgment without first receiving [respondent's] adequate response to [petitioner's] contention interrogatory."

In its response to the cross-motion, respondent contends that its supplemental response to the interrogatory in question "complied with the Board's Order" of October 3, 2007. While not disputing that it did not specifically respond to the question posed in the interrogatory, respondent alleges that "[i]n the interrogatory, Petitioner has taken the term 'entitled to use,' a term of art in trademark law, and proceeds to supply an erroneous legal

definition [presumably the "right to sell"] to that term of art." In any event, respondent claims that its "supplemental answer to Petitioner's interrogatory makes it clear what [respondent's] state of mind was when filing its declaration." Finally, respondent claims that "the primary contention of its Motion for Summary Judgment is the issue of standing … If Petitioner is found to lack standing, the Board will not be required to make a decision on the issues of likelihood of confusion or fraud."

In order to establish that it is entitled to discovery under Fed. R. Civ. P. 56(f), petitioner must show through affidavit (in this case the declaration of its counsel) that it "cannot for reasons stated present by affidavit facts essential to justify" its opposition to respondent's motion. See, Keebler Co. v. Murray Bakery Products, 866 F.2d 1386, 1389, 9 USPQ2d 1736, 1739 (Fed. Cir. 1989). Petitioner must do more than set forth a "speculative hope of finding some evidence" that would support its arguments, however. Sweats Fashions, Inc. v. Pannill Knitting Co. Inc., 833 F.2d 1560, 1566-67, 4 USPQ2d 1793, 1799 (Fed. Cir. 1987); Pure Gold, Inc. v. Syntex (U.S.A.), Inc., 739 F.2d 624, 222 USPQ 741 (Fed. Cir. 1984). Rather, petitioner "should set forth with specificity the areas of inquiry needed to obtain the information necessary to enable" it to respond to the motion for summary judgment. TBMP § 528.06 (2d ed. rev. 2004).

"Unfocused requests" for discovery which lack specificity are not sufficient under Fed. R. Civ. P. 56(f). Keebler, 866 F.2d at 1390, 9 USPQ2d at 1739.

As a preliminary matter, we note that the Board's order of October 3, 2007 required respondent to respond to the interrogatory in question. While respondent provided a "response," in the sense that it did not merely object to the interrogatory, and instead provided a purported answer, it was not proper for respondent to essentially interpret the interrogatory as invalid and on that basis refuse to provide a real response to the question posed, after being ordered to serve a response. Indeed, if the interrogatory was found to be invalid when the Board reviewed it the first time, respondent would not have been compelled to respond to it.

In any event, petitioner has established that it is entitled to an actual response to the question actually posed in the interrogatory. First, and most importantly, while respondent's motion for summary judgment is primarily based on respondent's allegation that petitioner lacks standing, it is also based on respondent's claim that petitioner cannot come forward with evidence to support its fraud claim. As petitioner points out, the information responsive to the interrogatory in question directly relates to the fraud claim, and is uniquely within respondent's

control. Second, petitioner's request for discovery under Rule 56(f) is nothing if not specific and focused. Petitioner seeks a single response to a single interrogatory. Respondent has already been ordered to respond to the interrogatory, and failed to do so. For these reasons, petitioner's cross-motion is **GRANTED**, and respondent is allowed until **FIFTEEN DAYS** from the mailing date of this order to respond to petitioner's Second Set of Interrogatories No. 5. Petitioner is allowed until **FORTY FIVE DAYS** from the mailing date of this order to file its response to respondent's motion for summary judgment.

To avoid any confusion or further delay, respondent must answer the question posed, and petitioner must respond to respondent's motion for summary judgment, within the time provided herein. Any failure by either party to do this will be at its own peril. To answer the question posed in the interrogatory, respondent must indicate whether it believed, on the date it signed the declaration in question, that it had "the right to sell a drug that bears the name STERITALC in U.S. commerce." It must provide this answer without citing, referring to or quoting its declaration, except that respondent may cite the date on which the declaration was filed. If, as last time, respondent believes the interrogatory is "erroneous," improper, confusing or unclear in any way, it may not so state in its

supplemental response, but must instead initiate a telephone conference with petitioner and the Board to discuss any issues it has with the interrogatory, well prior to the deadline for responding to it. Serving a supplemental response which, like the last one, questions the basis or substance of the interrogatory or refuses to answer the question posed is not permitted and will be grounds upon which petitioner may file a motion for sanctions. By the same token, once respondent complies with this order, petitioner may not seek to further delay responding to the motion for summary judgment, and any attempt to do so will be at its peril. In the event petitioner intends to do anything other than respond to the motion for summary judgment within the time provided, it must initiate a telephone conference with respondent and the Board to discuss its intention, well prior to the deadline for responding to respondent's motion for summary judgment.

Proceedings herein remain otherwise suspended pending disposition of respondent's motion for summary judgment.

News from the TTAB

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:

http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf
http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address: http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm

***

EXHIBIT B

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

received
9/18/08 DGJ

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

REGISTRANT'S SECOND 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. Registrant's response is yes.

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,

9-15-08

Date

John S. Egbert
Reg. No. 30,627
L. Jeremy Craft
Kevin S. Wilson
Egbert Law Offices, PLLC
412 Main St., 7th Floor
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(713)224-8080
(713)223-4873 fax

ATTORNEY FOR REGISTRANT
NOVATECH SA

VERIFICATION

I, Bruno Ferreyrol, officer for Registrant Novatech SA, hereby declare that I have read the foregoing Registrant's Second 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 10th day of September, 2008.

By: Bruno Ferreyrol

Title: Executive Director

Name: Ferreyrol, Bruno

Address: Novatech S.A.

1058 Voie Antiope - Zi Athélia 3

F - 13705 LA CIOTAT CEDEX

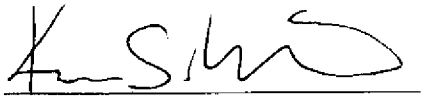
Our File: 1811-71

CERTIFICATE OF SERVICE

I hereby certify that Registrant's Second Supplemental Answer to Petitioner's Second Set of Interrogatories is being sent by first class mail on this 15th day of September 2008 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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ATTORNEY FOR REGISTRANT
NOVATECH SA

JSE:ksw
Our File: 1811-71

EXHIBIT C

ESTTA Tracking number: **ESTTA89350**

Filing date: **07/11/2006**

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

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Bryan Corporation		
Entity	Corporation	Citizenship	Massachusetts
Address	4 Plympton Street Woburn, MA 01801 UNITED STATES		

Correspondence information	Daniel G. Jarcho/Andrew J. Park Attorney McKenna, Long & Aldridge, LLP 1900 K Street, N.W. Washington, D.C., DC 20006 UNITED STATES apark@mckennalong.com Phone:202-496-7442

Registration Subject to Cancellation

Registration No	3093389	Registration date	05/16/2006
International Registration No.	NONE	International Registration Date	NONE
Registrant	NOVATECH SA Voie Antiope, ZI ATHELIA III F-13600 LA CIOTAT FRANCE		
Goods/Services Subject to Cancellation	Class 005 Goods/Services: Pharmaceutical products containing talcum powder, namely, pharmaceutical preparations containing talcum powder for the treatment of malignant pleural effusions, pneumothorax, mesotheliama, skin disorders, cancer, and gout; sanitary products containing talcum powder, namely, sanitary pads, sanitary napkins, and sanitary preparations for medical use all containing talcum powder; talcum powder for medical use, namely, medicated talcum powder		

Attachments	BRYAN.PETITION FOR CANCELLATION.PDF (8 pages)(194803 bytes)

Signature	/ajp/
Name	Andrew J. Park
Date	07/11/2006

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

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

BRYAN CORPORATION,	)	
	)	
Petitioner,	)	
	)	Cancellation No.
v.	)	
	)	
NOVATECH SA,	)	
	)	
Registrant.	)	
	)	

PETITION FOR CANCELLATION

Bryan Corporation ("Petitioner"), a corporation organized under the laws of Massachusetts, with an office and principal place of business at 4 Plympton Street, Woburn, MA, hereby petitions to cancel Registration No. 3,093,389 pursuant to 15 U.S.C. § 1064 et seq. and 37 C.F.R. § 2.111 et seq.

Petitioner alleges the following as grounds for cancellation:

1. Petitioner is engaged in the development, manufacture, and sale of medical devices and drug products. This matter involves Petitioner's drug product STERILE TALC POWDER, which is a sclerosing agent for the prevention of recurrent malignant pleural effusion ("MPE"), using talc powder as the active ingredient (hereinafter "the Product"). The United States Food and Drug Administration ("FDA") has determined that under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 et seq., this type of product used to treat MPE cannot be distributed in interstate commerce without prior approval by FDA.

2. Petitioner secured FDA approval for STERILE TALC POWDER on December 15, 2003. By its terms, such approval authorized both the use of the name STERILE TALC POWDER for the Product and the distribution of that Product in interstate commerce.

3. On information and belief, Petitioner is the only company to have obtained FDA approval for a drug product that is a sclerosing agent for the prevention of recurrent MPE, using talc powder as the active ingredient. On information and belief, Petitioner also is the only company to have obtained FDA approval for the use of the name STERILE TALC POWDER for a drug product. The name of a drug product is part of the FDA-regulated labeling requirements and must be approved by the FDA prior to use.

4. The name of a drug product is part of the FDA-regulated labeling requirements and must be approved by the FDA prior to use. The FDA vigorously and strictly regulates the use of drug product names. In assessing the permissibility of a prospective drug name, the FDA will, among other things, (1) check for similarity to any prior FDA-approved drug name; and (2) consider the prospective drug name with the nature of the drug to ensure that it is not misleading as to the nature of the drug, its efficacy, or its ingredients.

5. Petitioner initially sought FDA approval for the name TALC POWDER but upon consideration, the FDA demanded Petitioner use the name STERILE TALC POWDER instead since the active ingredient - talc powder - is sterilized. Accordingly, since the FDA not only approved, but insisted on the use of the name STERILE TALC POWDER for Petitioner's FDA-approved Product, the name is (1) dissimilar to the name of any other third-party's FDA-approved drug product, particularly a drug product that is a sclerosing agent for the prevention of

MPE using talc powder; and (2) it is not misleading in any manner vis-à-vis the nature of the drug.

6. It is unlikely for any third-party to obtain FDA approval for the name of a drug that is identical or similar to the name STERILE TALC POWDER for drugs that are identical or similar to Petitioner's Product. Thus, it is unlikely for Registrant to obtain FDA approval for the name STERITALC for the drug products claimed by its trademark registration since it is similar to Petitioner's FDA-approved STERILE TALC POWDER mark and it is used on drug products that are similar to Petitioner's Products.

7. Petitioner has obtained common law intellectual property rights to the STERILE TALC POWDER mark through its exclusive, continuous, and extensive use in commerce throughout the United States in connection with the Product, and as a result, the mark is famous and well-known as the source identifier of Petitioner's FDA-approved Product.

8. On March 21, 1996, Registrant, a French company, filed U.S. application Serial No. 75/076,198 for registration on the Principal Register for the mark STERITALC for "Pharmaceutical products containing powder" (later amended to "Pharmaceutical products for the treatment of pulmonary ailments, namely aerosols and flasks containing talc as an active ingredient") in International Class 005. This application was based on intent-to-use and eventually matured into U.S. Reg. No. 2,116,833 on November 25, 1997.

9. On August 28, 2004, Registrant's U.S. trademark Reg. No. 2,116,833 was canceled for failure to file an affidavit of continued use.

10. On December 28, 2004, Registrant once again sought U.S. registration for the STERITALC mark by filing a new application with the PTO. The new U.S. application Serial

No. is 79/008,374. This application was based on Registrant's International Registration for the STERITALC mark ("Section 66(a) application"). The Section 66(a) application claimed "Pharmaceutical products containing talcum powder, namely pharmaceutical preparations containing talcum powder for the treatment of malignant pleural effusions, pneumothorax, mesotheliama, skin disorders, cancer, gout; sanitary products containing talcum powder, namely sanitary pads, sanitary napkins, sanitary preparations for medical use all containing talcum powder; talcum powder for medical use, namely medicated talcum powder" ("Re-filed mark"). The Section 66(a) application for the Re-filed mark eventually matured to registration on May 16, 2006.

11. In support of the registration of the Re-filed mark, Registrant executed and submitted a declaration that stated, among other things that (a) it believes it is entitled to use the STERITALC mark in commerce; and (b) it believes, to the best of its knowledge and belief, that no other third party has the right to use the same or similar mark on the same or similar goods in commerce.

12. On information and belief, if FDA were notified of Registrant's intent to distribute its pharmaceutical products in interstate commerce, and of Registrant's intent to do so using the STERITALC name for the products, FDA would determine that such distribution of products and use of the name require FDA approval. On information and belief, Registrant has not obtained FDA approval to distribute its pharmaceutical products in interstate commerce. On information and belief, Registrant has not obtained FDA approval to use the name STERITALC for its pharmaceutical products.

13. Registrant procured registration of the Re-filed mark by false means and/or by knowingly and willfully making false and/or fraudulent declarations or representations to the PTO, including, *inter alia*, falsely alleging in a Declaration that Registrant believed it was entitled to use the mark in commerce, when Registrant did not then and still has not obtained approval from FDA to distribute its product in commerce or to use the name STERITALC. On information and belief, said false statements were made with the intent to induce the PTO to grant said registration, and reasonably relying upon the truth of said false statements, the PTO did, in fact, grant said registration to Registrant on May 16, 2006.

14. Since at least December 15, 2003, Petitioner has been manufacturing, marketing and selling its FDA-approved Product continuously and extensively in interstate commerce under the trademark STERILE TALC POWDER.

15. Petitioner has spent substantial amounts of time, money and effort to develop, test, and market its FDA-approved Product. On information and belief, there is no other FDA approved product sold in the United States that is a sclerosing agent for the prevention of recurrent MPE using talc powder as the active ingredient, with the exception of another related but different FDA-approved product also developed, marketed and sold by Petitioner called "Sclerosol." Further, on information and belief, there is no other FDA approved product sold in the United States under the name STERILE TALC POWDER or a similar name. As a result, Petitioner's Product and its mark STERILE TALC POWDER have become famous and well-known and, specifically, the mark STERILE TALC POWDER has become famous and well-known as the source identifier of Petitioner's FDA-approved Product.

16. On information and belief, Registrant has not obtained FDA approval authorizing the sale of any of its products under the STERITALC mark in the United States. Therefore, Petitioner has priority of use and common law rights to the STERILE TALC POWDER mark that are senior to Registrant's registration of the STERITALC mark.

17. Registrant's STERITALC mark is nearly identical to Petitioner's STERILE TALC POWDER mark in terms of appearance, pronunciation and meaning.

18. Registrant's STERITALC registration claims goods that are the same or similar to Petitioner's FDA-approved Product, the channels of trade are the same or similar, and they are targeted to the same potential purchasers in the medical community and the general public.

19. Petitioner's Product is the only FDA-approved drug, and its name, STERILE TALC POWDER, together with the related Petitioner product called Sclerosol, are the only FDA-approved product names for a sclerosing agent for the prevention of MPE using talc powder as the active ingredient.

20. The similarity in appearance, pronunciation and meaning of Registrant's STERITALC mark to Petitioner's FDA-approved STERILE TALC POWDER mark, and the similarity of the respective products, channels of trade, and intended consumers make it likely that, when Registrant's mark is applied to Registrant's products, it will cause confusion and mistake, in particular, it will cause consumers to wrongly believe that Registrant's product is an FDA-approved drug when it is not and it will deceive as to the source, origin, or sponsorship of Registrant's goods, with consequent injury to Petitioner and to the patient population taking these pharmaceutical products.

21. Petitioner is likely to be damaged by the registration of Registrant's STERITALC mark because such registration will support and assist Registrant in the confusion and misleading use of Registrant's mark and will give color of rights in Registrant in violation of the superior rights of Petitioner.

22. In view of the above allegations, Registrant is not entitled to continue registration of its mark since Registrant, upon information and belief, obtained the registration through misrepresentation and fraud and the subject registration is likely to cause confusion and mistake and to deceive as to the source, origin, or sponsorship of Registrant's products.

WHEREFORE, the Petitioner respectfully prays that Registration No. 3,093,389 be canceled.

Respectfully submitted,

Dated: July 11, 2006

Daniel G. Jarcho
Andrew J. Park
Attorneys for Petitioner

McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7000
(202) 496-7756 fax

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

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

BRYAN CORPORATION,	)	
	)	
Petitioner,	)	
	)	Cancellation No.
v.	)	
	)	
NOVATECH SA,	)	
	)	
Registrant.	)	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITION FOR CANCELLATION** was served on Registrant by mailing a true copy thereof to the attorney of record via overnight carrier addressed as follows:

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

this 11th day of July, 2006.

Andrew J. Park, Esq.
Attorney for Bryan Corporation, Petitioner

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

EXHIBIT D

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.	)	
	)	

DECLARATION OF BRYAN ABRANO

I, Bryan Abrano, am over the age of eighteen years of age, am competent to make this declaration based upon personal knowledge, and if called as a witness would testify as follows:

1. I am the President of Bryan Corporation ("Bryan"), the Petitioner in the above captioned matter. I have been President of Bryan since 2007, and employed by Bryan since 2000.

2. Bryan is a small, privately owned Woburn, Massachusetts company that develops, manufactures, and sells medical devices and drug products. Bryan distributes its products throughout the United States directly. Bryan uses its own and independent sales representatives to market and sell Bryan's products to hospitals, clinics, doctor's offices and other medical facilities throughout the United States.

3. The drug product at issue in this case is Bryan's STERILE TALC POWDER™ talc product, which is a sclerosing agent for the prevention of recurrent malignant pleural effusion (MPE). Pursuant to the Federal Food, Drug, and Cosmetic Act, the United States Food and Drug

Administration ("FDA") has determined that this type of product used to treat MPE ("Product") cannot be distributed in interstate commerce without prior FDA approval.

4. On December 15, 2003, Bryan secured FDA approval for (i) the distribution of the STERILE TALC POWDER talc product in interstate commerce; and (ii) the use of the name STERILE TALC POWDER as the product name. The name of a drug is part of the FDA-regulated labeling requirements and must be approved by the FDA prior to use.

5. Bryan initially sought FDA approval for the name TALC POWDER but upon consideration, the FDA demanded Bryan use the name STERILE TALC POWDER instead. Accordingly, the FDA not only approved but insisted on the use of the name STERILE TALC POWDER as the Product's name.

6. There is no other known FDA-approved third party product sold in the United States that is a sclerosing agent (using talc powder as the active ingredient) for the prevention of recurrent MPE. Further, there is no other known FDA-approved product sold in the United States under the name STERILE TALC POWDER or a similar name. As a result, Bryan's Product and its trademark STERILE TALC POWDER have become famous and well-known and, specifically, the trademark STERILE TALC POWDER has become famous and well-known as the source identifier of Bryan's FDA-approved Product.

7. Since at least December 15, 2003, Bryan has been manufacturing, marketing, and selling its FDA-approved product exclusively, continuously, and extensively in interstate commerce under the trademark STERILE TALC POWDER. Bryan is the only manufacturer that sells an MPE sclerosing agent in the United States. Bryan therefore has market exclusivity.

8. Since 2003, Bryan has spent substantial amounts of time, money, and effort to develop, test, and market STERILE TALC POWDER brand talc product. Bryan's marketing and

advertising expenditures for this product are well into the hundreds of thousands of dollars range. Bryan advertises STERILE TALC POWDER brand talc product in medical journals, articles, magazines, at industry tradeshows, and through direct mail. Representative advertisements for STERILE TALC POWDER brand talc product are attached to this declaration as Exhibit A.

9. The market for MPE sclerosing agents is finite. Yearly there are, on average, 150,000 reported cases of MPE in the United States. Since 2003, however, Bryan's unit sales of STERILE TALC POWDER brand talc product have increased more than 20% a year. The per unit amount of this product has not changed.

10. Bryan's sales of STERILE TALC POWDER talc product are a significant source of revenue for Bryan.

11. The STERILE TALC POWDER brand is widely recognized by doctors, drug distributors, and healthcare professionals as another effective, high quality Bryan Corporation product.

12. I have no knowledge of any person using the phrase STERILE TALC POWDER as a source designator for an MPE treatment, or for any other type of treatment, other than as a reference to a product sold by Bryan.

13. Based on my overall experience selling and promoting STERILE TALC POWDER™ talc product, I believe that the STERILE TALC POWDER™ mark has become distinctive as applied to Bryan's product. By distinctive, I mean that when consumers hear, see, or use the term STERILE TALC POWDER, they understand and expect that term to refer exclusively to a Bryan product.

14. Within the medical and pharmaceutical trade, I believe the mark STERILE TALC POWDER™ means talc product made by Bryan.

I declare under penalty of perjury that the foregoing is a true and correct.

Executed on this 10 th day of October 2008

Bryan Abrano, President
Bryan Corporation

DC:50578569.1

EXHIBIT A

STERILE TALC POWDER™

Treatment for Malignant Pleural Effusion (MPE)

DECREASE THE RECURRENCE OF MPE

Key Features:

- **Chest Tube Administration**
- **Controlled Particle Size**
- **Gamma Irradiated**
- **Packaged Sterile in a 100ml Glass Vial**
- **Single Use, 5 gram Dosage**

Sterile Talc Powder™ is indicated for use as a sclerosing agent to decrease the recurrence of MPE in symptomatic patients. A cost-effective treatment for MPE, Sterile Talc Powder™ provides uniform, consistent and clean administration via chest tube.

Studies[1-5] demonstrate that talc, administered intrapleurally via chest tube, has a high success rate in treating MPE, relieving symptoms and decreasing the recurrence of pleural effusion.

Please see full prescribing information on the adjacent page

To place an order for Product #1690, Sterile Talc Powder please contact Bryan Corporation at

Toll Free: 800.343.7711
Fax: 781.935.7602
Email: sales@bryancorp.com
www.bryancorp.com

LATEX | STERILE R

Sorensen et al. Eur J Respir Dis 1984; 65(2): 131-5
Noppen et al. Acta Can Belg 1997; 52(4): 258-62
Zimmer PW et al. Chest 1997; 112(2): 430-434
Ong KC et al. Respirology 2000; 5:99-103
Yim AP et al. Ann Thorax Surg 1996; 62:1655-6

BRYAN

Prescribing Information

STERILE TALC POWDER™

NDC 63256-200-05 Sterile Talc Powder
For Intrapleural Administration Only
Cat. # 1690

DESCRIPTION

Sterile Talc Powder is a sclerosing agent intended for intrapleural administration supplied in a single-use 100 ml Type I glass bottle, sealed with a gray, 20 mm stopper and covered with a flip-off seal. Each bottle contains a minimum of 5.0 g of Talc *USP* (Ultra 2000 Talc), either white to off-white to light gray. Asbestos free and pyrogen free grade of talc of controlled particle size. The composition of the talc is 95% talc as hydrated magnesium silicate. The empirical formula of talc is $Mg_3Si_4O_{10}(OH)_2$ with a molecular weight of 379.3. Associated naturally occurring minerals include colloidal hydrated aluminum and magnesium silicate (dolomite), dolomite (calcium and magnesium carbonate), calcite (calcium carbonate) and quartz. Talc is practically insoluble in water and in dilute solutions of acids and alkali hydroxides. The finished product has been sterilized by gamma irradiation.

CLINICAL PHARMACOLOGY

Mechanism of Action

The therapeutic action of talc insufflated into the pleural cavity is believed to result from induction of an inflammatory reaction. This reaction promotes adherence of the visceral and parietal pleura, obliterating the pleural space and preventing reaccumulation of pleural fluid.

The extent of systemic absorption of talc after intrapleural administration has not been adequately studied. Systemic bioavailability could be affected by the integrity of the pleural surface, and therefore could be increased if talc is administered immediately following lung resection or biopsy.

CLINICAL STUDIES

The data demonstrating safety and efficacy of talc slurry administered via chest tube for the treatment of patients with malignant pleural effusions are from the published medical literature. The following prospective, randomized studies were designed to evaluate the risk of recurrence of malignant pleural effusions in patients with a variety of solid tumors. The studies compared talc slurry, insufflated into the pleural cavity via chest tube, versus a concomitant control. In all studies, after maximal drainage of the pleural effusion, the investigator administered talc slurry via chest tube. Chest films documented response (absence or lack of recurrence of fluid) for a period of time. Studies differed on the timing of the efficacy assessment. Zimmer et al. did not specify the time required evaluations. Dog et al. specified the assessment at 1 month. Sclerosis et al. specified the assessment at 3-4 months. The remaining studies assessed response at the completion of the follow-up period.

REFERENCE	TREATMENT	RESPONSE RATE EVALUABLE PTS[a] p value[b]	RESPONSE RATE ALL PTS p value
Sydnes et al. Eur J Respir Dis. 1984; 65(2):131-5	Talc Slurry 10g/250ml NS vs Chest tube drainage alone	100% (9/9) vs 58% (7/12) p=0.04	64% (9/14) vs 41% (7/17) p=0.29
Kappen et al. Acta Clin Belg 1991; 52(4):258-62	Talc Slurry 5g/50-ml NS vs Bleomycin 1mg/kg/50ml NS	79% (11/14) vs 75% (9/12) p=1.00	79% (11/14) vs 75% (9/12) p=1.00
Zimmer PW et al. Chest 1997; 112(2):432-434	Talc Slurry 5g/50 ml NS[c] vs Bleomycin 60U/50 ml NS[c]	90% (17/19)[d] vs 79% (11/14)[d] p=0.62	Not Given
Dog KC et al. Respirology 2000; 5:99-103	Talc Slurry 5g/150ml NS[e] vs Bleomycin 10U/kg/150 ml NS[e]	89% (16/18) vs 70% (14/20) p=0.24	64% (16/25) vs 56% (14/25) p=0.73
Van AP et al. Ann Thorac Surg 1996; 62:1655-8	Talc Slurry 5g/50ml NS + lidocaine 2% 10 ml vs Talc insufflation 5g powder	100% (26/26) vs 96% (27/28) p=0.61	96% (26/27) vs 96% (27/28) p=0.61

Randomized Controlled Trials Using Talc Slurry as a Sclerosing Agent

a. Two-sided p value (Fisher's exact test)
b. Patients were evaluable if chest x-rays were done to assess response per protocol. The Sydnes et al. study excluded patients if incomplete lung re-expansion was noted post drainage.
c. Data per procedure (133 procedures in 29 evaluable patients). 3 patients with bilateral effusions.
d. Talc slurry 1%, 20 ml
e. Talc slurry 1%, 10 ml

In single-arm studies of malignant pleural effusions from the published literature, talc poudrage pleurodesis rates using talc slurry pleurodesis ranged from 75% to 100%.

INDICATIONS AND USAGE

Sterile Talc Powder, administered intrapleurally via chest tube, is indicated as a sclerosing agent to decrease the recurrence of malignant pleural effusions in symptomatic patients.

CONTRAINDICATIONS

None known.

WARNINGS

None.

PRECAUTIONS

1. **Future procedures:** The possibility of the future diagnostic and therapeutic procedures including the thoracoscopic biopsy must be considered prior to administering Sterile Talc Powder. Scarring of the pleural cavity may preclude subsequent diagnostic procedures of the pleura at the treated side. Talc pleurodesis may complicate or preclude future ipsilateral lung resective surgery, including pneumonectomy for transplantation purposes.

2. **Use in potentially curable disease:** Talc has no known antineoplastic activity and should not be used alone for potentially curable malignancies where systemic therapy will be more appropriate. Sterile Talc Powder is not indicated for malignant effusions secondary to a potentially curable lymphoma.

3. **Pulmonary complications:** Acute Pneumonitis and Acute Respiratory Distress Syndrome (ARDS) have been reported in cases associated with intrapleural talc administration. Three of the case reports of ARDS have occurred after insufflation with a relatively large talc dose (10 g) administered via intrapleural chest tube in conjunction with bleomycin. One patient died and one patient had treatment and two patients recovered without further sequelae.

DRUG INTERACTIONS

It is not known whether the effectiveness of talc [illegible] is modified by the administration of other chemotherapeutic agents.

Carcinogenesis, Mutagenesis, Impairment of Fertility: [illegible] three peritoneal intraperitoneal studies designed [illegible] single intraperitoneal administration of talc at 20 mg/kg and 40 mg/kg [illegible] rats administered talc intraperitoneally at 20 mg/kg [illegible] incidence was not increased. In these studies [illegible]

Genotoxicity was tested in a battery of [illegible] (HPRT) [illegible] sister chromatid interchanges (SCEs). None of the talc samples tested were [illegible] UDS or SCEs in treated cultures. [illegible]

Pregnancy: Pregnancy Category B. [illegible] mg/kg. Approximately [illegible] higher than [illegible] intraperitoneally due to talc. There are, however, no [illegible] Because animal reproduction studies are not always predictive of [illegible] used during pregnancy unless the benefit outweighs the risk.

Pediatric Use: The safety and efficacy of Sterile Talc Powder [illegible]

Geriatric use: The estimated mean and median ages of patients [illegible] studies (single-arm or randomized) were 60 and 61 years, respectively. [illegible] the safety and efficacy in the geriatric population have been [illegible]

ADVERSE REACTIONS

Intrapleural administration of talc slurry was [illegible] that 2000 patients. Patients with mesothelioma [illegible] mineral, with respect to reported adverse [illegible] the effects of the talc [illegible] experience to [illegible]

Infection: Complications reported include empyema.

Respiratory: Complications reported include hypoxemia, [illegible] pneumonia, ARDS, bronchopleural fistula, [illegible] pulmonary [illegible]

Cardiovascular: Complications reported included [illegible] hypovolemia and systolic arrest.

Delivery Procedure: Adverse [illegible] tube insertion, [illegible] of thoracotomy or thoracoscopy [illegible] emphysema.

Chronic Toxicity: Since talc [illegible] site limited.

OVERDOSAGE

No clinical relationship between [illegible] talc slurry [illegible] associated with talc [illegible]

DOSAGE AND ADMINISTRATION

Sterile Talc Powder is intended for intrapleural administration after [illegible] clinical criteria. Dosing is based on the completeness of the [illegible] re-expansion of the lung after maximal [illegible]

The recommended dose is 5 g in 50 ml [illegible] Sterile Talc Powder [illegible] dose for other therapeutic or diagnostic [illegible]

Talc Preparation

Prepare the talc slurry using aseptic technique [illegible] from packaging. Remove green tear flip off seal.

Each brown bottle contains 5 g of Sterilized Talc Powder [illegible]

1. Using a 16 gauge needle [illegible] Chloride Injection, *USP* into the talc bottle [illegible] Injection, *USP* into the bottle for doses more than [illegible]
2. Swirl the bottle to disperse the talc powder [illegible] Each bottle [illegible]
3. Divide the [illegible] each bottle into [illegible] syringe will [illegible] volume of 50 ml in each syringe. Draw up the [illegible] slurry prior to administration.
4. When appropriately [illegible] Injection, *USP* with [illegible] and one syringe [illegible] with one syringe [illegible] sterilized [illegible]
5. Prepare [illegible] avoid sedimentation [illegible]
6. [illegible]

*NOTICE: [illegible]
NOT FOR IV ADMINISTRATION

ADMINISTRATION

Administer the talc slurry through the [illegible] contents of the syringe into the chest cavity. After [illegible] procedures. After the talc slurry has been administered [illegible] minutes, instruct the 25 [illegible]

Following introduction of the talc slurry, the [illegible] 25 to 30 minutes [illegible] the talc is distributed within the [illegible]

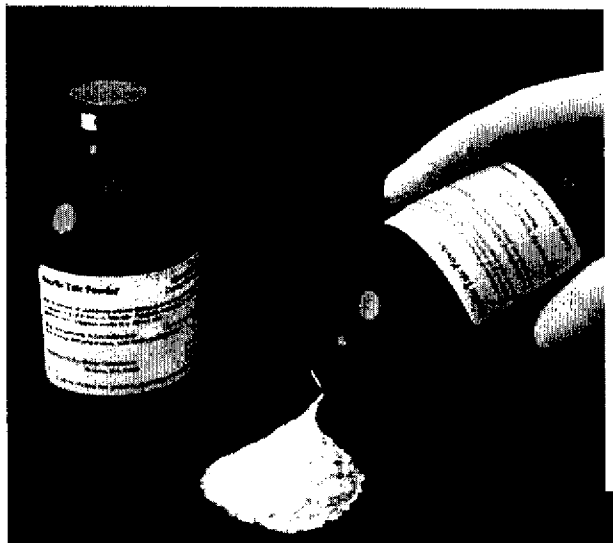
After [illegible] pleural space [illegible]

HOW SUPPLIED

NDC 63256-200-05 Sterile [illegible]
The sterile talc [illegible] with a gray [illegible]

Storage: Store at Room Temperature [illegible]

DISTRIBUTED BY: Bristol Laboratories [illegible]



STERILE TALC POWDER™

Treatment for Malignant Pleural Effusion (MPE)

Cat. #1690
NDC #63256-200-05

NOW FDA APPROVED!

BRYAN CORPORATION

STERILE TALC POWDER

Sterile Talc Powder is the only FDA approved talc product that, when administered intrapleurally via chest tube, is indicated to decrease the recurrence of malignant pleural effusions (MPE) in symptomatic patients.

Key Features:

- **Chest Tube Administration**
- **Controlled Particle Size**
- **Gamma Irradiated**
- **Packaged Sterile in a 100ml Glass Vial**
- **Single Use, 5 gram Dosage**

Bryan Corporation
Four Plympton Street, Woburn, MA 01801
Toll Free: 800.343.7711
Fax: 781.935.7602
Email: sales@bryancorp.com
www.bryancorp.com

LATEX STERILE R

NDC 63256-200-05
Sterile Talc Powder
For Intrapleural Administration Only
Cat. # 1690

To place an order,

call

1-800-343-7711

Visit

www.bryancorp.com

for more information

BRYAN CORPORATION

Bryan Corporation
Four Plympton Street
Woburn, MA 01801

EXHIBIT E

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.	)	
	)	

DECLARATION OF JAMES DODDS

I, James Dodds, am over the age of eighteen years of age, am competent to make this declaration based upon personal knowledge, and if called as a witness would testify as follows:

1. I am an independent drug sales representative. I am currently employed by and the President of Medical Technologies, Inc. ("MTI") headquartered in St. Charles, Missouri. I have been marketing and selling pharmaceutical products for MTI for the past twenty five (25) years, and have been selling Bryan Corporation pharmaceutical products since 1998.

2. In my capacity as President of MTI, I market and sell pharmaceutical products to hospitals, clinics, surgery centers, doctor's offices and other medical facilities in the following United States territories: Missouri, Kansas, Iowa, Illinois, Nebraska and surrounding areas.

3. I market and sell a Bryan product called STERILE TALC POWDER™ brand talc for treatment of a medical condition called malignant pleural effusion ("MPE"). I have marketed and sold this product since 2003 years to at least 250 different customers.

4. It has always been my and my company's policy to use STERILE TALC POWDER™ to indicate Bryan as its source.

5. As a result of my position, I am intimately familiar with Bryan's promotion and use of the STERILE TALC POWDER™ mark, and the marketing, promotion and use of this mark by drug salespeople and medical professionals other than myself.

6. As part of my duties, I come into contact with pharmaceutical product consumers, including doctors, nurses, hospital pharmacists and other medical staff. These consumers commonly ask for Bryan's STERILE TALC POWDER™ talc product by name.

7. In the course of performing my duties, I come into contact with other medical industry professionals, including pharmaceutical distributors and salespeople, both as competitors and when I attend medical tradeshows, including the following major medical tradeshows sponsored by the following organizations: American Society of Health-System Pharmacists (ASHP), American Thoracic Society (ATS), Society of Thoracic Surgeons (STS), American College of Chest Physicians (ACCP), American Association for Thoracic Surgery (AATS), Association of Perioperative Registered Nurses (AORN), American College of Surgeons (ACS), Radiological Society of North America (RSNA); American College of Chest Physicians. It is a common practice among such professionals to use STERILE TALC POWDER™ to identify the source of Bryan's talc product.

8. I understand and have observed that STERILE TALC POWDER™ is used to identify Bryan's product and, in fact, is not used in any other way in the pharmaceutical sales industry.

9. I have no knowledge of any person using the phrase STERILE TALC POWDER as a source designator for an MPE treatment, or for any other type of treatment, other than as a reference to a product sold by Bryan.

10. Based on my overall experience selling and marketing STERILE TALC POWDER™ talc product, I believe that the STERILE TALC POWDER™ mark has become distinctive as applied to Bryan's product. By distinctive, I mean that when consumers hear, see, or use the term STERILE TALC POWDER, they understand and expect that term to refer exclusively to a Bryan product.

11. Within the medical and pharmaceutical trade, I believe the mark STERILE TALC POWDER™ means talc product made by Bryan.

I declare under penalty of perjury that the foregoing is a true and correct. Executed on this 14th day of October 2008.

James Dodds

EXHIBIT F

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.	)	
	)	

PETITIONER BRYAN CORPORATION'S MOTION FOR SANCTIONS

Pursuant to 37 C.F.R. §2.120(g), and the Board's inherent authority, Bryan Corporation ("Bryan") moves for an order sanctioning Novatech SA ("Novatech") for its failure to comply with the August 29, 2008, discovery Order, and for Novatech's continued delay and pattern of evasiveness in providing discovery relating to Bryan's fraud claim. Well-established sanctions principles dictate that Novatech should be penalized as to the fraud claim it has attempted to avoid. Accordingly, Bryan requests that judgment be entered against Novatech on the fraud claim. As grounds for this motion, Bryan states the following:

1. Both parties to this proceeding agree that Novatech's liability on Bryan's fraud claim turns on Novatech's intent when it submitted its declaration to the U.S. Patent & Trademark Office and represented that it believed itself "entitled to use" the STERITALC mark in commerce, and that no other party had "the right to use the same or similar mark on the same or similar goods in commerce." Petition for Cancellation at ¶11 (Ex. A hereto). In particular, the fraud claim turns on whether Novatech knew or should have known that statement was false,

given that Novatech lacked FDA approval for its STERITALC product and therefore could not market it legally in United States commerce.

2. On November 10, 2006, Bryan served Interrogatory No. 5 on Novatech, which addressed this central element of intent. Interrogatory No. 5 reads as follows: "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* Interrogatory No. 5 (Ex. B hereto).

3. For the past two years, Novatech has tried to sidestep providing a response to this interrogatory. First, on December 13, 2006, Novatech filed an utterly baseless objection to this interrogatory, stating that it called for a legal conclusion and privileged attorney-client information. *See* Novatech's Response to Bryan's Second Set of Interrogatories, Interrogatory No. 5 (Ex. C hereto). Furthermore, instead of providing an answer, Novatech also stated that the "STERITALC mark was filed under 66(a) as an international application," almost as if the declaration it had signed had no significance. *Id.*

4. Novatech's refusal to provide a real response forced Bryan to file a motion to compel. On October 3, 2007, the Board granted that motion, stating that Novatech's "objection to the interrogatory as calling for a 'legal conclusion' was overruled." October 3, 2008 Order at 12 (citing *Johnston Pump/General Valve Inc. v. Chromalloy American Corp.*, 10 USPQ2d 1671, 1676 (TTAB 1989)) (Ex. D hereto).

5. On November 5, 2007, Novatech responded to the Order with an entirely circular answer that did not respond to the question: "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 waiving 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." *See* Registrant's Supplemental Answers to Petitioner's Second Set of Interrogatories at 4 (Ex. E hereto). In other words, Novatech essentially responded that the declaration speaks for itself, and provided no discovery on the critical issue of intent.

6. Without providing a meaningful response to the interrogatory it was ordered to answer, Novatech filed a Motion for Summary Judgment just three weeks later, requesting summary judgment on the issue of fraud. Because Bryan did not have the information it needed to respond to that motion, this forced Bryan to file another motion to compel.

7. The Board granted Bryan's second motion to compel on August 29, 2008 ("Order II") (Ex. F hereto). In its second Order, the Board admonished Novatech, stating that it was wrong for Novatech to *"essentially interpret the interrogatory as invalid and on that basis refuse to provide a real response to the question posed, after being ordered to serve a response."* Order II at 6-7 (emphasis added). The Board's order acknowledged that Interrogatory no. 5 was "specific and focused" and that Novatech had already been ordered to respond, and failed to do so. *Id.*

8. In granting Bryan's second motion to compel, the Board clearly set out its expectations for Novatech's response. The Board stated: "To answer the question posed in the interrogatory, respondent must indicate whether it believed, on the date it signed the declaration in question, that it 'had the right to sell a drug that bears the name STERITALC in U.S. commerce.' It must provide this answer without citing, referring to or quoting its declaration, except that respondent may cite the date on which the declaration was filed. If, as last time, respondent believes the interrogatory is "erroneous," improper, confusing or unclear in any way, it may not so state in its supplemental response, but must instead initiate a telephone conference with petitioner and the Board to discuss any issues it has with the interrogatory, well prior to the deadline for responding to it." Order II at 7-8

9. It is significant in this case that the Board's August 29 Order also expressly admonished Novatech that an insufficient response would be a basis for sanctions: "Serving a supplemental response which, like the last one, questions the basis or substance of the interrogatory or refuses to answer the question posed is not permitted <u>and will be grounds upon which petitioner may file a motion for sanctions</u>." Order II at 8 (emphasis added).

10. Novatech, on September 15, 2008, supplemented its answer to Interrogatory no. 5 with verbiage relating to objections and a one-word substantive answer: "yes." *See* Registrant's Second Supplemental Answers to Petitioner's Interrogatories at 4 (Ex. G hereto). This answer is wholly inadequate because of the "verification" that accompanied the Company witness's signature. That "verification" was not under oath as is expressly required by Fed. R. Civ. P. 33(b)(3). Given the two Board Orders that have been issued on this single interrogatory, there is absolutely no excuse for submitting a response that is not under oath.

11. Furthermore, Novatech's "verification" was in fact a set of qualifiers that wholly undermined the answer's evidentiary value. For example, the "verification" stated that the answer was "subject to inadvertent or undiscovered errors"; "based on and therefore necessarily limited by the records and information still in existence, presently recollected, and thus far discovered"; and subject to change "if it appears at any time that omissions or errors have been made therein." *See* Ex. G (Verification page). Given the length of time in which it had to respond to this interrogatory, and the multiple orders it was under, Novatech very easily could have provided Bryan with a verification that did not seek to limit the evidentiary value of the answer. *See Alexander v. F.B.I.*, 192 F.R.D. 50, 52-53 (D.D.C. 2000) (statement that entity compiled its answers from its own records, but that it could not warrant the accuracy of the information provided, was inadequate verification).

12. Novatech's disregard for the Board's authority demonstrates an intent to obstruct applicant's receipt of information that the Board had already determined is discoverable in this proceeding. *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848 (TTAB 2000); *UnicutCorp. v. Unicut, Inc.*, 222 USPQ 341 (TTAB 1984); and TBMP Section 527.01.5. Unless remedied, this will continue to provide Novatech with "convenient avenues of evasion." *Nagler v. Admiral Corp.*, 167 F.Supp. 413 (S.D. N.Y. 1958); 4A Moore's Federal Practice, 33.25[1].

13. Sanctions are appropriate here because Novatech's circumvention of the discovery process goes to the heart of, and threatens to compromise, the Board's factfinding process regarding the fraud claim. This was not just any interrogatory that Novatech has attempted to avoid. It is an interrogatory that goes to the state of mind of Novatech, and in particular to the state of mind of Bruno Ferreyrol, the witness who signed the Declaration at

issue in the fraud claim. This very same witness is the person who signed the qualified interrogatory "verification" that was not under oath. Sanctions are necessary here to police the integrity of the Board's proceedings. To hold otherwise would be to permit an applicant to submit a fraudulent declaration and then play games with the discovery process that seeks to uncover that fraud.

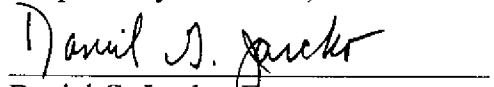
14. Under Trademark Rule 2.120(g)(1), if a party fails to comply with a Board order compelling discovery, the Board may order appropriate sanctions as defined in that rule and in Fed. R. Civ. P. 37(b)(2), including entry of judgment. *See MHW Ltd. v. Simex, Aussenhandelsgesellschaft Savelsberg KG*, 59 USPQ2d 1477 (TTAB 2000); TBMP Section 527.01(a) (2d ed. rev. 2004). The full list of sanctions includes striking of all or part of the pleadings of the disobedient party; refusing to allow the disobedient party to support or oppose designated claims or defenses; prohibiting the disobedient party from introducing designated matters in evidence; and entering judgment against the disobedient party, as noted above. *See* TBMP Section 527.01(a)(2d ed. rev. 2004).

15. In the context of this Motion, all of these potential sanctions embody the same principle -- the Board should curtail Novatech's ability to defend against the fraud claim because it has abused the discovery process with respect to that claim. The first sanction -- striking pleadings -- would have no real meaning at this stage of the proceedings. Furthermore, in the context of this motion, the second and third sanctions (refusing to allow Novatech to oppose the fraud claim and prohibiting Novatech from introducing evidence as to the fraud claim) would have the same practical result as the final sanction: entry of judgment against Novatech on the fraud claim. Accordingly, Bryan respectfully requests the Board to enter judgment against Novatech on the fraud claim as a sanction for its discovery abuse.

CONCLUSION

For the foregoing reasons, Bryan respectfully requests that the Board grant this motion by entering judgment against Novatech on Bryan's fraud claim.

Respectfully submitted,



Dated: October 14, 2008

Daniel G. Jarcho, Esq.
Andrew J. Park, Esq.
Thomas G. Southard, Esq.
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1900 K St. NW
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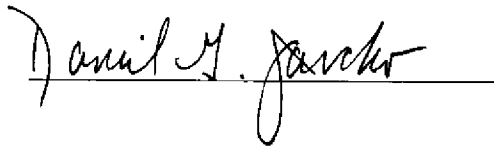
CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2008, a copy of the foregoing Motion for Sanctions were served, by first class mail, postage prepaid, upon:

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