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

Proceeding	91180212
Party	Plaintiff Schering Corporation
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Date	10/26/2009
Attachments	Reply in Furtehr Support of Opposer's Motion for Sanctions - DIRACTIN.PDF ( 19 pages )(2927270 bytes )

Opposition No.: 91/180,212  
Appln. Serial No. 77/070,074  
Mark: DIRACTIN

(a/k/a “*People in glass houses shouldn’t throw stones.*” – Proverb)

**OPPOSER’S REPLY IN FURTHER SUPPORT OF ITS MOTION  
MOTION FOR SANCTIONS, TO STRIKE APPLICANT’S ANSWER, FOR  
THE ENTRY OF JUDGMENT AND TO SUSPEND PROCEEDINGS**

Opposer, Schering Corporation (“Schering”), submits this reply in further support of its motion for sanctions against Applicant, Idea AG, striking Idea AG’s Answer and entering judgment sustaining the Opposition. Idea AG did not contest Schering’s suspension request.

### ***Idea AG's Discovery Abuses***

The Board's 21-page August 7, 2009 Discovery Order was clear. However, Idea AG's Supplementary Discovery Responses (served on September 6, 2009 – Schering's Motion, Exhs. G, H, & I), Amended Supplementary Discovery Responses (served on October 7, 2009<sup>1</sup> – Idea AG's Opposition, Collective Exh. A), and Second Amended Interrogatory Responses (served on

<sup>1</sup> Schering's Sanctions Motion was filed on September 29, 2009. A letter dated October 7, 2009 from Idea AG's counsel (Idea AG's Opposition, Collective Exh. A) shows that Applicant did not even attempt to cure the deficiencies in its supplemental responses until well after they were due, and only after Schering filed its Sanctions Motion.

October 23, 2009 — attached hereto as Exh. L) improperly assert already-overruled objections, contain new objections, provide incomplete information and/or documents, and assert factual matters that are belied by publicly available information.

Idea AG's opposition papers seek to excuse its repeated violations of the Board's Order – by making faux assertions of diligence, twisting the meaning of the Board's directives, claiming that Schering has not been prejudiced (which it has, by having to make numerous discovery motions), and contending that Schering has acted with ill motives in moving for sanctions. The proverb "people in glass houses shouldn't throw stones" is apt here.

***Initially Unverified Supplemental Interrogatory  
Answers Were and Are the Least of Idea AG's Sins***

If the only deficiency of Idea AG's supplemental interrogatory answers served on September 6, 2009 was that they were unverified (in violation of Rule 33(b)(5), Fed. R. Civ. P.), Schering would not have moved for sanctions. Idea AG's amended supplemental interrogatory answers have now been verified.

However, Idea AG's initially unverified supplemental interrogatory answers were and are the list of its sins. As already noted, because Idea AG continues to assert its previously overruled objections, and also assert new objections, Schering has no way of knowing whether Idea AG has provided complete answers to the disputed written discovery.

**Idea AG's Amended Supplemental Interrogatory Answers Remain Deficient –**

- Interrogatory No. 4 – requesting identification of conception and adoption documents; *amended supplemental answer*: subject to objections, no non-privileged documents.

This interrogatory answer is patently false, as demonstrated by the Strategic Branding documents Idea AG untimely produced on October 7, 2009 (see chart and discussion below).

- Interrogatories Nos. 8 and 9 – requesting the dates of first use, continued and periods of non-use of the DIRACTIN mark in commerce in or with the United States for each

product recited in the pending DIRACTIN Application; *second amended supplemental answer* (See Exh. L attached hereto): no first use or continued use in commerce except for confidential clinical trials before the FDA that are now completed.

Idea AG's opposition papers continue to deny that clinical trials before the FDA are use of a mark in commerce within the U.S., notwithstanding Schering's recitation of Board precedent that it is. Idea AG has untimely further supplemented its answers, but the answers remain incomplete. Idea AG's belated promise of compliance thus rings hollow. For example, the second amended supplemental answers still do not identify the products clinically tested before the FDA. The Board twice already has stated that a protective order is in place to address any of Idea AG's confidentiality concerns.

- Interrogatory No. 10 – requesting the identity of person(s) most knowledgeable about Idea AG's sales, marketing, advertising and promotion of products bearing the DIRACTIN mark in the United States; *amended supplemental answer*: subject to objections, Idea AG identifies Jens-Peter Wartmann and Gregor Cevc.

Faced with a sanctions motion, Idea AG finally identifies knowledgeable persons. This is an example of Idea AG's acts of discovery gamesmanship.

- Interrogatory No. 12 – requesting the identity of printed and electronic publications in which DIRACTIN products are described or referred to; *amended supplemental answer*: subject to objections, several publications and further additional are identified, but none were produced.

Idea AG's amended supplemental answer belies the claim made in its opposition papers that no information or documents have been withheld. Responsive documents clearly exist, are within Idea AG's possession, but have not been provided to Schering.

- Interrogatory No. 13 – requesting the identification of licenses, permissions or consents Idea AG entered into with others to use the DIRACTIN mark in the United States; *amended supplemental answer*; subject to objections, no agreements.

Caught providing a false interrogatory answer (belied by publicly available information and Idea AG's own produced press release information that it does not dispute), Idea AG's

opposition papers engage in past-tense-vs.-present-tense word games as *post hoc* justification.

This is outrageous, and another example of Idea AG's discovery abuse.

- Interrogatory No. 14 – requesting information relating to trade venues where DIRACTIN products have been promoted or are planned to be promoted in the United States; *amended supplemental answer*: subject to objections, no attendance at trade venues is planned.

Contrary to its opposition papers, Idea AG's initial answer to Interrogatory No. 14 (Schering's Motion, Exh. D) mentions nothing about possible *prior attendance* at trade venues to promote DIRACTIN products; and neither does Idea AG's supplemental answer (Schering's Motion, Exh. G) nor its amended supplemental answer (Idea AG's Opposition, compound Exh. A). Idea AG's answer to Interrogatory No. 14 remains incomplete.

- Interrogatories Nos. 19-20 – regarding DIRACTIN, requesting information relating to Idea AG's possible business relationship(s) with McNeil Specialty Pharmaceuticals / McNeil Consumer Specialty Pharmaceuticals, subsidiary of Johnson & Johnson, or TDT, subsidiary of Celtic Pharmaceutical Holdings L.P.; *amended supplemental answers*: subject to objections, no business relationships.
- Interrogatory No. 22 – requesting the identity of person(s) who supplied information for or participated in responding to, Schering's interrogatories, production requests or admissions' requests; *amended supplemental answer*: subject to objections, only Idea AG's founder and CEO, Prof. Gregor Cevc, is identified.

Since Idea AG has maintained its already overruled objections, Schering has no way of knowing whether Idea AG's claim that it has not withheld responsive information is truthful.

Idea AG's Amended Supplemental  
Responses to Production Requests Remain Deficient –

Again without any correlation to Schering's Production Requests (as required by Rule 34(b)(2)(E)(i), Fed. Riv. Civ. P.),<sup>2</sup> on October 7, 2009 Idea AG produced the following additional documents with its amended supplemental discovery responses:

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<sup>2</sup> The Rule requires a producing party to provide documents as kept in the ordinary course of business or to organize and label them to correspond to the propounding party's requests. This requirement is imposed to prevent a party from mixing critical documents with others to obscure their significance. 1980 Advisory Committee Notes to Rule

<b>Document(s)</b>	<b>Production Nos.</b>
Strategic Branding for IDEA-033, Brainstorming Workshop (September 21, 2006) – <b>Marked Confidential</b>	65-88
Strategic Global Branding for IDEA-033, Initial Findings Telephone Conference (October 17, 2006) – <b>Marked Confidential</b>	89-116
Strategic Global Branding for IDEA-033, Summary Meeting (November 8, 2006) – <b>Marked Confidential</b>	117-157
Strategic Global Branding for IDEA-033, Summary Meeting (November 8, 2006) – <b>Marked Confidential</b>	158-174

Idea AG's following production responses remain incomplete:

- Production Requests Nos. 1-5 – requesting the production of printed, electronic and broadcast media advertising, labels, packaging, printed promotional items, and electronic publications bearing the DIRACTIN mark with respect to the United States; *amended supplemental responses*: subject to objections, no non-privileged documents, except Idea AG promised to produce packaging specimens.

Regarding Production Request No. 3, the promised packaging specimens were never produced. What Idea AG claims to be “possibly responsive” packaging specimens (produced as Prod. Docs. No. 1-19) are not these items at all. Rather, the produced documents comprise a physician package rating summary, compiling physician reactions to *proposed artwork* for the front of DIRACTIN packaging that Idea AG *might use* in the future. None of the packaging from the FDA clinical trials for the DIRACTIN product has ever been produced.

- Production Requests Nos. 6-14 – requesting production of creation, selection and adoption documents, consents, authorizations or permissions given to use the DIRACTIN mark in the United States, first use and continued use of the DIRACTIN mark in commerce in or with the United States, documents showing the products with which the mark has been used, and documents showing sales and advertising of DIRACTIN products in the United States; *amended supplemental responses*: subject to objections, Idea AG untimely provided creation, selection and adoption documents, and maintains

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34(b), Fed. R. Civ. P. Idea AG did not choose the former option by producing its documents in the folders or by the database file structures as they were kept in the regular course of its business. The Rule thus mandates compliance with the latter option, which Idea AG refuses to do.

that it will only make its first use and continuous use (a/k/a FDA-related documents) available in Munich, Germany; otherwise, no non-privileged documents.

Regarding Production Request No. 6, the promised creation, selection and adoption documents were untimely produced, as noted in the chart above, on October 7, 2009. This was after Schering filed its Sanctions Motion.

Schering's Production Requests (Schering's Motion, Exh. B) requested that Idea AG produce its documents at the offices of Opposer's counsel. Idea AG's initial production responses (Schering's Motion, Exh. E), made no objections to the place or manner of production. Idea AG therefore, for example with respect to Schering's Production Requests Nos. 8 and 9, has long since waived its objections<sup>3</sup> to copying and producing its documents at the offices of Opposer's counsel.<sup>4</sup>

- Production Request No. 15 – requesting production of trademark search documents in connection with Idea AG's adoption, use or application for registration of the DIRACTIN mark; *amended supplemental response*: subject to objections, Idea AG promised to produce non-privileged documents.
- Production Requests Nos. 16-18 – requesting production of statements, inquiries, comments or other communications by or from Idea AG's customers, competitors, or other third parties regarding Schering or its TINACTIN marks, the quality of DIRACTIN products, or the DIRACTIN mark itself; *amended supplemental responses*: subject to objections, no non-privileged documents.
- Production Requests Nos. 19-21 – requesting production of documents pertaining to actual confusion between the parties' marks, channels of distribution through which DIRACTIN products are sold in the United States, and the categories of consumers with whom Idea AG does business or to whom Idea offers its products under the DIRACTIN mark; *amended supplemental responses*: subject to objections, no non-privileged documents.
- Production Request No. 22 – requesting production of documents regarding U.S. importers or distributors of DIRACTIN products; *amended supplemental response*: subject to objections, no non-privileged documents.

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<sup>3</sup> TBMP § 403.04; *Envirotech Corp. v. Compagnie Des Lampes*, 219 USPQ 448, 449 (TTAB 1979) (“[A] party who fails to respond to a request for discovery during the time allowed therefore is deemed to have forfeited his right to object to the request on its merits ....”).

<sup>4</sup> See *No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1556 (TTAB 2000) (Applicant ordered to copy and produce documents at Applicant's expense).

Idea AG has not provided any documents responsive to Production Requests Nos. 15-22 that are in addition to those it produced on September 6, 2009. As Schering already argued in its Sanctions Motion, Idea AG's documents produced to date remain woefully inadequate, and the truthfulness of its amended supplemental production responses is belied by publicly available documents (*See* Schering's Sanctions Motion, Exh. K).

- Production Request No. 23 – requesting production of documents regarding surveys, market research tests, *etc.* regarding purchasers or potential purchasers of Idea AG's DIRACTIN products sold in the United States; *amended supplemental response*: subject to objections, Idea AG promised to produce all non-privileged documents in its possession.

Because Idea AG's continues to assert objections, Schering as no way of knowing whether the single document Idea AG produced (a Physician Package Rating Survey (circa 2006-2007)) fully complies with Production Request No. 23.

- Production Request No. 24 – requesting production of documents regarding licenses Idea AG granted to others to use the DIRACTIN mark; *amended supplemental response*: subject to objections, no non-privileged documents.

As Schering already argued in its Sanctions Motion, this response to Production Request No. 24 is patently false.<sup>5</sup>

- Production Requests Nos. 25-26 – requesting production of documents regarding Idea AG's purchase of North American rights in compounds which directly or indirectly involve Idea AG's DIRACTIN products from McNeil Specialty Pharmaceuticals / McNeil Consumer and Specialty Pharmaceuticals, subsidiary of Johnson & Johnson: *supplemental responses*: subject to objections, Idea offered to make responsive documents available in Munich, Germany; *amended supplemental responses*: No non-privileged documents.
- Production Request No. 27 – requesting production of documents regarding Idea AG's *bona fide* intent to use the DIRACTIN mark in commerce; *amended supplemental response*: subject to objections, Idea offered to make responsive documents (a/k/a its FDA-related documents) available in Munich, Germany.

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<sup>5</sup> Idea AG's purported reliance upon Schering's discovery definitions and instructions to not include licenses with "juristic persons" (as opposed to "natural persons") is another example of Applicant's discovery abuse. *Avia Group Int'l Inc. v. Faraut*, 25 USPQ2d 1625, 1626 (TTAB 1992) ("The adequacy of a [discovery response] ... will not be governed by the introductory instructions or preamble.").

Regarding Idea AG's multiple supplemental responses to production Requests Nos. 25-26, its sudden change of position as to the existence of responsive documents strains credulity. As stated above, Idea AG made no objections to the place or manner of its document production. So, with respect to Schering's Production Requests No. 27, Idea AG waived its objections to copying and producing its documents at the offices of Opposer's counsel.

- Production Request No. 28 – requesting production of documents regarding market plans, marketing projections, or other marketing or market share documents; *amended supplemental response*: subject to objections, Idea AG promised to produce packaging specimens.

Idea AG's amended supplemental response to Production Request No. 28 remains totally non-responsive. Still, the promised packaging specimens have never been produced.

- Production Requests Nos. 29 - 34 – requesting production of documents regarding Idea AG's relationship with TDT, subsidiary of Celtic Pharmaceutical Holdings LP, and any of Idea AG's direct or indirect rights in the DIRACTIN mark previously owned by McNeil Specialty Pharmaceuticals, McNeil Consumer and Specialty Pharmaceuticals, Johnson & Johnson, TDT, or Celtic Pharmaceutical Holdings LP; *responses*: subject to objections, Idea AG offered to make responsive documents available in Munich, Germany; *amended supplemental responses to Requests 30-34*: subject to objections, no non-privileged responsive documents in Idea AG's possession, custody and control exist.

With respect to Schering's Production Request No. 29, Idea AG waived its objections to copying and producing its documents at the offices of Opposer's counsel. Regarding Production Requests Nos. 30-34, Idea AG's amended supplemental responses are most troubling, and provide further evidence of Idea AG's evasion of discovery.

- Production Requests Nos. 35-37 – requesting production of documents identified in Idea AG's interrogatory answers, supporting or relating to the denial or qualification of Idea AG's admissions' responses, or referred to by Idea AG in responding to Schering's interrogatories and admissions' requests; *amended supplemental responses*: Idea AG essentially repeats and incorporates all of its prior objections, including (where previously mentioned), the proffer to make documents available in Munich Germany.

Idea AG's amended supplemental responses to Production Requests Nos. 35-37 continue its pattern of discovery non-compliance.

Idea AG's Amended Supplemental  
Responses to Admissions' Requests Deficient –

Because Idea AG continues to assert its previously overruled objections to Admissions' Requests Nos. 1-11, 16-18, and 20-23, Schering has no way of knowing whether Idea AG has provided sufficient amended supplemental responses – notwithstanding Idea AG's assertions in its opposition papers that no information or documents were withheld on the basis of these improper objections.

***Untimely and Inadequate Privilege Log***

Idea AG's privilege log (Idea AG's Opposition, compound Exh. A) was untimely served on October 7, 2009. The log asserts that Idea AG only withheld a single 6-page document on privilege grounds, notwithstanding that Idea AG asserts the attorney-client privilege ubiquitously throughout its various supplemental discovery responses. On its face, Idea AG's privilege log is inadequate,<sup>6</sup> and provides little basis for Schering or the Board to determine whether Applicant properly asserted one or more privileges as grounds to withhold the document.

***Sanctions and the Issuance of a Default Judgment Remain the Appropriate Remedy***

Under the appropriate circumstances, the entry of a default judgment is an appropriate sanction for a party's willful failure to comply with a Board discovery order. *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1854 (TTAB 2000). Idea AG has twisted the clear import of the Board's rulings in order to evade its discovery obligations – making a mockery of the discovery process. The ultimate sanction of default judgment against Idea AG therefore is appropriate.

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<sup>6</sup> See *Hill v. McHenry*, 2002 U.S. Dist. LEXIS, 6637 at \*6, 8 (D. Kan., Apr. 10, 2002) (stating that a proper privilege log should describe the type of each withheld document, the date it was prepared, any other significant date of the document, the identity(ies) and title(s) of those who prepared, sent, and received it, the purpose of the document, its page length, the grounds for withholding its production, and any other information necessary to establish the elements of the asserted privilege.).

Idea AG's citation to *Ingalls Shipbuilding, Inc. v. U.S.*, 857 F.2d 1448 (Fed. Cir. 1988) is inapposite. The Federal Circuit Court of Appeals reversed the imposition of sanctions against the Government because its discovery failures were not due to willfulness or bad faith, but rather because Government counsel was confused about their discovery obligations. Here, Idea AG willfully and in bad faith failed to comply with the Board's clear discovery rulings.

Idea AG's citation to *Electronic Industries Assn. v. Potega*, 50 USPQ2d 1775 (TTAB 1999) also is inappropriate. The Board declined to impose the ultimate sanction of a default judgment against the applicant because the opposer was lax in its pursuit of discovery. That is not true here.

### ***Conclusion***

For the foregoing reasons, Opposer, Schering Corporation, requests that the Board sanction Applicant, Idea AG, for its failure to comply with the Board's discovery order, striking Applicant's Answer and entering judgment in Schering Corporation's favor. Applicant has not opposed Schering's request to suspend proceedings pending the Board's rulings on this motion.

Respectfully submitted,

SCHERING CORPORATION

By:



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Date: October 26, 2009

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **OPPOSER'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR SANCTIONS, TO STRIKE APPLICANT'S ANSWER, FOR THE ENTRY OF JUDGMENT AND TO SUSPEND PROCEEDINGS** was served on counsel for Applicant, this 26<sup>th</sup> day of October, 2009, by sending same via First Class mail, postage prepaid, to:

Eric J. Sidebotham  
Daniel M. Shafer  
ERIC J. SIDEBOTHAM, APC  
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San Jose, CA 95110

  
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# **EXHIBIT L**

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

SCHERING CORPORATION,

Opposer,

v.

IDEA AG,

Applicant.

Opposition No.: 91/180,212

App'n Serial No. 77/070,074

Mark: DIRACTIN

The Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

**APPLICANT'S SECOND AMENDED SUPPLEMENTAL RESPONSE TO  
OPPOSER'S FIRST SET OF INTERROGATORIES**

Applicant, IDEA AG ("Applicant"), by and through its attorneys, hereby serves the following **second amended** supplemental responses to Interrogatory Nos. 8 and 9 of SCHERING CORPORATION ("Opposer"), in compliance with Fed. R. Civ. P. 33, and Rules 2.116 and 2.120 of the Trademark Rules of Practice of the United States Patent and Trademark Office. Objections are stated here only for purposes of preserving them; no information is withheld on the basis of any stated objections.

**PRELIMINARY AND GENERAL OBJECTIONS**

1. The following responses are based on discovery available as of the date of this response. Discovery is continuing, and these responses are subject to change accordingly. It is anticipated that further investigation, research and analysis may lead to

the discovery of additional information, supply additional facts, and add meaning to known facts, as well as establish entirely new factual conclusions and legal contentions, all of which may lead to additions to, changes to, or variations from the information set forth herein.

2. The following responses are given without prejudice to Applicant's right to produce or rely on subsequently discovered information, facts, or documents.

Applicant accordingly reserves the right to change the responses as additional facts are ascertained, analysis is made, legal research is completed, and contentions are made.

3. The following responses are made in a good faith effort to comply with the Trademark Rules of Practice, the Trademark Trial and Appeals Board Manual of Procedure, and with applicable provisions of the Federal Rules of Civil Procedure, and to supply such responsive information as exists and is presently within Applicant's possession, custody, or control, but should in no way be deemed to be to the prejudice of Applicant in relation to further investigation, research, and analysis.

4. Applicant objects to the extent that any of the interrogatories seek to require Applicant to disclose information or materials that are protected under the attorney-client privilege and/or attorney work-product doctrine, and expressly declines to waive any such privileges.

5. Applicant objects to the extent that any of the interrogatories seek to require Applicant to disclose information or materials that are, in whole or part proprietary and/or protectable trade secret.

6. Applicant objects that the nature and scope of interrogatories appears to extend significantly beyond the subject matter of these opposition proceedings, and in particular related to registration of the current mark. Given this objection, and subject to it, Applicant has made every good faith effort to respond to each of Opposer's interrogatories that reasonably relate to the opposition proceedings.

7. Applicant objects that Opposer is in violation of TBMP § 405.03(d), in that many of Opposer's interrogatories contain numerous separate and distinct sub parts.

8. Applicant objects that this set of interrogatories, in combination with the other discovery propounded by Opposer, is unduly burdensome, harassing, and intended to harass, annoy, embarrass or increase the litigation expenses of Applicant.

9. Applicant objects that Opposer has lulled Applicant into inactivity by doing absolutely nothing in this opposition proceeding until the very last day of discovery, at which time Opposer propounded these interrogatories and other discovery. Opposer has clearly waited until the very last minute to propound its discovery to obtain an improper advantage in that Opposer would obtain information via discovery but Applicant would not. Such gamesmanship is evidence of an improper motive, and should not be countenanced.

10. Applicant objects that the following interrogatories assume facts which are either untrue or have not been established. None of Applicant's answers herein is intended to or shall be deemed to admit the truth of any alleged facts contained within these interrogatories.

11. Applicant objects that the following interrogatories may involve topics where it is suitable and/or appropriate for Opposer to obtain an expert opinion. Applicant, however, has yet to obtain any such experts, and thus may not be able to answer all of the interrogatories fully. Applicant reserves the right to supplement any response herein at a future date to include information which becomes known after Applicant engages such expert witnesses.

12. Applicant's responses herein are provided herein below may contain confidential and/or proprietary information, and are being provided pursuant to the Board's standard protective order. By accepting these discovery responses, Opposer is agreeing that it is bound by the Board's standard protective order, and hereby has notice that Applicant considers this information to be confidential and/or proprietary, and that

Opposer may not disclose or use any of the information provided herein, including after conclusion of these proceedings. Applicant is also hereby notifying Opposer that it has no legal right to retain or maintain any information provided herein by Applicant, and that Opposer must destroy and not disclose all such information provided by Applicant.

**SECOND AMENDED SUPPLEMENTAL RESPONSES**

**INTERROGATORY NO. 8**

For each product identified in Application Serial No. 77/070,074, state the date of first use of Applicant's Mark in commerce in or with the United States.

**SECOND AMENDED SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 8**

Applicant hereby incorporates all prior objections to this interrogatory. Subject to those objections, and without waiving them, Applicant responds as follows: Applicant has not used Applicant's Mark in commerce in or with the United States, except that Applicant has been engaged in confidential clinical trials under the governance of the United States Food and Drug Administration ("FDA"), which may or may not constitute a "first use in commerce." Said clinical trials began on June 23, 2005.

**INTERROGATORY NO. 9**

State with regard to Applicant's use of its DIRACTIN Mark on or in connection with each product on which the mark has been used in the United States, the date of commencement of use, the commencement date of each period of nonuse; the reason for each such period of nonuse; and the date when use was resumed.

**SECOND AMENDED SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 9**

Applicant hereby incorporates all prior objections to this interrogatory. Subject to those objections, and without waiving them, Applicant responds as follows: Applicant has not used Applicant's Mark in commerce in or with the United States, except that Applicant has been engaged in confidential clinical trials under the governance of the

United States Food and Drug Administration ("FDA"), which may or may not constitute a "first use in commerce." The clinical trials commenced on June 23, 2005, and were clinically finished on March 3, 2009, but have not been finished technically, as the statistical data analysis and report are not yet completed.

DATED: October 23, 2009

**IDEA AG**



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VERIFICATION

I, Prof. Gregor Cevc, declare:

I am the Chief Executive Officer of IDEA, AG, a party to the above-entitled action. I have read Applicant's Second Amended Supplemental Responses to Opposer's Special Interrogatories, Set One, and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated upon my information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 22<sup>nd</sup> day of October, 2009, in Munich  
Germany [City], [State], [Country].

By: \_\_\_\_\_

PROF. GREGOR CEVC

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Applicant's Second Amended Supplemental Response To Opposer's First Set Of Interrogatories was served on counsel for Opposer, this 23 day of October, 2009, by sending same via U.S.

Mail, prepaid, to:

David J. Kera, Esq.  
Beth A. Chapman, Esq.  
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\_\_\_\_\_  
RYAN SMITH