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**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF NEW YORK**

IOVATE HEALTH SCIENCES, INC.,

Plaintiff ,

v.

PERFORMANCE RESEARCH GROUP,  
INC., FERNANDO FRARACCIO,  
STEVE MONARDO and JOHN  
DALIMONTE,

Defendants.

**MEMORANDUM OF LAW IN  
SUPPORT OF PLAINTIFF'S  
UNOPPOSED MOTION FOR  
LEAVE TO FILE A FIRST  
AMENDED COMPLAINT**

Civil Action No. 07-CV-0236-A(SR)

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, Plaintiff Iovate Health Sciences, Inc., by and through its attorneys, respectfully requests leave to file a First Amended Complaint (attached to the Declaration of Jerry Canada ("Canada Decl.") as Ex. 1).

**I. Procedural and Factual Background**

On April 9, 2007, Plaintiff initiated this patent infringement lawsuit against Defendants Performance Research Group, Fernando Fraraccio, Steve Monardo and John Dalimonte (collectively "Defendants") by filing a complaint that asserted infringement of U.S. Patents No. 5,973,199 ("the '199 Patent"). Defendants filed an Answer to Plaintiff's Complaint on May 25, 2007. A scheduling conference has not yet been set and discovery has not yet begun. Through this proposed First Amended Complaint, Plaintiff seeks to add four additional claims against Defendants for misappropriation of trade secrets, violations of the Lanham Act, deceptive and misleading trade practices and unfair competition in violation of New York General Business Law § 349, and false advertising and unfair competition in violation of New York General Business Law §350.

The proposed amendment is (a) promptly sought following Plaintiff's learning of Defendants' actions relating to the theft of trade secrets; (b) relates to the same product that is already subject of this lawsuit; and (c) does not prejudice or unduly surprise Defendants. Defendants have consented to Plaintiff's motion.

## **II. Law and Argument**

### **A. Leave to Amend Pleadings Should be Liberally Granted**

Fed. R. Civ. P. 15(a) provides that, "[t]he court should freely give leave [to amend a pleading] when justice so requires." The "rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith." *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993)(citations omitted). "Mere delay, however, absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend." *State Teachers Retirement Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981).

### **B. Plaintiff's Proposed Amendments to its Complaint Are Timely Presented**

The Statement of Craig Stevenson (Canada Decl., Ex. 2), dated January 11, 2008, and the Statement of Scott Welch (Canada Decl., Ex. 3), dated November 9, 2007, both provide details concerning the theft of Iovate trade secrets by Defendants. The Statements of Welch and Stevenson were made in connection with a civil action in Ontario Superior Court of Justice. (Canada Decl., ¶3). Based upon these statements, Plaintiff has recently formed a good faith

belief that the Defendants were involved in the theft of Iovate trade secrets.<sup>1</sup> In view of these recent statements, Plaintiff now seeks to amend its complaint.

### **C. Amendment of the Complaint Would Not Prejudice Defendants**

An amendment creates prejudice if it would “(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction.” *Block*, 988 F.2d at 350 (citations omitted). None of these concerns is present here.

Plaintiff’s proposed amendment would not require Defendants to expend significant additional resources on discovery, because no significant discovery has yet taken place. (Canada Decl., ¶7). Moreover, the new claims relate to the same product, Defendants’ Vertex product. The proposed amendment would not delay resolution of this case because no scheduling conference has been set and discovery on the merits of the case has not yet begun. Finally, there is no indication that Defendants plan to bring an action in any other jurisdiction.

### **III. Conclusion**

Considering that Defendants do not oppose this motion for leave to amend, the early stage of the case, the timeliness of this motion, and the absence of any of the aforementioned factors, Plaintiff respectfully requests that the Court grant leave to amend its complaint.

WHEREFORE premises considered, Plaintiff respectfully requests that the Court grant Plaintiff leave to amend the Complaint. Plaintiff further requests that the Court enter Plaintiff’s

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<sup>1</sup> In the course of a series of litigations against WellNx Life Sciences, Inc., Iovate has amassed thousands of pages of documents, including without limitation market research reports and multiple witness statements, relating to confidential Iovate information wrongfully shared with WellNx and its owners, Derek and Bradley Woodgate, who, based on the attached statements of Welch and Stevenson, used that stolen confidential information to further their own business.

First Amended Complaint attached hereto as Exhibit 1, and for such other relief as it may be  
justly entitled.

Dated: February 19, 2008

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