..ARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
Room 500 U.S. Customhouse
721 19th Street
Denver, Colorado 80202
303-837-4915

June 18, 1987

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Howard Roy Curtin, President
Consolidated Research and Technologies, Inc.
d/b/a Esion Corporation
599 West Center Street
Pleasant Grove, Utah 84062

NOTICE OF ADVERSE FINDINGS LETTER

Dear Mr. Curtin:

During an inspection of your firm between December 15 and 18, 1986, serious violations of the Federal Food, Drug, and Cosmetic Act (the Act) were discovered by our investigator. The noted inspection was conducted for the purpose of determining the adequacy of your corrective action on the adulteration and misbranding violations listed in a letter of October 31, 1985 we sent you. The violations were associated with your manufacture and distribution of medical devices (Accupath 1000 and Vi-Tel 618).

Our findings during December 1986 show that you discontinued sale of the Accupath 1000; are still distributing the Vi-Tel 618; and are currently distributing another product called the INTERRO. The INTERRO is a medical device, as that term is defined in Section 201(h) of the Federal Food, Drug, and Cosmetic Act.

Based on the available information, we do not consider the INTERRO to be a Class II device under 21 CFR 882.1540 (copy enclosed) because it is not used in accordance with that citation. We are aware of situations where your devices are being used in a manner similar to, or the same as the Accupath 1000. Your corrective action to the violations listed in our previous letter are questionable in their reliability since the INTERRO appears to be only a substitute for the Accupath 1000. In addition, there is no documentation that pursuant to 21 CFR 812.2(c)(3) your devices are exempt from the regulation governing Investigational Device Exemptions (IDE's). We note that 21 CFR Part 809 is reserved for in vitro diagnostic products, which your device is not. Therefore, the investigational statement your devices exhibit is incorrect. We recommend you revise the language to that under 21 CFR 812.5.

We have information indicating that diagnosis and treatment of disease conditions are associated with use of your devices. Enclosed is a copy of an article from the January 1987 issue of Nutritional Forum describing use of the INTERRO device at one clinic. Such uses may present risks to subjects undergoing treatment or diagnostic procedures. While we understand from labeling that you do not distribute the device under medical use claims, you also distribute promotional material describing the INTERRO as being better than the Accupath 1000 (copy enclosed). Such actions are, in our opinion,

inconsistent and demonstrate that you are commercially distributing the devices for uses which fall within the definition of a medical device.

We request that you submit documentation to the Federal Food and Drug Administration which demonstrates that pursuant to 21 CFR 812.2(c)(3) the devices are exempt from the IDE regulation. Specifically, you should submit the information:

That your device:

- is only diagnostic is nature:
- is noninvasive;
- does not require an invasive sampling procedure;
- does not by design or intention introduce energy into a subject; and
- is not used as a diagnostic procedure without confirmation of the diagnosis by another medically established diagnostic product or procedure.

In addition, there should be evidence that an Institutional Review Board (IRB) has been presented a protocol for evaluation and has approved an investigation with your device.

Please advise this office in writing, within thirty (30) days of receipt of this letter, of the steps you have taken or plan to take to address these matters. If the matters outlined in this letter are not addressed with satisfactory corrective actions or explanation, the violations listed in our October 31, 1985 letter many be applicable to your current activities. Your reply should be addressed to Lloyd W. Beaston, Compliance Officer.

Sincerely yours,

Lloyd W. Beaston /for

Shelly L. Maifarth
Acting, Director of Compliance

Enclosures

1. Copy of Federal Register, Vol. 45, No. 13, Friday, January 18, 1980 - Medical Devices; Procedures for Investigational Device Exemption
2. 21 CFR 882.1540
3. Article from January 1987 Nutritional Forum titled "MY VISIT TO THE NEVADA CLINIC"
4. Promotional flyer for the INTERRO

MELVIN VAL MILLER
ATTORNEY AT LAW*
GOVERNMENT RELATIONS CONSULTANT

DIB
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f/u 10/87
4WS
7-21-87

July 16, 1987

Mr. Lloyd W. Beaston
Compliance Officer
U.S. Food and Drug Administration
Denver District Office
P.O. Box 25087
Denver, Colorado 80225-0087

Re: Notice of Adverse Findings Letter, June 18, 1987
Esion Corporation (Registration No. 1720813)

Dear Mr. Beaston:

It was a pleasure talking with you on the phone yesterday. Per that conversation, I am including an outline of the actions Esion Corporation has taken, and will take, to address questions raised by the Food and Drug Administration (FDA) in a Notice of Adverse Findings Letter dated June 18, 1987.

As I am sure you are well aware, large and small companies alike find FDA regulations extremely complex. FDA has recognized that the vast majority of companies involved with the research and manufacture of medical devices are small and economically quite fragile. As a result, the FDA established the Small Manufactures Assistance office as part of the Center for Devices and Radiological Health (CDRH). There are a number of companies which intentionally disregard or try to circumvent the FDA regulations to the detriment of an uninformed public, but I can assure you that Esion Corporation does not fit into that scenario. They, like many small companies, find the regulations extremely difficult to understand, but have continuously attempted to act in good faith. They have committed a significant amount of resources (financial and personnel) in an attempt to maintain continuous compliance with the regulations.

I would like to share with you an event that occurred some time ago which I believe is evidence of Esion Corporation's "good faith" effort to comply with FDA regulations. Dr. Curtin traveled to Washington, D.C. and sought legal counsel regarding his proposed project. Dr. Curtin was advised that the IDE exemption contained in 21 CFR 812.2(c)(3) applied to his situation, and that since the INTERRO does not present a risk to a participant, IRB review was not necessary.

I find Dr. Curtin to be an extremely intelligent man. He had reviewed the regulations and reached what he believed to be an accurate opinion, but still sought legal advice which confirmed his opinion to be correct. Esion Corporation relied on that advice until retaining me earlier this year.

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*ADMITTED TO UTAH BAR ONLY

I am not in the habit of second guessing another attorney's advice, so I advised Esion Corporation, that even though IRB review may (arguably) not be required, the safest approach (to avoid FDA regulatory action) would be to obtain IRB review. Dr. Curtin was in full support of taking the more conservative approach and agreed in early April 1987, to start gathering the necessary information to present to an IRB. Certainly, the NAF letter has influenced our time schedule, but I can assure you that Dr. Curtin had decided well in advance of receiving the NAF letter to seek IRB review. My first draft of documents described below was mailed on May 14, 1987.

I have worked closely with Dr. Curtin in reviewing the appropriate regulatory approach for their project. On behalf of Esion Corporation, I met with Glen Norton, Small Manufacturers Assistance, CDRH, on several occasions in May to discuss the IDE exemption under 21 CFR 812.2(c)(3) and a "best approach" for a future premarket notification submission. At the recommendation of Mr. Norton, I prepared numerous FOI requests for 510 k submissions in order to determine, to which if any, we may be found to be substantially equivalent.

In the mean time, Dr. Curtin and I have prepared final drafts of an informed consent form (21 CFR Part 50), documents for investigators which sets forth their regulatory duties (which includes a signed statement that they will not use the INTERRO without confirmation by another medically established diagnostic product or procedure), other miscellaneous documents for presentation to an IRB (21 CFR Part 56), and are currently preparing a draft protocol. We are attempting to have all the necessary information assembled to present to our IRB for review in August.

As we discussed yesterday, I will provide a more detailed response and ask that the IRB send you copies of their findings by August 31, 1987.

Thank you for your consideration in this matter. If you have any questions, please feel free to contact me at (202) 546-0601.

Sincerely,

M Val Miller

M. Val Miller

MELVIN VAL MILLER
ATTORNEY AT LAW*
GOVERNMENT RELATIONS CONSULTANT

October 16, 1987

(By Express Mail)

Mr. Lloyd W. Beaston
Compliance Officer
U.S. Food and Drug Administration
Denver District Office
P.O. Box 25087
Denver, Colorado 80225-0087

Re: Supplemental Response to Notice of Adverse Findings Letter, June 18, 1987, Esion Corporation (Registration No. 1720813)

Dear Mr. Beaston:

I have wanted to prepare this supplemental response to my earlier letter dated July 16, 1987 for several weeks, but hoped to have received written confirmation from the Institutional Review Board (IRB) to include for your review.

We anticipated making a presentation to the IRB the third week in August, but due to conflicts in schedules of myself and the IRB we were unable to make a presentation until September 26, 1987. Please find below a description of the IRB members, the materials reviewed and the findings of the Board.

IRB MEMBERS:

Robert Detweiler (Chairman);
Dr. Darrell Weber, Ph.D. (Non-physician Scientist);
Dr. Dennis Heaston, M.D. (Physician);
Carol Harmer;
Gail Metcalf; and
Gail Brown, IRB Secretary (Non-voting position).

I have reviewed in detail the IRB requirements in 21 CFR Part 56 and consider this board to be in complete compliance with the regulations. Dr. Curtin, President of Esion Corp. expressed some concern about Gail Brown serving as the secretary of the IRB because she is an employee of Esion. I assured Dr. Curtin that this didn't present even the slightest problem, in that, most IRB's I have dealt with are composed largely of employees of the institution or clinic actually conducting the investigation. None of the voting members of the Board are employed by Esion, and Ms. Brown serves a stricly administrative function.

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*ADMITTED TO UTAH BAR ONLY

Dr. Heaston has a strong background in clinical investigations and provided a great deal of expertise to the group. Dr. Weber is a faculty member of Brigham Young University and also adds a great deal of experience to the Board in the non-medical scientific field. The other three members are respected citizens of the business and religious community.

MATERIALS REVIEWED:

I provided verbatim copies and reviewed in detail with the IRB the following regulations:

1. 21 CFR 812 et seq., Medical Devices; Procedures for Investigational Device Exemptions (IDE) as published January 18, 1987 in the Federal Register (45 Fed. Reg. 3732); and

2. Informed Consent requirements as codified in 21 CFR Part 50.

During the meeting a great deal of time was devoted to those portions of the preamble in the above-mentioned notice which dealt with protection of the rights and safety of subjects, informed consent requirements, significant vs. nonsignificant risk devices, and reporting requirements of adverse device experiences.

Dr. Curtin explained the Interro and Vi-tel and investigational plan in detail and then demonstrated the devices to each member of the group. A question and answer format was used during every portion of the meeting.

A sample Informed Consent form was presented to the IRB for approval in its present form or with any revisions the Board considered appropriate.

FINDINGS OF THE IRB:

I had wanted to include a copy of the IRB letter to Esion Corporation, but decided against delaying this response further. I will forward a copy of their letter as soon as it is received.

The Board found that the Interro and Vi-Tel do not pose any significant risk, and therefore, concluded that they are nonsignificant risk devices. Additionally, the IRB reviewed the investigational plan and sample informed consent form and approved each. The IRB did not request that we be reviewed more

often than annually, but Esion offered to provide periodic reports during the course of the investigation.

CONCLUSION:

Esion wants to be responsive to any concerns that you have, and will provide any additional information you need. They anticipate conducting a study in conjunction with a teaching university in Texas, and will be seeking IRB review in that and other areas of the country. We will be happy to provide copies of all correspondence received from each IRB if you desire.

If you have any other questions, please feel free to contact me at the address above.

Sincerely,

M. Val Miller

M. Val Miller