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October 19, 2005

Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

RE: Opposer: EMSL Analytical, Inc.
Applicant: TestAmerica Environmental Microbiology Lab, Inc.
Trademark: EMLab
Serial No.: 78/457,437
Our File No: 26559/78659

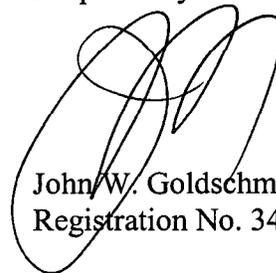
Dear Sir:

Transmitted herewith are the following documents:

1. Notice of Opposition with a certified copy of U.S. Service Mark Registration No. 2,199,503;
2. Check No. 206176 made payable to Commissioner for Trademarks in the amount of \$300.00; and
3. A Return Post Card acknowledging receipt.

The Commissioner is hereby authorized to charge payment of any deficiencies or credit any overpayment in the enclosed amount to Deposit Account No. 50-0979.

Respectfully submitted,



John W. Goldschmidt Jr.
Registration No. 34,828



10-24-2005
U.S. Patent & TMO/TM Mail Rcpt Dt. #64

JWG:set
Enclosures

CERTIFICATE OF FIRST CLASS MAIL

I hereby certify that this correspondence, and all papers and things referred to herein as being attached, enclosed, transmitted or otherwise submitted, are being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, Virginia 22313-1451.

Date: October 19, 2005

Signature: _____

John W. Goldschmidt, Jr.

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

EMSL Analytical, Inc. :
: :
Opposer : **Opposition No.**
: :
v. : **Serial No. 78/457,437**
: **Filed: July 27, 2004**
TestAmerica Environmental : **Published for Opposition: September 20, 2005**
Microbiology Laboratory, Inc. :
: :
Applicant :
:

NOTICE OF OPPOSITION

In the matter of the application of TestAmerica Environmental Microbiology Laboratory, Inc., a California Corporation, having a place of business at 1150 Bayhill Drive, Suite 100, San Bruno, California 94066, Application Serial No. 78/457,437 filed July 27, 2004, for registration of the mark EMLab, which application was published for opposition on September 20, 2005, in the Official Gazette of the United States Patent and Trademark Office, the Opposer, EMSL Analytical, Inc. a New Jersey corporation, having a place of business at 107 Haddon Avenue, Westmont, New Jersey 08108, believes that it will be damaged by registration of the mark shown in Application and hereby opposes the same.

10/25/2005 SWILSON1 00000100 78457437

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CERTIFICATE OF FIRST CLASS MAIL

I hereby certify that this correspondence, and all papers and things referred to herein as being attached, enclosed, transmitted or otherwise submitted, are being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, Virginia 22313-1451.

Date: October 19, 2005

Signature: _____

John W. Goldschmidt, Jr.

619064_1

The grounds for opposition are as follows:

1. Opposer is and has been one of the leading environmental testing service firms in the country providing analytical testing services for the presence of, among other materials, asbestos, lead, and other toxins, mold, bacteria, and allergens.
2. Opposer is and has been for many years engaged in extensive advertising and the sale of a wide variety of analytical and laboratory testing services. In connection therewith, and since at least as early as 1981, Opposer has continuously used in interstate commerce the name and mark EMSL, as well as related names and marks, in connection with analytical and laboratory testing services.
3. Opposer has used its EMSL name and mark, and related names and marks, in commerce in connection with its services, including, but not limited to, environmental analytical testing services of air, water and surface samples for asbestos, lead and other toxins, mold, fungi, bacteria, and allergens, as well as testing services including electron microscopy, indoor air quality, environmental chemistry, materials identification, failure analysis, and related research and development services.
4. Opposer's services under the EMSL name and mark, and related names and marks, have been extensively and continuously offered to the general public, and particularly to commercial, industrial, regulatory and law enforcement concerns in need of environmental analytical testing services, analytical testing of air, water and surface samples for asbestos, lead and other toxins, mold, fungi, bacteria, and allergens, as well as testing services including electron microscopy, indoor air quality, environmental chemistry, materials identification, failure analysis, characterization and forensic laboratory services, and related research and development

services. Opposer has also extensively advertised its services under the EMSL name and mark and related names and marks throughout the United States and to such business concerns.

5. By reason of such advertising and wide distribution of Opposer's services in connection with said names and marks, the public has come to recognize the EMSL name and mark, and related names and marks, as signifying Opposer and its services, and Opposer has built up extensive goodwill in connection with the sale and advertising of its services under such names and marks.

6. Opposer is the owner of incontestable United States Service Mark Registration No. 2,199,503 for "providing environmental and material analysis and electron microscopy analysis" in International Class 42 ("Opposer's Registration"). A certified copy of Opposer's Registration is attached hereto as Exhibit "A."

7. Opposer's Registration is in good standing, is valid, subsisting and incontestable, and is conclusive evidence of Opposer's exclusive right to use the EMSL mark in connection with the services specified in the Registration.

8. Opposer has adopted and uses its EMSL name and mark, and related names and marks, in connection with its analytical services including, but not limited to, the services enumerated in Opposer's Registration.

9. In addition, Opposer has garnered substantial, nationwide common law rights in the EMSL name and mark, and related names and marks by virtue of its extensive use of the EMSL name and mark, and related names and marks, in connection with its services.

10. Notwithstanding Opposer's long prior rights in its EMSL name and mark, and related names and marks, and upon information and belief, on July 27, 2004, Applicant filed in the United States Patent and Trademark Office, an application for the federal registration of the mark "EMLab" ("Applicant's Application").

11. Applicant's Application was assigned Application Serial No. 78/457,437, and the mark was published for opposition in the Official Gazette of September 20, 2005, in connection with analysis of air and surface samples for fungi and bacteria, namely, culturable air samples, spore trap samples, tape, bulk, swab and water samples; E. coli and legionella analysis; allergen analysis and testing for dust mite, cockroach, cat, dog, rat, and mouse allergens.

12. Applicant's Application was filed on the basis of Applicant's (or Applicant's related company's or licensee's) alleged use of the EMLab designation in commerce regulated by Congress.

13. Applicant's Application further states that Applicant: (a) first used the EMLab designation at least as early as February 1, 2002; (b) first used the designation in commerce at least as early as February 1, 2002; and (c) as of July 24, 2004, the filing date of the application, the designation was then in use in such commerce.

14. Opposer has been using the EMSL name and mark, and related names and marks, in connection with its services long before Applicant commenced use or applied to register the EMLab mark.

15. Applicants proposed EMLab mark is highly similar, if not nearly identical to, Opposer's EMSL name and mark, and related names and marks.

16. Consumers of Opposer's services offered under its EMSL name and mark, and related names and marks, have encountered instances of actual confusion between the services offered under Opposer's EMSL name and mark, and/or related names and marks, and Applicant's proposed EMLab mark.

17. Applicant has opened new laboratories offering the EMLab services in numerous locations where Opposer has previously established certain of its laboratories.

18. Due to the highly similar nature of the two marks and the relatedness of the services, as well as the instances of actual confusion which have already occurred, and the geographic proximity of where the services are rendered, concurrent use of the proposed EMLab mark by Applicant and the mark EMSL by Opposer has resulted in, and is likely to continue to result in, consumer confusion as to source, sponsorship, approval or affiliation within the meaning of 15 U.S.C. §§ 1114 and 1125(a), and as such, Opposer is likely to be damaged by the registration of Applicant's proposed mark within the meaning of 15 U.S.C. §1063(a).

19. Applicant's proposed mark is unregistrable pursuant to 15 U.S.C. § 1052(d), as it so resembles a mark previously used in the United States by another and not abandoned as to be likely to cause confusion, mistake or to deceive.

20. Opposer, upon information and belief, avers that it has been, and will continue to be, damaged by the continued use and registration by Applicant of the proposed EMLab mark, as set forth in Applicant's United States Service Mark Application Serial No. 78/457,437, in that (a) Applicant's mark is highly similar, if not nearly identical, to the mark of Opposer's Registration and Opposer's common law rights, (b) Applicant's mark is used in connection with services identical and/or related to the services offered to the public by Opposer, (c) there have

been instances of actual confusion between Applicant's and Opposer's marks, and (d) the Opposer's and Applicant's marks are used in close or identical geographic proximity to each other.

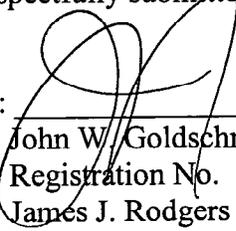
WHEREFORE, Opposer prays that the instant opposition be sustained, United States Service Mark Application Serial No. 78/457,437 be rejected, and registration of the mark therein shown be refused.

The filing fee in the amount of \$300.00 associated with the filing of this Notice of Opposition is enclosed herewith.

The Commissioner is hereby authorized to charge any deficiency or credit any overpayment in the enclosed amount to Deposit Account No. 50-0979.

Respectfully submitted,

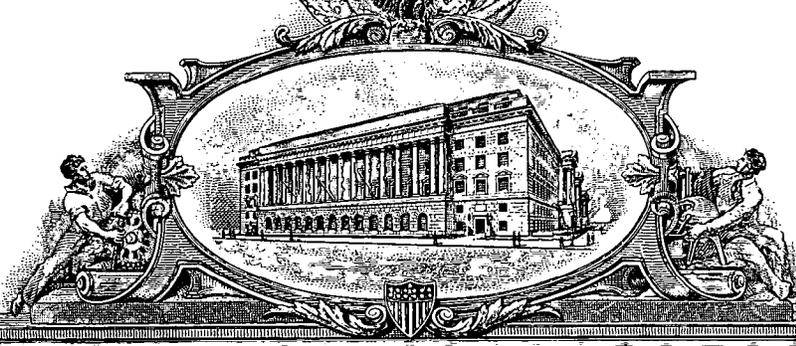
By: _____


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Attorneys for Opposer
EMSL Analytical, Inc.

EXHIBIT "A"

1373830



THE UNITED STATES OF AMERICA

**TO ALL TO WHOM THESE PRESENTS SHALL COME:
UNITED STATES DEPARTMENT OF COMMERCE**

United States Patent and Trademark Office

September 30, 2005

**THE ATTACHED U.S. TRADEMARK REGISTRATION 2,199,503 IS
CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND
EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN
THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE.**

**REGISTERED FOR A TERM OF 10 YEARS FROM *October 27, 1998*
SECTION 8 & 15**

SAID RECORDS SHOW TITLE TO BE IN:

REGISTRANT

**By Authority of the
Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office**




**M. K. CARTER
Certifying Officer**

Int. Cl.: 42

Prior U.S. Cls.: 100 and 101

Reg. No. 2,199,503

United States Patent and Trademark Office

Registered Oct. 27, 1998

**SERVICE MARK
PRINCIPAL REGISTER**



**EMSL ANALYTICAL, INC. (NEW JERSEY
CORPORATION)
1 COOPER STREET
WESTMONT, NJ 08108**

**CROSCOPY ANALYSIS, IN CLASS 42 (U.S. CLS.
100 AND 101).
FIRST USE 6-1-1981; IN COMMERCE
12-1-1981.**

**FOR: PROVIDING ENVIRONMENTAL AND
MATERIAL ANALYSIS AND ELECTRON MI-**

**SER. NO. 75-285,891, FILED 5-5-1997.
DEBORAH LOBO, EXAMINING ATTORNEY**