ESTTA Tracking number: **ESTTA211166**
Filing date: **05/13/2008**

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

Proceeding	91178539
Party	Defendant Omnisource DDS, LLC
Correspondence Address	ERIK M. PELTON ERIK M. PELTON & ASSOCIATES, PLLC P. O. BOX 100637 ARLINGTON, VA 22210 UNITED STATES emp@tm4smallbiz.com
Submission	Opposition/Response to Motion
Filer's Name	Erik M. Pelton
Filer's e-mail	emp@tm4smallbiz.com
Signature	/ErikMPelton/
Date	05/13/2008
Attachments	AQUAJETT - Resposne to 2nd Motion to Amend FINAL.pdf (4 pages)(25988 bytes)

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

SMITHKLINE BEECHAM CORP.,	)	
Opposer	)	IN THE MATTER OF:
vs.	)	Opposition No. 91178539
OMNISOURCE DDS, LLC	)	
Applicant.	)	

RESPONSE TO OPPOSER'S SECOND MOTION
TO AMEND THE NOTICE OF OPPOSITION

Applicant notes initially that although it has also filed a response to Opposer's Motion for Summary Judgment to protect its right to respond to the allegations contained therein, Applicant in no way waives it right to respond and object to Opposer's Second Motion to Amend the Notice of Opposition.

COMES NOW Applicant and hereby responds to Opposer's Second Motion to Amend the Notice of Opposition ("Opposer's Second Motion"). In support of its response, Applicant states the following:

Opposer's Second Motion was filed after the close of discovery. Opposer already filed one motion to amend its Notice of Opposition pleading. Opposer now seeks to amend its Notice of Opposition again and to add a claim that Applicant does not have a bona fide intent to use the mark AQUAJETT for oral irrigators.

Opposer's Second Motion claims that Applicant failed to produce any objective evidence demonstrating its intent to use the mark AQAUJETT for oral irrigators. However, Applicant has produced evidence of patents owned by its principal and trade show attendance. Applicant's principal testified in deposition that he has been a practicing dentist for many years. See

Weissman Depo. (attached to Opposer's Motion for Summary Judgment) and Declaration of William R. Weissman (attached to Applicant's Response to Opposer's Motion for Summary Judgment).

Opposer's Second Motion claims that there would be no prejudice to Applicant. However, Opposer admits that the issue of bona fide intent was not within the scope of the claims of Opposer in the Notice of Opposition. As a result, the discovery already conducted did not include the issue of a bona fide intent, any discovery obligations thus far for Applicant did not include any burden or responsibility to respond in regards to the issue of Applicant's intentions and Applicant was under no obligation to produce such documentation.

OPPOSER'S FIRST MOTION TO AMEND NOTICE OF OPPOSITION

Even though Opposer acknowledges that that Board has not yet ruled on Opposer's First Motion to Amend Notice of Opposition (Opposer's First Motion) and the Board, in its March 26, 2008 Order noted that a determination regarding Opposer's First Motion would not be made prior to a final hearing, Opposer has included the proposed amendments contained in Opposer's First Motion in Opposer's Second Motion.

PREJUDICE TO APPLICANT

Opposer waited more than five weeks after the deposition of William R.Weissman, DDS, to file its Second Motion. Applicant will be prejudiced if Opposer's Second Motion is granted. Any discovery obligations thus far for Applicant did not include any burden or responsibility to respond in regards to the issue of Applicant's intentions and Applicant was under no obligation to produce such documentation.

If the Board grants Opposer's Second Motion, it should only do so by striking from the Second Motion the additions contained in Opposer's First Motion which have not yet been ruled on by the Board. Furthermore, the Board grants Opposer's Second Motion, it should extend the discovery period and deny the Motion for Summary Judgment to permit Applicant additional time to introduce evidence supporting its bona fide intent to use its mark in commerce.

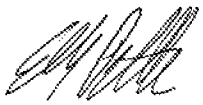
CONCLUSION

The evidence does not indicate a lack of a bona fide intention by Applicant to use AQUAJETT for oral irrigators. See Applicant's Response to Motion for Summary Judgment. Applicant should not now, after the close of discovery and after Opposer already filed an earlier Motion to Amend its Notice of Opposition.

If the Board grants Opposer's Second Motion, Applicant hereby requests the Board extend the discovery period and deny the Motion for Summary Judgment to permit Applicant additional time to introduce evidence supporting its bona fide intent to use its mark in commerce.

Dated: May 13, 2008

Respectfully Submitted,



Erik M. Pelton

ERIK M. PELTON & ASSOCIATES, PLLC
PO Box 100637
Arlington, VA 22210
ph: 703-525-8009
fax: 703-525-8089

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Applicant's Response to Opposer's Second Motion to Amend the Notice of Opposition was deposited with postage sufficient for first class mail on May 13, 2008, to Counsel for Opposer at the following address:

Glenn A. Gundersen
Dechert LLP
Cira Centre, 2929 Arch Street
Philadelphia, PA 19104-2808

By: _____
Erik M. Pelton, Esq.