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Filing date: **09/19/2008**

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

Proceeding	91178539
Party	Plaintiff SmithKline Beecham Corporation
Correspondence Address	Glenn A. Gundersen Dechert LLP Cira Centre, 2929 Arch Street Philadelphia, PA 19104-2808 UNITED STATES glenn.gundersen@dechert.com
Submission	Motion to Compel Discovery
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Signature	/Erik Bertin/
Date	09/19/2008
Attachments	Motion to Compel.pdf ( 30 pages )(856295 bytes )

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

SMITHKLINE BEECHAM CORPORATION	:	
	:	
Opposer,	:	
	:	
v.	:	OPPOSITION NO. 91178539
	:	
OMNISOURCE DDS, LLC	:	
	:	
Applicant.	:	

**MOTION TO COMPEL**

Opposer, SmithKline Beecham Corporation, respectfully moves for an order compelling Applicant, Omnisource DDS, LLC, to provide full and complete responses to Opposer's interrogatories. In addition, Opposer respectfully requests that the proceedings be suspended pending the Board's decision on this motion. In the event that the Board grants Opposer's motion to compel, Opposer requests that the deadlines be reset so that Opposer's testimony period will begin at least thirty days from the date Applicant is ordered to supplement its interrogatory responses.

**Background**

Opposer served Applicant with its Second Set of Interrogatories on February 11, 2008, and Applicant served its responses to these requests on March 17, 2008. (*See Applicant's Responses to Opposer's Second Set of Interrogatories, enclosed as Exhibit A.*) On September 17, 2008, Opposer notified Applicant that its interrogatory responses were deficient, and asked Applicant to supplement its responses to these requests. (*See Letter from Opposer's counsel to Applicant's counsel, enclosed as Exhibit B.*) Applicant agreed to supplement its responses to

some of these interrogatories, but declined to provide supplemental responses to interrogatory numbers 1, 2, 4, 5, 8-13, 15, 16, and 22-26. (See Letter from Applicant's counsel to Opposer's Counsel, enclosed as Exhibit C.)

The testimony period is scheduled to begin on September 20<sup>th</sup>. Opposer proposed that the parties extend the deadlines in this proceeding in order to give the parties time to resolve these discovery issues, but Applicant has declined to grant this request. Although Opposer has made a good faith effort to resolve this dispute, it has no choice but to ask for assistance from the Board.

### Argument

If a party fails to provide a substantive answer to an interrogatory, the party seeking discovery may file a motion to compel a substantive response to that request. 37 C.F.R. § 2.120(e); TBMP §§ 415.01, 523.01. For the reasons set forth below, Applicant should be required to supplement its responses to interrogatory numbers 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 15, 16, 22, 23, 24, 25, and 26.

#### **A. The Meaning and Impression of the Marks (Interrogatory Nos. 1, 2, and 4)**

In its Fifth Affirmative Defense, Applicant alleged that Opposer's AQUAFRESH marks have a different meaning than Applicant's AQUAJETT mark. In interrogatory number 1, Opposer asked Applicant to identify the meaning of its mark, and explain how it differs from the meaning of Opposer's mark. Applicant provided "some definitions" for the words AQUA, JETT, and FRESH, but declined to identify the differences in the meaning of the marks at issue in this dispute. (*Compare* Ex. A, Int. No. 1, *with* Ex. C.)

In its Fifth and Sixth Affirmative Defenses, Applicant alleged that the visual impression and overall impression of Opposer's marks is different than the visual impression and overall

impression of Applicant's mark. Opposer asked Applicant to identify these impressions in interrogatories 2 and 4. Applicant has failed to identify the "overall impression" of these marks, and stated that "the visual impressions of the marks are clear on their face," which is not a responsive answer.

Applicant claims that the foregoing information is protected by the work product doctrine. (*See* Ex. C.) However, Applicant already identified the commercial impressions of the parties' marks, and identified the respective differences in these impressions. (*See* Ex. A, Resp. to Int. 3.) Therefore, Opposer respectfully submits that there is no justification for refusing to provide the same information with respect to the meaning of the parties' marks, and the visual and overall impressions of these marks.

**B. Third Party Marks (Interrogatory No. 5)**

In its Seventh Affirmative Defense, Applicant alleged that "there are numerous other uses of AQUA in International Class 10 which is the same class in which Applicant's mark has been applied for and numerous other uses of the term 'AQUA' in dental products." (*See* Ex. A, Int. 5.) Opposer asked Applicant to identify these alleged uses, but Applicant withheld this information under the work product doctrine.

The fact that a third party may be using the word AQUA for dental products or products in class 10 is not privileged information. If Applicant intends to rely upon these alleged marks as a defense to Opposer's claims, it should be required to identify these uses in its discovery responses. *See* TBMP § 414(9) ("Information concerning a party's awareness of third party use and/or registration of the same or similar marks for the same or closely related goods or services as an involved mark, is discoverable to the extent that the party has actual knowledge thereof").

**C. Applicant's Products (Interrogatory Nos. 8-12)**

Applicant has filed applications to register the marks AQUAJETT, OMNIJET, OMNIPIK, AQUAPIK, and SHOWERJET for "oral irrigators." Opposer has asked Applicant to identify "each oral irrigator product" that it intends to offer, sell, or distribute under these marks, and asked Applicant to "describe the primary functionality" of each product. (*See* Ex. A, Int. Nos. 8-12.) Applicant responded to these interrogatories by simply stating "oral irrigators," which is not a responsive answer to this request.

Opposer has asked Applicant to identify the channels of trade for its products. (*See* Int. No. 13.) In response to this request, Applicant identified the classes of customers for its product, but failed to identify the channels of trade where those products are likely to be sold. (*See* Ex. C.)

Applicant claims that it intends to market its products to users of oral care goods. In Interrogatory Nos. 15 and 16, Opposer asked Applicant to identify and describe these "oral care goods" and the "users" of these products. In response to these requests, Applicant listed "oral irrigators, dental floss, interdental brushes, interdental pics, and other similar goods," but failed to specify what these "other similar goods" might be. When asked to identify the "users" of these products, Applicant responded that the "interrogatory speaks for itself," which is not a responsive answer.

Finally, Opposer asked Applicant to identify each product that is expected to compete with the products that it intends to offer, sell, or distribute in the United States. (*See* Ex. A, Int. Nos. 22-26.) In response to these requests, Applicant cited five oral irrigator products "among

others.” Opposer asked Applicant to identify these “other” products, but Applicant has declined to do so. (See Ex. C.)

Applicant claims that the foregoing information has “*largely* been provided” during the discovery deposition of Applicant’s president, which indicates that Applicant failed to provide all of the information that has been requested. (See Ex. C, emphasis added.) If Applicant believes that this information has been provided in its deposition testimony, it should be required to identify the specific portions of the transcript where that information may be found, and should be required to incorporate that information into its prior interrogatory response.

**Conclusion**

For the foregoing reasons, Opposer respectfully requests that the Board issue an order suspending this proceeding and an order compelling Applicant to supplement its responses to Interrogatories 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 15, 16, 22, 23, 24, 25, and 26.

Respectfully submitted,



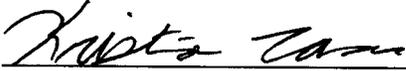
Glenn A. Gundersen  
Erik Bertin  
Kristina M. Case  
DECHERT LLP  
Cira Centre  
2929 Arch Street  
Philadelphia, PA 19104-2808  
(215) 994-2183

Dated: September 19, 2008

Attorneys for Opposer  
SMITHKLINE BEECHAM  
CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Motion To Compel has been duly served by mailing such copy first class, postage prepaid, to Erik M. Pelton, Erik M. Pelton & Associates, PLLC, P.O. Box 100637, Arlington, Virginia 22210, on September 19, 2008.

  
\_\_\_\_\_  
Kristina M. Case

**EXHIBIT A**

GAG  
SAB  
SC

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

SMITHKLINE BEECHAM CORPORATION, )  
)  
Opposer, )  
)  
vs. )  
)  
OMNISOURCE DDS, LLC, )  
)  
Applicant. )

IN THE MATTER OF:

Opposition No. 91178539

RECEIVED

MAR 17 2008

G.A.G.

**APPLICANT'S RESPONSES TO  
OPPOSER'S SECOND SET OF INTERROGATORIES TO APPLICANT**

**I. GENERAL OBJECTIONS**

Applicant hereby incorporates by reference, as if fully stated herein, the Preliminary Statement and General Objections in Applicant's Objections and Responses to Opposer's First Set of Interrogatories.

**II. INTERROGATORIES**

**Interrogatory No.1.**

In its Fifth Affirmative Defense, Applicant alleges that "Opposer's marks which are for 'AQUAFRESH' and variations thereof have a totally different meaning from the Applicant's mark 'AQUAJETT' ... and totally different meaning in the marketplace." Identify the meaning of Applicant's AQUAJETT Mark, and explain how it differs from the meaning of Opposer's AQUAFRESH Mark.

**RESPONSE:**

The meaning of the marks, and the words contained therein, are clear on their face and are available in any common dictionary. The following are some definitions, but not meant to be an

exhaustive list. AQUA means water; blue-green color. JETT means fast moving. FRESH means clean; new.

**Interrogatory No.2.**

In its Fifth Affirmative Defense, Applicant alleges that "Opposer's marks which are for 'AQUAFRESH' and variations thereof and "Applicant's mark 'AQUAJETT' ... have a totally different visual impression." Identify the visual impression of Applicant's AQUAJETT Mark, and explain how it differs from the visual impression of Opposer's AQUAFRESH Mark.

**RESPONSE:**

The visual impressions of the marks are clear on their face. Some differences include, but are not limited to, the letter "J" and the use of two "T"s next to each other at the end of Applicant's mark.

**Interrogatory No.3.**

In its Fifth Affirmative Defense, Applicant alleges that "Opposer's marks which are for 'AQUAFRESH' and variations thereof and "Applicant's mark 'AQUAJETT' "have "totally different commercial impressions." Identify the commercial impression of Applicant's AQUAJETT Mark, and explain how it differs from Opposer's AQUAFRESH Mark.

**RESPONSE:**

Some differences in the commercial impressions include, but are not limited to: AQUAJETT has a commercial impression related to the movement of water; AQUAFRESH has a commercial impression related to cleanliness.

**Interrogatory No.4.**

In its Sixth Affirmative Defense, Applicant alleges that the "overall impression created by Applicant's mark is totally different from the overall impression created by Opposer's mark."

Identify the overall impression of Applicant's AQUAJETT Mark, and explain how it differs from the overall impression of Opposer's AQUAFRESH Mark.

**RESPONSE:**

Some differences in the commercial impressions include, but are not limited to: AQUAJETT has a commercial impression related to the movement of water; AQUAFRESH has a commercial impression related to cleanliness.

**Interrogatory No.5.**

In its Seventh Affirmative Defense, Applicant alleges that "there are numerous other uses of AQUA' in International Class 10 which is the same class in which Applicant's mark has been applied for and numerous other uses of the term 'AQUA' in dental products." Identify all uses of AQUA in International Class 10 and all uses of AQUA for dental products to which Applicant refers in its Seventh Affirmative Defense.

**RESPONSE:**

In addition to the general objections above, Applicant objects to this interrogatory as requesting information and/or materials protected by attorney work product.

**Interrogatory No.8.**

Identify each oral irrigator product that Applicant intends to offer, sell, or distribute in the United States bearing, displaying, or using the mark OMNIJET.

**RESPONSE:**

Oral irrigators.

**Interrogatory No.9.**

Identify each oral irrigator product that Applicant intends to offer, sell, or distribute in the United States bearing, displaying, or using the mark OMNIPK.

**RESPONSE:**

Oral irrigators.

**Interrogatory No. 10.**

Identify each oral irrigator product that Applicant intends to offer, sell, or distribute in the United States bearing, displaying, or using the mark AQUAPIK.

**RESPONSE:**

Oral irrigators.

**Interrogatory No. 11.**

Identify each oral irrigator product that Applicant intends to offer, sell, or distribute in the United States bearing, displaying, or using the mark SHOWERJET.

**RESPONSE:**

Oral irrigators.

**Interrogatory No. 12.**

Describe the primary functionality of each product that Applicant intends, sell, or distribute in the United States bearing, displaying, or using Applicant's AQUAJETT Mark.

**RESPONSE:**

Oral irrigators.

**Interrogatory No. 13.**

Identify the channels of trade for each product that Applicant intends to offer, sell, or distribute in the United States bearing, displaying, or using Applicant's AQUAJETT Mark.

**RESPONSE:**

In addition to the general objections above, Applicant objects to this interrogatory as overly broad, unduly burdensome, vague, irrelevant, duplicative, containing multiple questions, and speculative. Notwithstanding and without waiving these objections, Applicant provides the following response: Applicant intends to market and sell products using the AQUAJETT Mark to users of oral care goods.

**Interrogatory No. 15.**

In its responses to Opposer's First Requests for Production of Documents and Things, Applicant alleged that it "intends to market the goods to users of oral care goods" (See Applicant's Responses to Document Request Nos. 4, 5, 6, 11). Identify and describe the "oral care goods" that Applicant mentioned in its responses to these requests.

**RESPONSE:**

Oral irrigators, dental floss, interdental brushes, interdental pics, and other similar goods.

**Interrogatory No. 16.**

In its responses to Opposer's First Requests for Production of Documents and Things, Applicant alleged that it "intends to market the goods to users of oral care goods" (See Applicant's Responses to Document Request Nos. 4, 5, 6, 11). Identify and describe the types and categories of "users" that Applicant mentioned in its responses to these requests.

**RESPONSE:**

In addition to the general objections above, Applicant objects to this interrogatory as overly broad, unduly burdensome, vague as to the meaning of "types and categories of "users"", irrelevant, duplicative, containing multiple questions, and speculative. Applicant's response referenced in the interrogatory speaks for itself.

**Interrogatory No. 22.**

Identify each product that is currently offered for sale, sold, or distributed in the United States that is expected to compete with the products that Applicant intends to offer, sell, or distribute in the United States bearing, displaying, or using the mark AQUAJETT.

**RESPONSE:**

In addition to the general objections above, Applicant objects to this interrogatory as overly broad, unduly burdensome, vague, containing multiple questions, requesting privileged information and/or attorney work product. Notwithstanding and without waiving these objections, Applicant provides the following response:

SHOWERFLOSS oral irrigator, INTERPLAK oral irrigator, INTERJET oral irrigator, WATERPIK oral irrigator, and HYDROPIK oral irrigator, among others.

**Interrogatory No. 23.**

Identify each product that is currently offered for sale, sold, or distributed in the United States that is expected to compete with the oral irrigator products that Applicant intends to offer, sell, or distribute in the United States bearing, displaying, or using the mark OMNIFRESH.

**RESPONSE:**

In addition to the general objections above, Applicant objects to this interrogatory as overly broad, unduly burdensome, vague, irrelevant, containing multiple questions, requesting privileged information and/or attorney work product. Notwithstanding and without waiving these objections, Applicant provides the following response:

See response to Interrogatory No. 22.

**Interrogatory No. 24.**

Identify each product that is currently offered for sale, sold, or distributed in the United States that is expected to compete with the oral irrigator products that Applicant intends to offer, sell, or distribute in the United States bearing, displaying, or using the mark OMNIPK.

**RESPONSE:**

In addition to the general objections above, Applicant objects to this interrogatory as overly broad, unduly burdensome, vague, irrelevant, containing multiple questions, requesting privileged information and/or attorney work product. Notwithstanding and without waiving these objections, Applicant provides the following response:

See response to Interrogatory No. 22.

**Interrogatory No. 25.**

Identify each product that is currently offered for sale, sold, or distributed in the United States that is expected to compete with the oral irrigator products that Applicant intends to offer, sell, or distribute in the United States bearing, displaying, or using the mark AQUAPIK.

**RESPONSE:**

In addition to the general objections above, Applicant objects to this interrogatory as overly broad, unduly burdensome, vague, irrelevant, containing multiple questions, requesting privileged information and/or attorney work product. Notwithstanding and without waiving these objections, Applicant provides the following response:

See response to Interrogatory No. 22.

**Interrogatory No. 26.**

Identify each product that is currently offered for sale, sold, or distributed in the United States that is expected to compete with the oral irrigator products that Applicant intends to offer, sell, or distribute in the United States bearing, displaying, or using the mark SHOWERJET.

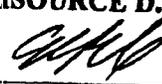
**RESPONSE:**

In addition to the general objections above, Applicant objects to this interrogatory as overly broad, unduly burdensome, vague, irrelevant, containing multiple questions, requesting privileged information and/or attorney work product. Notwithstanding and without waiving these objections, Applicant provides the following response:

See response to Interrogatory No. 22.

Dated: March 11, 2008

**OMNISOURCE D.D.S., LLC**

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

Erik M. Pelton, Esq.

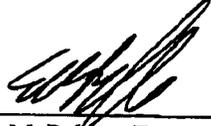
Erik M. Pelton & Associates, PLLC  
PO Box 100637  
Arlington, Virginia 22210  
TEL: (703) 525-8009  
FAX: (703) 525-8089

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of APPLICANT'S RESPONSE TO OPPOSER'S SECOND SET OF INTERROGATORIES TO APPLICANT was deposited with postage sufficient for first class mail on March 11, 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.

**EXHIBIT B**

---

ERIK J. BERTIN

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September 17, 2008

**VIA EMAIL AND FACSIMILE**

Erik M. Pelton  
Erik M. Pelton & Associates, PLLC  
P.O. Box 100637  
Arlington, Virginia 22210

Re: *SmithKline Beecham Corporation v. Omnisource DDS, LLC*  
Opposition No. 91/178,539

Dear Erik:

We have reviewed your client's responses to Opposer's discovery requests. Many of these responses are incomplete. Because you have refused to postpone the start of the testimony period, we must insist that your client supplement its responses to these requests by the close of business tomorrow.

Opposer's Second Set of Interrogatories

- ° Interrogatory No. 1. In this interrogatory, our client asked Omnisource to identify the meaning of its AQUAJETT Mark. Omnisource responded by stating that the meaning of the marks "are clear on their face." This is not a responsive answer to this request. Omnisource provided "some definitions" for the words AQUA, JETT, and FRESH, but noted that this was "not meant to be an exhaustive list." If your client is aware of any other definitions, they should be specified in its response. Our client also asked Omnisource to explain how its mark differs from Opposer's AQUAFRESH Mark. Omnisource failed to provide a response to this request.
- ° Interrogatory Nos. 2, 3, and 4. In these interrogatories, our client asked Omnisource to identify the visual impression, commercial impression, and overall impression of its AQUAJETT Mark. Omnisource failed to identify the "overall impression" of its mark. In response to Interrogatory 2, Omnisource stated that "the visual impressions of the mark are clear on their face," which is not a

responsive answer to this request. Our client also asked your client to explain how the visual, commercial, and overall impressions of its mark differ from the visual, commercial, and overall impressions of Opposer's AQUAFRESH Mark. Omnisource identified "some differences" in its response to these requests. If your client is aware of any other differences, they should be specified in a supplemental interrogatory response.

- Interrogatory No. 5. In its Seventh Affirmative Defense, Omnisource alleged that "there are numerous other uses of AQUA in International Class 10 which is the same class in which Applicant's mark has been applied for and numerous other uses of the term 'AQUA' in dental products." Our client asked Omnisource to identify these alleged uses, but your client refused to do so on privilege grounds. I fail to see how the use of a third party mark would be privileged, given that the use of a third party mark is, by definition, public information. In any event, if Omnisource intends to rely upon third party marks as a defense to our client's claims, there is no legitimate basis for refusing to disclose that information in discovery.
- Interrogatory Nos. 8, 9, 10, 11, 12. In these interrogatories, our client asked Omnisource to identify "each oral irrigator product" that it intends to offer, sell, or distribute in the United States under the mark AQUAJETT, OMNIJET, OMNIPK, AQUAPIK, and SHOWERJET. Our client also asked Omnisource to "describe the primary functionality" of each product that it intends to offer, sell, or distribute in the United States under the mark AQUAJETT. Omnisource responded to these interrogatories by stating "oral irrigators." This is not a responsive answer to any of these requests.
- Interrogatory No. 13. In this interrogatory, our client asked Omnisource to identify the channels of trade for each product that it intends to offer, sell, or distribute in the United States under the mark AQUAJETT. In response to this request, Omnisource identified the classes of customers for its product, but failed to identify the channels of trade where those products are likely to be sold.
- Interrogatory No. 15, 16. In these interrogatories, our client asked Omnisource to identify and describe the "oral care goods" and the "users" that it mentioned in its prior discovery responses. In response to Interrogatory 15, Omnisource identified "oral irrigators, dental floss, interdental brushes, interdental pics, and other similar

goods.” Please identify the “other similar goods” that your client was referring to in its response to this request. In response to Interrogatory 16, Omnisource stated that the “response referenced in the Interrogatory speaks for itself.” This is not a responsive answer to this request.

- Interrogatory No. 22, 23, 24, 25, 26. In these interrogatories, our client asked Omnisource to identify each product that is expected to compete with the products that Applicant intends to offer, sell, or distribute in the United States. In response to these requests, Omnisource cited five oral irrigators “among others.” If your client is aware of other oral irrigator products that are likely to compete with its own product, they should be identified in a supplemental interrogatory response.

#### Opposer’s First Set of Interrogatories

- Interrogatory Nos. 5, 6. In these Interrogatories our client asked Omnisource if it has received a legal opinion concerning a possible conflict between Applicant’s mark and Opposer’s mark. Omnisource objected to this request on privilege grounds. The fact that your client may have received a legal opinion is not privileged, and in any event, our client did not ask Omnisource to produce a copy of its legal opinions. Our client asked Omnisource to provide a privilege log containing the type of information needed to test the validity of any privilege claim that your client might assert over its legal opinions.
- Interrogatory No. 8. In this Interrogatory our client asked Omnisource to describe the circumstances when it first became aware of Opposer’s use of its marks. Omnisource responded to this request by stating that it “has been aware of a toothpaste called AQUAFRESH for a number of years.” This is not a responsive answer, because it does not indicate when your client first became aware of our client’s product.

#### Applicant’s Supplemental Responses to Opposer’s First Set of Interrogatories

- Interrogatory No. 1. In this Interrogatory our client asked Omnisource to identify any subsidiaries, parent companies, or related companies which use Applicant’s mark. Applicant’s response to this request is a non sequitur: “No subsidiaries, parent companies or related companies which use Applicant’s Mark or any other

name or mark in which the term AQUAJETT appears.” We will need you to clarify this response in a supplemental interrogatory response.

Verifications

- Your client failed to provide a signed verification from the person who provided the factual information set forth in its interrogatory responses, as required by Fed. R. Civ. P. 33.

Opposer’s Second Request for Production of Documents and Things

- Request No. 31. In this request, our client asked Omnisource to produce a representative sampling of labels, tags, and other packaging materials for any oral irrigator product that your client has offered, sold, or distributed in the United States under the mark OMNIFRESH, OMNIPK, AQUAPIK, or SHOWERJET. Omnisource failed to provide a response to this request.
- Request Nos. 18-25, 27-30, 32-38. In these requests, our client asked Omnisource to produce all documents that refer or relate to its plans for the oral irrigator products that it intends to sell in the United States under the marks OMNIFRESH, OMNIPK, AQUAPIK, or SHOWERJET. Our client also asked Omnisource to produce a sampling of advertising, marketing and promotional materials for these products; documents sufficient to show any trade shows where these products have been marketed; documents describing the functionality of these products; a sampling of any media coverage that these products have received; and documents sufficient to identify the products that are expected to compete with these products. Omnisource objected to these requests on relevance grounds. Your client put these marks at issue in this dispute by citing them as evidence of its *bona fide* intent to use AQUAJETT in commerce, and evidence of its *bona fide* intent to sell the oral irrigator products described in Dr. Weissman’s patents. As such, these marks and your client’s plans for using them are directly relevant to the defenses that your client has asserted in this proceeding. If your client has documents that are responsive to these requests, they should be produced.
- Request No. 26. In this request, our client asked Omnisource to produce documents sufficient to identify each product that is expected to compete with the products that it intends to offer, sell, or distribute under the mark AQUAJETT. In

response to this request, your client cited “other motorized oral irrigator products, a sampling of which can easily be found by searching the Internet.” However, your client failed to produce this “sampling” of documents in response to this request.

Opposer’s Requests for Admissions

- Applicant objected to nearly a third of Opposer’s requests “as requesting conjecture or speculation and grounded in fact,” and stated that it “can neither admit nor deny the Request as asked.” However, Omnisource failed to explain why these requests call for conjecture or speculation, or why it is unable to admit or deny the request. These include request numbers 29-50, 54, 56, 58, 60, 62, 64-76, 98-100, 102, 104, 106, 108, 114, 116, 118, 120, 122, 124, 126, 128, 130, 132, 134, 136, 138, 140, 142, 144, 146, 148, 150, 152, 154, 156, 158, 160, 162, and 164. A response to a request for admission must state in detail the reasons why the responding party cannot truthfully admit or deny the matter set forth in each request. The boilerplate responses that your client provided to these requests do not comply with this requirement.

We look forward to receiving your supplemental responses to these requests by the close of business tomorrow. If your client needs more time to address these issues, we would be willing to extend this deadline, provided that you agree to postpone the start of the testimony period for both parties. I look forward to hearing from you.

Sincerely,



Erik Bertin

**EXHIBIT C**

# FAX COVER PAGE

**TO:** ..... Erik Bertin

**FAX NUMBER:** ..... 202-261-3333

**DATE:** ..... September 18, 2008

**FROM:**



Erik M Pelton & Associates, PLLC

**Attorneys at Law**  
Erik M. Pelton\*  
Christopher R. Shiplett\*\*  
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erikpelton.com

**TOTAL NUMBER OF PAGES (including cover):** ..... 4

**COMMENTS:**

See attached.

**If there are any transmission errors or questions regarding this fax, please contact  
Erik M. Pelton & Associates, PLLC**

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**EMP&A**  
Erik M Pelton & Associates, PLLC

September 18, 2008

**SENT VIA FACSIMILE TO 202-261-3333  
& VIA FIRST CLASS MAIL**

Erik Bertin  
Dechert LLP  
1775 I Street NW  
Washington, DC 20006

Re: Opposition No. 91178539

Dear Erik,

In receipt of your fax and email transmitted after 8pm yesterday. Your correspondence requests a response by the "close of business" today, which is not reasonable. (In fact, since your letter was sent after the normal "close of business" yesterday you have asked me to provide the information requested in your five page letter to you in less than one full day).

Before I address the specifics of your letter, a review of the procedural history regarding the proceeding and its discovery is appropriate.

- Applicant's initial discovery responses were served on November 8, 2007.
- The close of discovery occurred on February 9, 2008.
- Supplemental responses to Opposer's interrogatories and requests for production were served by Applicant on February 25, 2008.
- Opposer deposed my client on February 27, 2008, and covered much of the information requested in your September 17, 2008, letter during the course of that deposition.
- Applicant served responses to Opposer's second interrogatories and requests for production on March 11, 2008.
- Opposer's Motion for Summary Judgment was filed on April 8, nearly two month following the close of discovery.
- The Board denied summary judgment and revised the proceeding docket on September 10, 2008.
- Prior to your letter of yesterday evening, Opposer has not detailed any perceived discovery issues related to Applicant's response to Opposer first or second set of discovery since prior to Applicant serving its supplemental responses in February.

Your letter notes that I "have refused to postpone the start of the testimony period." The commencement of Opposer's testimony period was set by the Board. The commencement of

Opposer's testimony period is not directly related to the issues regarding Applicant's discovery responses set forth in your letter. In addition, as I noted during our telephone conference yesterday, Applicant is well within its rights to conform to the deadlines established in the Board's September 10, 2008 order, and Applicant may be prejudiced by any further delay in this proceeding.

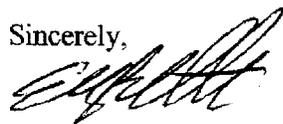
Opposer may file a motion requesting an extension with the board if it believes one is merited. However, because we do not believe there is good cause warranting any extension, any such motion will be opposed by Applicant.

Notwithstanding the above, Applicant responds below to the points raised in your September 17, 2008, letter to make a good faith effort to resolve this discovery issue without intervention from the Board.

- The material sought regarding Interrogatory Nos. 1, 2, 3, 4, and 5 from Opposer's Second Set of Interrogatories is protected by attorney work product.
- The information requested in Interrogatory Nos. 8, 9, 10, 11, 12, 13, 15, 16, 22, 23, 24, 25, and 26 of Opposer's Second Set of Interrogatories has largely been provided by my client during the deposition of William Weissman, DDS on February 27, 2008.
- Regarding Applicant's responses to Opposer's First Set of Interrogatories:
  - Regarding Interrogatory Nos. 5 and 6, Applicant has not received any such opinion.
  - Regarding Interrogatory No. 8, Applicant cannot recall with specificity the dates or circumstances when it first became aware of Opposer's use of its marks.
- Regarding Applicant's Supplemental Response to Opposer's First Set of Interrogatories, Interrogatory No. 1, Applicant supplements its response to state: No subsidiaries, parent companies or related companies *exist* which use Applicant's Mark or any other name or mark in which the term AQUAJETT appears.
- Applicant will provide a signed verification to you in the near future.
- Regarding Request No. 31, Applicant's products under the mark OMNIFRESH, OMNIPIK, AQUAPIK, and SHOWERJET have not yet been offered, sold or distributed.
- Regarding Request No. 18-25, 27-30, 32-38, Applicant will review its past production and supplement its response with any additional responsive documents. Applicant notes that its supplemental production which was labeled OMNISOURCE 000028-000032 contains records from trade shows attended by Applicant.
- Regarding Request No. 26, the request asks for materials about third parties which are not in possession of Applicant and which are equally available to Opposer.
- Regarding Opposer's Requests for Admissions, the specific requests for admissions listed in your letter have been denied by Applicant. In general, they request information about future actions and possibilities and/or use terms which are not specifically defined, such as "intends" "likely", which cannot be affirmatively admitted or denied in the present tense.

Do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Erik M. Pelton', written in a cursive style.

Erik M. Pelton

ERIK M. PELTON & ASSOCIATES, PLLC