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

Proceeding	91178539
Party	Defendant Omnisource DDS, LLC
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Date	03/07/2009
Attachments	AQUAJETT - Motion to Strike Testimony - FINAL.pdf (4 pages)(39839 bytes)

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

SmithKline Beecham Corporation
Opposer,

v.

Omnisource DDS, LLC,
Applicant.

Opposition No. 91178539

Application Serial No. 78893144

Mark:

AQUAJETT

APPLICANT'S MOTION TO STRIKE TESTIMONY

Applicant hereby moves the Board to strike the following Notices of Reliance of Opposer as procedurally defective pursuant to TBMP §§ 707.02., 704.08 and 530:

- Opposer's Second Notice of Reliance, Exhibit A;
- Opposer's Third Notice of Reliance, Exhibit A;
- Opposer's Fourth Notice of Reliance, Exhibit A; and
- Opposer's Ninth Notice of Reliance

for the following reasons.

Opposer's Second Notice of Reliance, Exhibit A, Opposer's Third Notice of Reliance, Exhibit A, and Opposer's Fourth Notice of Reliance, Exhibit A each contain excerpts from the NEXIS database. These are not complete copies of printed publications, nor are they complete electronic copies of printed publications. As a result, the full context, meaning and relevance of the excerpted materials cannot be determined. The articles do not necessarily relate to Opposer; do not necessarily relate to goods or services relevant to the current proceeding; do not necessarily relate to channels of trade relevant to the current proceeding; may not be from

sources of general circulation; may not be available to the general public in libraries or of general circulation among members; and may not be from sources in the United States.

Pursuant to TBMP § 704.08:

In lieu of the actual "printed publication or a copy of the relevant portion thereof," the notice of reliance may be accompanied by an electronically generated document which is the equivalent of the printed publication or relevant portion, as, for example, by a printout from the NEXIS computerized library of an article published in a newspaper or magazine of general circulation.

In case of reasonable doubt as to whether printed publications submitted by notice of reliance under 37 CFR § 2.122(e) are "available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue" in the proceeding, the burden of showing that they are so available lies with the offering party.

Opposer's Ninth Notice of Reliance contains testimony from another proceeding.

Opposer's has not moved this Board for consent to use testimony from another proceeding pursuant to TBMP § 530. The testimony in Opposer's Ninth Notice of Reliance is from a proceeding involving a totally different and unrelated party (Tocad Company, Limited) and was taken more than twelve (12) years ago on December 12, 1996. Applicant obviously did not have any ability to object or cross-examine at this unrelated testimony deposition. Opposer has failed to meet the requirements of TBMP § 530 and Board procedure and therefore the testimony should be stricken and barred from the current proceeding.

WHEREFORE, Applicant hereby requests the Board strike Opposer's Second Notice of Reliance, Exhibit A; Opposer's Third Notice of Reliance, Exhibit A; Opposer's Fourth Notice of Reliance, Exhibit A; and Opposer's Ninth Notice of Reliance.

Dated this 7th day of March, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of APPLICANT'S MOTION TO STRIKE TESTIMONY has been served on the following by delivering said copy on March 7, 2009, via First Class Mail, postage prepaid, to counsel for Opposer at the following address:

Glenn A. Gundersen
Dechert LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19103-2808

By: 

Erik M. Pelton, Esq.