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

Proceeding	91178539
Party	Plaintiff SmithKline Beecham Corporation
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Submission	Motion to Strike
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Date	04/30/2009
Attachments	AQUAJETT Motion to Strike.pdf (6 pages)(191162 bytes)

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

SMITHKLINE BEECHAM CORPORATION	:	
	:	
Opposer,	:	
	:	
v.	:	Opposition No. 91/178,539
	:	
OMNISOURCE DDS, LLC	:	
	:	
Applicant.	:	

OPPOSER'S MOTION TO STRIKE APPLICANT'S TESTIMONY

Opposer, SmithKline Beecham Corporation, moves to strike Exhibits 2, 7, 8, 11, 12, and 13 to Applicant, Omnisource DDS, LLC's Notice of Reliance, on the grounds that the proffered materials may not be introduced by notice of reliance. Because this motion can be resolved simply by reviewing the face of Applicant's notice of reliance, Opposer respectfully requests that the Board rule on this motion before the trial period begins.

I. DISCOVERY DEPOSITION TESTIMONY (EXHIBIT 2 TO APPLICANT'S NOTICE OF RELIANCE)

Applicant has submitted a complete copy of the discovery deposition of Applicant's president, William R. Weissman, including the entire deposition transcript and the exhibits thereto. Applicant's Notice of Reliance explains that William R. Weissman is the president of Omnisource DDS, LLC, and that this deposition was taken on February 27, 2008 – more than a year before Applicant's testimony period began.¹

Rule 2.120(j) states that a discovery deposition of an officer, director, or managing agent of a party may be introduced into evidence by an adverse party. The rules do not allow a party to introduce its own discovery deposition testimony during the testimony period. Accordingly, the deposition transcript

¹ By agreement of the parties, the discovery deposition of Applicant's president was taken after the close of the discovery period. (See Docket Item 11, Stipulation to Postpone Discovery Deposition.)

and exhibits submitted under Exhibit 2 to Applicant's Notice of Reliance should not be allowed into evidence.

II. DECLARATION SUBMITTED IN RESPONSE TO OPPOSER'S SUMMARY JUDGMENT MOTION (EXHIBIT 7 TO APPLICANT'S NOTICE OF RELIANCE)

Applicant has submitted a declaration from its president, William R. Weissman. Applicant previously submitted this declaration in response to Opposer's motion for summary judgment. (See Docket Item No. 17.) Evidence filed in connection with a motion for summary judgment "may not form part of the evidentiary record to be considered at final hearing, unless it is properly introduced in evidence during the appropriate testimony period." TBMP 528.05(a).

Rule 2.123 states that a party may introduce testimony by deposing a witness during its own testimony period and filing that deposition with the Board. The rules do not allow a party to introduce testimony in the form of a written declaration. Accordingly, the Declaration submitted under Exhibit 7 to Applicant's Notice of Reliance should not be allowed into evidence.

III. APPLICANT'S DISCOVERY RESPONSES (EXHIBIT 8 TO APPLICANT'S NOTICE OF RELIANCE)

Applicant has submitted excerpts from Opposer's Interrogatories and Requests for Admissions, together Applicant's responses to those requests. However, Rule 2.120(j)(5) specifically states that "an answer to an interrogatory, or an admission to a request for admission, may be submitted and made part of the record by only the inquiring party"

Applicant claims that its admissions and its interrogatory responses should be allowed into evidence in order to rebut the interrogatory answers and admissions which have been submitted by Opposer. Rule 2.120(j)(5) states that a responding party may submit its own interrogatory answers and admissions "so as to make not misleading what was offered by the inquiring party," provided that the responding party provides "a written statement explaining why [it] needs to rely upon each of the additional discovery responses." Applicant has failed to explain why the interrogatory answers and admissions submitted under Opposer's notice of reliance would be misleading. Likewise, Applicant has

failed to explain why it needs to rely on the specific interrogatory answers and admissions cited in its notice of reliance in order to respond to Opposer's evidence.

Finally, Applicant responded to all but one of Opposer's requests for admission by stating "Denied" (See Applicant's Notice of Reliance, Ex. 8, Applicant's Responses to Request for Admission Nos. 110, 112, 114, 116). Rule 2.120(j)(3)(i) states that "an admission to a request for admission" may be made of record with a notice of reliance. The rules do not allow a party to introduce a denial to a request for admission.

For the foregoing reasons, Applicant's discovery responses should not be allowed into evidence.

IV. APPLICANT'S INTERNAL DOCUMENTS (EXHIBITS 11, 12, AND 13 TO APPLICANT'S NOTICE OF RELIANCE)

Applicant has submitted meeting minutes, correspondence, notes, and receipts, which were produced in response to Opposer's discovery requests. The rules do not allow a party to introduce its own internal documents into evidence unless they are otherwise admissible under Rule 2.122(e) as an official record or a printed publication. See TBMP 704.11.

Applicant does not claim that its internal documents are official records or printed publications. Instead, Applicant claims that it needs to rely upon these documents in order to rebut the interrogatory answers and admissions Opposer submitted with its notices of reliance. As discussed above, Rule 2.120(j)(5) allows a responding party to submit its own interrogatory answers and admissions under limited circumstances. The rules do not allow a responding party to introduce its own internal documents as rebuttal evidence.

Moreover, Applicant's meeting minutes, correspondence, notes, and receipts cannot be submitted with a notice of reliance because they are not self-authenticating. The internal documents described in Applicant's notice of reliance can only be introduced into evidence with deposition testimony from a person who can clearly and properly authenticate and identify the documents, including the nature, source, and date of the materials. See *Raccioppi v. Apogee, Inc.*, 47 USPQ2d 1368, 1370 (TTAB 1998). Applicant has failed to provide such appropriate authentication.

Finally, the documents submitted under Exhibit 12 should not be allowed into evidence, because they were not produced in a timely manner. (See letter from Applicant's counsel, attached hereto as Exhibit 1.) In its order dated December 18, 2008 the Board advised the parties "that they remain under a continuing obligation to supplement their discovery responses" and that "[t]o the extent that responsive documents are not produced, they cannot be relied upon at trial." (Order at 2.) Applicant did not produce these documents until February 5, 2009 – nearly a year after the discovery period closed on February 9, 2008 and exactly three business days before Opposer's testimony period closed on February 10, 2009 – and counsel for Opposer did not receive these documents until the last day of Opposer's testimony period.

CONCLUSION

For the foregoing reasons, Opposer respectfully submits that the Board should exclude Exhibits 2, 7, 8, 11, 12, and 13 that Applicant submitted with its Notice of Reliance.

Dated: April 30, 2009

Respectfully submitted,

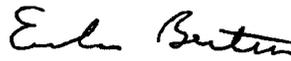


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Attorneys for Opposer
SMITHKLINE BEECHAM CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Opposer's Motion to Strike Applicant's Testimony has been duly served by delivering such copy by hand to Erik M. Pelton, 311 Park Avenue, Suite 1A, Falls Church, VA 22046 on April 30, 2009.



Erik Bertin

EXHIBIT 1

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February 5, 2009

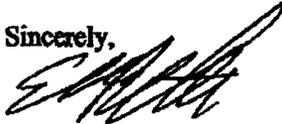
Glenn A. Gundersen
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Philadelphia, PA 19104-2808

Re: Opposition No. 91178539

Dear Glenn,

Enclosed, please find Applicant's supplemental document production labeled OMNISOURCE 00033 - 00042. These documents were recently discovered by Applicant and had been in the possession of James Weissman. Note that these pages have been labeled CONFIDENTIAL pursuant to the protective order.

Sincerely,



Erik M. Pelton

GAG
EJP
EJP

RECEIVED

FEB 10 2009

G.A.G.