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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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Attachments	AQUAJETT Statement of Objections.pdf (4 pages)(223531 bytes)

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

In re Application of Omnisource DDS, LLC
Application Serial No.: 78/893,144
Filed; May 25, 2006
Mark: AQUAJETT

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

OPPOSER'S STATEMENT OF OBJECTIONS

Opposer, SmithKline Beecham Corporation, objects to certain evidence that Applicant, Omnisource DDS, LLC, offered in its Notice of Reliance and cited in its Supplemental Notice of Reliance, on the grounds that these materials are inadmissible or immaterial under the Federal Rules of Evidence and/or under the applicable Trademark Rules.

I. Third-Party Trademark Registrations

Exhibit 4 to Applicant's Notice of Reliance contains copies of third party registrations for marks that contain the word "AQUA" or the Spanish word "AQUIS." Applicant argues that these registrations are relevant to "the strength of Opposer's mark, likelihood of confusion, and other *DuPont* factors." (*See* Applicant's Notice of Reliance, Exhibit 4.)

Opposer objects to this evidence on the grounds that it is irrelevant under Rule 402 of the Federal Rules of Evidence. It is well-established that third-party trademark registrations have no probative value on the issue of likelihood of confusion, because they do not prove that a third-party mark is actually in use, that consumers are familiar with the mark, or that the mark is likely to have any effect on consumer perception. *See, e.g., Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 203-04, 22 USPQ2d 1542, 1543 (Fed. Cir. 1992) (third-party registrations may not be given any weight in determining strength of the registrant's mark); *AMF, Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 1406, 177 USPQ

268, 269 (CCPA 1973) (third-party registrations cannot be used as evidence of consumer perception in the marketplace); *Sports Authority Michigan, Inc. v. PC Authority, Inc.*, 63 USPQ2d 1782, 1798 (TTAB 2001) (third-party registrations do not prove that a mark is in use or that consumers have been exposed to the mark). Applicant has submitted no evidence of such use or consumer awareness of these marks, and as such, the submitted registrations are of no significance and should not be considered

The third party registration for the mark AQUIS (Reg. No. 2,811,171) should also be ignored, because the term “aquis” does not appear in any of the marks that Opposer has asserted in this proceeding. Thus, this mark does not have the same appearance, pronunciation, or meaning as Opposer’s trademarks. See J. David Sams, *Tips from the T.T.A.B.: Third-party Registrations in T.T.A.B. Proceedings*, 72 TMR 297, 298 (1982) (“It is futile to make of record copies of third-party registrations that show marks obviously different in appearance from those of the parties to the proceedings.”).

The registration for C.E.T. AQUADENT, for “veterinary dental care preparations,” is immaterial, since toothbrush, toothpaste, and oral irrigators for human use are completely different than a product that reduces plaque and promotes fresh breath in dogs and cats. Likewise, the registrations for AQUA BOND for “dental sealants” used by dental professionals, AQUACUT for “dental instruments” used by dental professionals, AQUASAFE for dental filtration systems used by dentists, AQUATORCH for welding apparatus used for welding dental items, AQUALITECH for amalgam separators used for removing arsenic from dental waste, and AQUASEPT for a “dental air and water delivery system” containing a “dental syringe,” are immaterial. Even if these marks were in use, these products would be used by dental professionals, rather than the ordinary consumers who would purchase AQUAFRESH toothpaste and toothbrushes. Finally, the registration for AQUA-SOL, for a soluble lubricating reagent sold as a component of dental floss, is immaterial, because even if the mark were in use, the product is not one which would be known to the ordinary purchaser of over the counter oral care products.

II. Applicant’s Discovery Responses And Discovery Deposition Testimony

Opposer renews its objections to the discovery responses that Applicant submitted under Exhibit 8 to its Notice of Reliance, and renews its objections to the discovery deposition testimony that Applicant

cited in its Supplemental Notice of Reliance.¹ Specifically, Applicant's response to Request for Admission No. 174 and Applicant's responses to Interrogatories Nos. 6, 7, 8, 9, and 10 should be given no consideration, because Applicant failed to explain why its responses to these requests are needed to counter or neutralize the evidence that Opposer submitted with its Notices of Reliance. For the same reasons, the discovery deposition testimony that Applicant cited in its Supplemental Notice of Reliance should be given no consideration.

Opposer raised these objections in a motion to strike which was filed on July 29th (Docket No. 40.) On October 5th the Board issued an order stating that "applicant's explanation of its need to rely upon submitted evidence goes to the substance of the evidence" and that "any consideration of its relevance will be deferred until final hearing." (Order Dated Oct. 5, 2009 at 2.) The Board also noted that Opposer "should renew these objections in its brief on the case if it wishes to maintain them." (*Id.*)

Accordingly, Opposer hereby renews the objections that it asserted in its motion to strike (Docket No. 40) and respectfully submits that (i) Opposer's Request for Admission No. 174 and Applicant's response to that request, (ii) Applicant's responses to Interrogatories Nos. 6, 7, 8, 9, and 10, and (iii) the discovery deposition testimony that Applicant cited in its Supplemental Notice of Reliance should be excluded for the reasons set forth in sections of I.B, III.A, and III.B of Opposer's motion to strike.

If the Board sustains these objections, Opposer respectfully submits that the Board should give no consideration to pages 53 to 57, and 59 to 61 from the Weissman discovery deposition transcript, or Weissman deposition exhibit numbers 12 and 13, which were submitted under Opposer's Eleventh Notice of Reliance. Opposer submitted this evidence during the Rebuttal Period for the purpose of responding to

¹ Applicant provided citations to the portions of the discovery deposition testimony that it intends to rely upon in this proceeding, but did not submit copies of the actual pages from the deposition transcript. Opposer moved to strike Applicant's supplemental notice of reliance on that basis. (*See* Docket No. 40 at § I.A.) Applicant then submitted the missing pages as an exhibit to the brief that Applicant filed in response to Opposer's motion to strike. (*See* Docket No. 41.) Opposer argued that these pages should not be considered, because Applicant attached them to a legal brief (instead of submitting them with a notice of reliance as required by Rule 2.120(j)), and because Applicant did not submit these pages until more than a month after the deadline for submitting such evidence. (*See* Docket No. 44 at § I.A.) The Board denied Opposer's objections in its order dated October 5th (Docket No. 45.)

the discovery responses that Applicant improperly submitted under Exhibit 8 to its Notice of Reliance, and the deposition testimony that Applicant cited in its Supplemental Notice of Reliance. If the Board excludes the evidence that the Applicant has submitted, then there is no need for the Board to consider the rebuttal evidence that Opposer submitted in response to that evidence.

Conclusion

For the foregoing reasons, Opposer respectfully submits that the Board should exclude (a) all of the third-party trademark registrations that Applicant submitted under Exhibit 4 to its Notice of Reliance; (b) Opposer's Request for Admission No. 174 and Applicant's response to that request, which was submitted under Exhibit 8 to Applicant's Notice of Reliance; (c) Applicant's responses to Interrogatory Nos. 6, 7, 8, 9, and 10, which were submitted under Exhibit 8 to Applicant's Notice of Reliance; and (d) the discovery deposition testimony which Applicant cited in its Supplemental Notice of Reliance. In the event that the Board grants this request, Opposer submits that the Board should give no consideration to pages 53 to 57, and 59 to 61 from the discovery deposition of Applicant's president, William Weissman, which were submitted as rebuttal evidence under Opposer's Eleventh Notice of Reliance.

December 24, 2009

Respectfully submitted,



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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Opposer's Statement of Objections has been duly served by mailing such copy first class, postage prepaid to Erik M. Pelton, P.O. Box 100637, Arlington, VA 22210 on December 24, 2009.



Erik Bertin