

ESTTA Tracking number: **ESTTA186154**

Filing date: **01/11/2008**

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	01/11/2008
Attachments	AQUA JETT - response to motion to amend notice of opp FINAL.pdf (3 pages) (18139 bytes)

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

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

APPLICANT’S OPPOSITION TO OPPOSER’S
MOTION TO AMEND NOTICE OF OPPOSITION

Opposer has moved the Board to allow Opposer to amend its Notice of Opposition.

Applicant hereby responds to the Motion as follows:

The Notice of Opposition was filed nearly six (6) months ago by Opposer.

Opposer has now motioned this court to amend its Opposition due to Opposer’s acquisition of Registration No. 1660337 via an assignment which followed the settlement of Opposer’s Petition to Cancel the ‘337 registration.

Registration No. 1660337 is not relevant to the current Opposition.

The fact that Registration No. 1660337 issued to a third party despite Opposer’s registered marks at the time demonstrates the dilution of the word AQUA in the field of dental goods.

Upon information and belief, the AQUA FLOSS mark in the Registration recently acquired by Opposer is not being used in commerce. The basis for Opposer’s Petition to Cancel the AQUA FLOSS registration, filed on March 16, 2007, was abandonment. See Notice of Opposition at <http://ttabvue.uspto.gov/ttabvue/v?pno=92047246&pty=CAN&eno=1>.

Opposer's Amended Notice of Opposition does not allege any use of AQUA FLOSS by Opposer.

As a result of the foregoing, Opposer's ownership of Registration No. 1660337 is immaterial to the current proceeding.

Discovery in this proceeding is scheduled to end on February 9, 2008.

Applicant will be harmed and prejudiced by Opposer's Amended Notice of Opposition because the discovery period is almost complete. An extension of the discovery period will harm and prejudice Applicant because it will further delay the registration of its already approved mark.

A responsive pleading in this proceeding was filed long ago. As a result, pursuant to Rule 15 of Fed. R. Civ. P., Opposer cannot amend its pleading as a matter of course. When a party cannot amend as a matter of course, the party may amend its pleading only with the opposing party's written consent or the court's leave. *Id.* Here, because Opposer has not demonstrated that its ownership of Registration No. 1660337 would have any bearing on the issues in the proceeding, justice does not require or favor allowing Opposer to amend its Notice and delay the proceeding.

Because Opposer's recent acquisition of the registration for AQUA FLOSS does not affect the issues presented in the proceeding, and Opposer has not alleged any actual use of AQUA FLOSS, Applicant hereby requests the Board deny Opposer's Motion to Amend Notice of Opposition.

Dated: January 11, 2008.

