

ESTTA Tracking number: **ESTTA546041**

Filing date: **07/01/2013**

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

Proceeding	91210367
Party	Plaintiff Roche Diagnostics GmbH, Roche Diagnostics Operations, Inc.
Correspondence Address	James A. Coles Taft Stettinius & Hollister One Indiana Square Indianapolis, IN 46204 UNITED STATES efsttaps@taftlaw.com, zgordon@taftlaw.com
Submission	Motion for Summary Judgment
Filer's Name	James A. Coles
Filer's e-mail	jcoles@taftlaw.com , efsttab@Taftlaw.com, zgordon@taftlaw.com
Signature	/James A. Coles/
Date	07/01/2013
Attachments	Motion - MSJ and MTS - ROCHE_Arriva Medical .pdf(13370 bytes ) Brief - 3.1MTS and pMSJ - ARRIVA MEDICAL (zg).pdf(50809 bytes )

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

Roche Diagnostics GmbH, and Roche Diagnostics Operations, Inc.  Opposers,  v.  Arriva Medical, LLC,  Applicant.	In the Matter of Trademark Serial No.: 85/339,161  Applicant's Mark: ARRIVA MEDICAL  <b>Opposition No.: 91210367</b>
---	---

**OPPOSER'S MOTION FOR PARTIAL SUMMARY JUDGMENT  
AND MOTION TO STRIKE**

Opposers, Roche Diagnostics GmbH, and Roche Diagnostics Operations, Inc. ("Roche") move for partial summary judgment and to strike Applicant's asserted affirmative defenses of estoppel by laches, estoppel by acquiescence, estoppel and waiver, under Fed.R.Civ.P. 56, and/or Fed.R.Civ.P. 12(f), and request that proceedings be suspended pursuant to 37 C.F.R. § 2.127(d).

Pursuant to Federal Rule of Civil Procedure 56(a) and T.B.M.P Rule 528, Roche moves for summary judgment on the affirmative defense of estoppel by laches. Roche also moves to strike the affirmative defenses of estoppel by acquiescence, estoppel, and waiver because they are insufficiently pled, inapplicable, and /or duplicative under TBMP 506 and Fed.R.Civ.P. 12(f). The undisputed facts conclusively establish these issues as explained in the brief filed in support of this motion.

WHEREFORE, Roche respectfully requests that the Board enter summary judgment in Roche's favor, grant this motion to strike, and issue an order dismissing and striking Arriva Medical LLC's affirmative defenses of laches, acquiescence, estoppel, and waiver. Norwood further requests that proceedings be suspended pursuant to 37 C.F.R. § 2.127(d).

Dated: July 1, 2013

Respectfully submitted,

/James A. Coles/

James A. Coles

Jonathan G. Polak

M. Zach Gordon

TAFT STETTINIUS & HOLLISTER LLP

One Indiana Square, Suite 3500

Indianapolis, Indiana 46204-2023

Email: [jcoles@taftlaw.com](mailto:jcoles@taftlaw.com)

[jpolak@taftlaw.com](mailto:jpolak@taftlaw.com)

[zgordon@taftlaw.com](mailto:zgordon@taftlaw.com)

Attorneys for Opposers,  
*Roche Diagnostics GmbH, and  
Roche Diagnostics Operations*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 1, 2013, a true and correct copy of the foregoing was sent to the following parties by First Class U.S. Mail in a sealed, postage prepaid, envelope which was deposited with the United States Postal Service.

Jean M. Maxwell  
Alere Inc.  
51 Sawyer Road, Suite 200  
Waltham, MA 02453  
UNITED STATES  
Jean.Maxwell@alere.com

/M. Zach Gordon/  
M. Zach Gordon  
TAFT STETTINIUS & HOLLISTER LLP  
One Indiana Square, Suite 3500  
Indianapolis, Indiana 46204-2023  
Telephone: 317-713-3500  
Facsimile: 317-713-3699

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

Roche Diagnostics GmbH, and Roche Diagnostics Operations, Inc.  Opposers,  v.  Arriva Medical, LLC,  Applicant.	In the Matter of Trademark Serial No.: 85/339,161  Applicant's Mark: ARRIVA MEDICAL  <b>Opposition No.: 91210367</b>
---	---

**BRIEF IN SUPPORT OF OPPOSER'S MOTION FOR PARTIAL SUMMARY  
JUDGMENT AND MOTION TO STRIKE**

Opposers, Roche Diagnostics GmbH, and Roche Diagnostics Operations, Inc. ("Roche") respectfully submit the following brief on their Motion for Partial Summary Judgment and Motion to Strike Applicant's asserted affirmative defenses of estoppel by laches, estoppel by acquiescence, estoppel, and waiver, under Fed.R.Civ.P. 56, TBMP 506 and Fed.R.Civ.P. 12(f), and request that proceedings be suspended pursuant to 37 C.F.R. § 2.127(d).

James A. Coles  
Jonathan G. Polak  
M. Zach Gordon  
TAFT STETTINIUS & HOLLISTER LLP  
One Indiana Square, Suite 3500 Indianapolis,  
Indiana 46204 Telephone: 317.713.3500  
Facsimile: 317.713.3699  
[jpolak@taftlaw.com](mailto:jpolak@taftlaw.com)  
[zgordon@taftlaw.com](mailto:zgordon@taftlaw.com)

Attorneys for Opposers,  
*Roche Diagnostics GmbH, and  
Roche Diagnostics Operations, Inc.*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	3
II.	STATEMENT OF ISSUES .....	4
III.	STATEMENT OF UNDISPUTED FACTS .....	4
IV.	ARGUMENT .....	5
	A. <i>The Legal Standard</i> .....	5
	B. <i>The Undisputed Facts Support the Determination that Applicant’s             Affirmative Defenses Must be Dismissed or Stricken             from this Opposition Proceeding</i> .....	6
	1. Estoppel by Laches – Summary Judgment .....	6
	2. Estoppel by Acquiescence – Motion to Strike .....	8
	3. Estoppel and Waiver – Motion to Strike .....	10
VI.	CONCLUSION .....	11
VII.	CERTIFICATE OF SERVICE.....	12

## **I. Introduction**

Opposers, Roche Diagnostics GmbH, and Roche Diagnostics Operations, Inc. (“Roche”) submit their Motion for Partial Summary Judgment and Motion to Strike, Applicant’s asserted affirmative defenses of estoppel by laches, estoppel by acquiescence, estoppel, and waiver, under Fed.R.Civ.P. 56, or in the alternative TBMP 506 and Fed.R.Civ.P. 12(f), and request that proceedings be suspended pursuant to 37 C.F.R. § 2.127(d).<sup>1</sup> Roche objects to Applicant, Arriva Medical, LLC’s, Application, Serial No. 85339161 (“the Application”) to register the term ARRIVA MEDICAL. Applicant filed the Application for the term ARRIVA MEDICAL (the “Mark”) on June 6, 2011. Roche, a competitor, manufacturer, and worldwide seller of medical devices, objects and opposes the Application. Roche bases its opposition on the grounds that the Mark is confusingly similar to Roche’s ACCU-CHEK AVIVA trademark which is the subject of registration, U.S. Reg. No. 3071846 (the “Registration”). The Registration has priority over Applicant’s use of the Mark and is used in association with similar, if not identical, goods. Moreover, significant instances of actual confusion have occurred between the Parties with respect to the Mark.

In its Answer to this Opposition proceeding, Applicant has raised the affirmative defenses of estoppel by laches, estoppel by acquiescence, estoppel, and waiver. For the Board to permit these affirmative defenses in this Opposition proceeding would run counter to longstanding U.S. federal law and United States Patent & Trademark Office (“U.S.P.T.O”) precedent. Specifically, this precedent holds that the clock for the determination of estoppel by laches does not begin to run until a mark is published for opposition, and that alleged estoppel by acquiescence as to *use* is irrelevant

---

<sup>1</sup> Although Roche now moves for partial summary judgment under Fed.R.Civ.P. 56, or in the alternative, a motion to strike under TBMP 506 and Fed.R.Civ.P. 12(f), the relief requested under each theory is the same. Under each theory, Roche respectfully requests that Applicant’s laches, acquiescence, estoppel, and waiver affirmative defenses be dismissed or stricken as precluded, defective, and/or inapplicable as a matter of law.

with respect to the issue of acquiescence as to *registration*. Applicant's waiver and estoppel affirmative defenses are barred because they are either unsupported or duplicative. Based on the foregoing precedent and the indisputable facts in this case, the Board must enter partial summary judgment in favor of Roche and dismiss Applicant's estoppel by laches, estoppel by acquiescence, estoppel, and waiver affirmative defenses as precluded, defective, and/or inapplicable as a matter of law.

## **II. Statement of Issues**

1. Must summary judgment be granted to Opposers because the Applicant's affirmative defenses of laches, acquiescence, estoppel, and waiver are inapplicable to an opposition proceeding as a matter of law?
2. In the alternative, should the affirmative defenses of laches, acquiescence, estoppel, and waiver be stricken because they are inapplicable to an opposition proceeding as a matter of law?

## **III. Statement of Undisputed Facts**

1. On June 6, 2011, Arriva Medical filed the Application with the United States Patent and Trademark Office ("USPTO"). (Ex. A-1.)
2. Applicant has applied to register the mark "ARRIVA MEDICAL" for use in International Class 010 in association with "Medical test equipment, namely, blood glucose meters, lancing devices and lancets for diabetes monitoring" and in International Class 035 in association with "Online and telephonic retail store services featuring medical test equipment and supplies for diabetes monitoring accessible." (Dkt. 1.) (Ex. A-1.)
3. On April 24, 2013, Roche timely opposed registration of the Mark by filing its Notice of Opposition to the Application. (Dkt. 1.)
4. Roche's Notice of Opposition conforms with all U.S.P.T.O. and T.T.A.B. timing requirements and was therefore timely filed.
5. On June 3, 2013, Applicant filed its Answer in the above-captioned proceeding and asserted the affirmative defenses of estoppel by "laches," estoppel by "acquiescence," "estoppel," and "waiver." (Dkt. No. 4.)

6. The letters (correspondence between Roche and Applicant, identified in Applicant's Answer, Dkt. No. 4) are Applicant's only basis for its estoppel by "laches," estoppel by "acquiescence," "estoppel" and "waiver" affirmative defenses.
7. In its Answer, Applicant makes no allegation that Roche acquiesced to Applicant *registering* the Mark (as opposed to *using* the Mark).
8. Roche has never, at any time, acquiesced to Applicant *registering* the Mark.
9. Applicant has not previously attempted to register any mark similar to the Mark with the U.S.P.T.O.

#### **IV. Argument**

##### **A. *The Legal Standard***

Under Fed.R.Civ.P. 56(a), "The [Board] shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The Federal Circuit has stated that, "The basic purpose of summary judgment procedure is...to save the time and expense of a full trial when it is unnecessary because the essential facts necessary to decision of the issue can be adequately developed by less costly procedures..." *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 222 USPQ 741 (Fed. Cir. 1984); *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879, 1881 (Fed. Cir. 1996); *Dana Corp. v. Belvedere International Inc.*, 950 F.2d 1555, 21 USPQ2d 1047 (Fed. Cir. 1991).

A motion for summary judgment may be filed prior to, or concurrently with, initial disclosures if it asserts claim or issue preclusion. 37 CFR § 2.127(e)(1). "Equitable defenses may not be available against certain grounds for opposition or under certain circumstances. For example, **the availability of estoppel, acquiescence, and waiver defenses are severely limited in opposition and cancellation proceedings.**" TBMP Rule 311.02(b)(2009) (*emphasis added*).

Fed.R.Civ.P. 8(b) requires that any defense to a claim be stated in short and plain terms. T.T.A.B. Rule 311.02(b) states that "[t]he elements of a defense should be stated simply, concisely

and directly” and “should include enough detail to give the plaintiff fair notice of the basis for the defense.” Bald and conclusory allegations are insufficient under this standard, in that they fail to provide fair notice of the basis for a claim or set forth sufficient facts that, if proven, support the claim. T.T.A.B. Rule 311.02(b) (citing *McDonnell Douglas Corporation v. National Data Corporation*, 228 U.S.P.Q. 45 (T.T.A.B. 1985)). Under Rule 8(a)'s notice pleading standard, affirmative defenses, including "(l)aches, waiver, estoppel, and unclean hands...must be plead with the specific elements required to establish the defense" or be dismissed or stricken. *Software Publr. Ass 'n v. Scott & Scott, LLP*, 2007 U.S. Dist. LEXIS 59814 (N.D. Tex. 2007).

Summary judgment is appropriate in a T.T.A.B. proceeding on the issue of whether an affirmative defense should be dismissed as barred, precluded, and/or inapplicable. *Nike, Inc. v. Gregory A. Bordes*, Opposition No. 91178960, Dkt. No. 35, at 16 (T.T.A.B. September 30, 2009); *See e.g. DAK Ind. Inc. v. Daiichi Kosho Co. Ltd.*, 25 U.S.P.Q.2d 1622 (T.T.A.B. Sept. 30, 1992). In the alternative, in appropriate cases “the Board may order stricken from a pleading any insufficient defense [...]. The Board also has the authority to strike an impermissible or insufficient claim or portion of a claim from a pleading.” TMBP Rule 506.01; Fed.R.Civ.P. 12(f).

**B. *The Undisputed Facts Support the Determination that Applicant’s Affirmative Defenses Must be Dismissed or Stricken from this Opposition Proceeding***

1. Estoppel by Laches - Summary Judgment

Applicant’s estoppel by laches affirmative defense is precluded and must be dismissed. As the Board has repeatedly noted, “**the affirmative defense of laches is inapplicable in opposition proceedings.**” *Nike, Inc. v. Gregory A. Bordes*, Opposition No. 91178960, Dkt. No. 35, at 16 (T.T.A.B. September 30, 2009)(emphasis added); *See e.g. National Cable Television Ass’n Inc. v. Am. Cinema Editors Inc.*, 19 USPQ2d 1424, 1432 (Fed. Cir. 1991); *James Burrough, Ltd. v. La Joie*,

462 F.2d 570, 174 USPQ 329 (C.C.P.A. 1972); *DAK Ind. Inc. v. Daiichi Kosho Co. Ltd.*, 25 U.S.P.Q.2d 1622, 1624 (T.T.A.B. Sept. 30, 1992); *Guide to T.T.A.B. Practice*, Handelman, Jeffery, 2003, Section 11.03[I].

An opposition proceeding involves not the right to *use* the mark, but rather the right to *register* it. *Warner-Lambert v Sports Solutions* 1996 WL475253, 39 U.S.P.Q.2d 1686, 1691, (T.T.A.B. 1996). As the Board explained in *Warner-Lambert*, when an applicant's mark is published for opposition, and an opposer, having requested and been granted one extension of time to oppose, files a timely notice of opposition, **“applicant's asserted affirmative defenses of laches and estoppel must fail as a matter of law.”**<sup>2</sup> *Id.* (emphasis added); See *Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes Inc.*, 971 F.2d 732, 23 USPQ2d 1701 (Fed. Cir. 1992); *National Cable Television Association v. American Cinema Editors Inc.*, 937 F.2d 1572, 19 USPQ2d 1424 (Fed. Cir. 1991); *Coach House Restaurant Inc. v. Coach and Six Restaurants Inc.*, 934 F.2d 1551, 19 USPQ2d 1401 (11th Cir. 1991).

In the present proceeding, Applicant is precluded from asserting the affirmative defense of estoppel by laches because it is undisputed fact that Roche timely filed this opposition in accordance with T.T.A.B. procedure, and properly alleged that it will be damaged by registration of the Application. (Undisputed Fact Nos. 3 & 4.) For a trademark opposition under 15 U.S.C. § 1063, the time period for determining laches does not begin to run the application has been published for opposition. *Nike, Inc. v. Gregory A. Bordes*, Opposition No. 91178960, Dkt. No. 35, at 16 (T.T.A.B. September 30, 2009); See e.g. *National Cable Television Ass'n, Inc.*, 19 USPQ2d at 1427. Applicant

---

<sup>2</sup> The Board's position that no undue delay can exist in a timely filed opposition proceeding is simple.: “The Court [in *National Cable Television*] could not have been clearer: the period which we consider in determining whether a plaintiff unduly delayed in bringing an action before the Board begins with the publication of the mark in the Official Gazette. Before then, no opposition is possible.” *DAK Ind. Inc.*, 25 U.S.P.Q.2d at 1624. Summary judgment is appropriate on this issue. *Nike, Inc. v. Gregory A. Bordes*, Opposition No. 91178960, Dkt. No. 35, at 16 (T.T.A.B. September 30, 2009); See e.g. *DAK Ind. Inc. v. Daiichi Kosho Co. Ltd.*, 25 U.S.P.Q.2d 1622 (T.T.A.B. Sept. 30, 1992).

has presented no allegations related to any delay by Roche that occurred after the Mark was published for Opposition. Since Roche filed its Notice of Opposition within the period provided by statute, Applicant's affirmative defense of estoppel by laches must be dismissed with prejudice.

2. Estoppel by Acquiescence - Motion to Strike

“The defense of acquiescence is a type of estoppel predicated upon conduct of a plaintiff that, expressly or by clear implication, assents to, encourages, or furthers the activity on the part of the defendant, which is now objected to.” *Hitachi Metals Int., Ltd. V. Yamakyu Chain Kabushiki Kaisha*, 209 USPQ1057, 1067 (T.T.A.B. 1981). In the context of a T.T.A.B. opposition, **acquiescence is tied to a mark's registration, not its use.** *Krause v. Krause Publications, Inc.*, 76 USPQ2d 1904 (T.T.A.B. 2005); citing *Salem Commodities, Inc. v. Miami Margarine Co.*, 44 C.C.P.A. 932, 936-37 (C.C.P.A. 1957). “Under § 7(b) of the Lanham Act, 15 U.S.C. 1057(b), registration is more than evidence of the right to use. It is prima facie evidence of the validity of the registration, registrant's ownership of the mark, and of registrant's exclusive right to use the mark in commerce *in connection with the goods or services specified in the certificate*, subject to any conditions and limitations stated therein.” *Krause v. Krause Publications, Inc.*, 76 USPQ2d at 1914 (emphasis in original). Consequently, allegations related to acquiescence as to *use* are inapplicable to a T.T.A.B. dispute which involves whether acquiescence to *register* with the U.S.P.T.O. has been granted.

Following this logic, the Board has determined that it “is clear, therefore, that the equitable defense of acquiescence in an opposition or cancellation proceeding does not begin to run until the mark is published for opposition.” *Id.*; *Guide to T.T.A.B. Practice*, Handelman, Jeffery, 2003, Section 11.04[D]; *See Salem Commodities, Inc. v. Miami Margarine Co.*, 44 C.C.P.A. 932, 936-37. An opposer cannot properly be charged with acquiescence in Applicant's right to registration until

the opposer becomes aware that such a right to register has been asserted by Applicant, that is, until Applicant's mark is published for opposition. *Krause v. Krause Publications, Inc.*, 76 USPQ2d at 1913-14; *Salem Commodities, Inc. v. Miami Margarine Co.*, 44 C.C.P.A. 932, 936-37; *See also Coach House Restaurant, Inc. v. Coach and Six Restaurants, Inc.*, 934 F.2d 1551, 1558-59 (11<sup>th</sup> Cir. 1991). Therefore, for estoppel by acquiescence to be raised in an opposition proceeding, *applicant must allege* that the opposer/registrant specifically consented to the applicant's **registration** of a mark, independent of any consent to use a mark.<sup>3</sup> *Id.*; *See Clinton Detergent Co. v. Procter & Gamble Co.*, 302 F.2d 745, 749 (C.C.P.A. 1962); *James Burrough, Ltd. v. La Joie*, 462 F.2d 570, 174 USPQ 329 (C.C.P.A. 1972).

In this proceeding, Applicant is barred from asserting the affirmative defense of estoppel by acquiescence. In paragraph 2 of the Affirmative Defenses in Applicant's Answer, Arriva Medical attempts to raise the issues of "acquiescence" with respect to Roche's likelihood of confusion opposition. (Dkt. No. 4.) It is undisputed that Applicant has failed to allege that Roche acquiesced to Applicant's **registration** of the Mark (Undisputed Fact No. 7) and the letters included in Applicant's answer do not speak to the issue of registration. (Dkt. No. 4.) Moreover, Applicant has wholly failed to allege that Roche acquiesced in any way to Applicant's use or registration of the Mark **after** the Mark was published for opposition. Indeed, Roche's Notice of Opposition is itself evidence that Roche has not acquiesced to the registration of the Mark by Applicant. (Dkt. No. 1.) Because none of the allegations Applicant has included in its Answer, including the letters upon which Applicant's affirmative defenses are based, relate to *registration* of the Mark or date to a time after the notice of publication, Applicant's affirmative defense of estoppel by acquiescence should be dismissed or stricken.

---

<sup>3</sup> Roche denies Applicant's allegations that Roche acquiesced to Applicant's *use* of the Mark. However, even if these allegations were true, they could not constitute the acquiescence with respect to *registration* that is necessary in a TTAB Opposition proceeding.

3. Estoppel and Waiver - Motion to Strike

The assertion of an affirmative defense that fails to give an opposer or the Board any factual basis for the defense and is insufficient on its face must be stricken or dismissed. *See Castro v. Cartwright*, Opposition No. 91188477, Dkt. No. 12 (T.T.A.B. Sept. 5, 2009). Applicant has made no allegations related to estoppel or waiver other than those that relate directly to the letters included in Applicant's Answer and relate to laches or acquiescence. (*See* Dkt. No. 4.) No independent facts or basis to support a defense are alleged.

The court in *Reis Robotics USA* rejected and struck affirmative defenses materially identical to the affirmative defenses of estoppel and waiver Applicant has raised in this proceeding. *Reis Robotics USA, Inc. v. Concept Industries, Inc.*, 462 F. Supp.2d. 897, 907 (N.D. III. 2006); *See Castro*, Opposition No. 91188477, Dkt. No. 12. In striking those defenses, the court held that "[m]erely stringing together a long list of legal defenses is insufficient to satisfy Rule 8(a)." *Id.* The court determined, "[i]t is unacceptable for a party's attorney simply to mouth [affirmative defenses] in formula-like fashion ('laches,' 'estoppel,' statute of limitations,' or what have you), for that does not do the job of apprising opposing counsel and this Court of the predicate for the claimed defense—which after all is the goal of the pleading." *Id.* (internal citations omitted).

In this proceeding, Applicant's allegations concerning the affirmative defenses of estoppel and waiver are unsupported. Indeed, apart from the allegations concerning its affirmative defenses of estoppel by laches and estoppel by acquiescence, which are inapplicable and must be dismissed, Applicant has not presented any allegations what so ever supporting the distinct affirmative defenses of estoppel and waiver. Consequently, these affirmative defenses are either unsupported and therefore improper or duplicative of estoppel by laches and estoppel by

acquiescence. *Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995) (defense stricken as redundant); *See also American Vitamin Products, Inc. v. Dow Brands Inc.*, 22 USPQ2d 1313, 1314 (TTAB 1992) (insufficient affirmative defenses stricken) Based on the foregoing, Applicant's estoppel and waiver affirmative defenses must be stricken or dismissed from this proceeding.

## **VI. CONCLUSION**

For the foregoing reasons, the Roche Diagnostics GmbH, and Roche Diagnostics Operations, Inc. respectfully requests that the Board issue an order dismissing and/or striking, Arriva Medical LLC's affirmative defenses of estoppel by laches, estoppel by acquiescence, estoppel, and waiver. Further, Roche Diagnostics GmbH, and Roche Diagnostics Operations, Inc. respectfully requests that the Board issue an order suspending these proceedings pursuant to 37 C.F.R. § 2.127(d).

Dated: July 1, 2013

Respectfully submitted,

/James A. Coles/  
James A. Coles  
Jonathan G. Polak  
M. Zach Gordon  
TAFT STETTINIUS & HOLLISTER LLP  
One Indiana Square, Suite 3500  
Indianapolis, Indiana 46204-2023  
Email: [jcoles@taftlaw.com](mailto:jcoles@taftlaw.com)  
[jpolak@taftlaw.com](mailto:jpolak@taftlaw.com)  
[zgordon@taftlaw.com](mailto:zgordon@taftlaw.com)

Attorneys for Opposers,  
*Roche Diagnostics GmbH, and*  
*Roche Diagnostics Operations*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 1, 2013, a true and correct copy of the foregoing was sent to the following parties by First Class U.S. Mail in a sealed, postage prepaid, envelope which was deposited with the United States Postal Service.

Jean M. Maxwell  
Alere Inc.  
51 Sawyer Road, Suite 200  
Waltham, MA 02453  
UNITED STATES  
Jean.Maxwell@alere.com

/M. Zach Gordon/  
M. Zach Gordon  
TAFT STETTINIUS & HOLLISTER LLP  
One Indiana Square, Suite 3500  
Indianapolis, Indiana 46204-2023  
Telephone: 317-713-3500  
Facsimile: 317-713-3699