

AFFIDAVIT OF JEFF KARR

I, Jeff Karr, state as follows:

1. I am the Archivist at the American Society for Microbiology (“ASM”). I have held this position at the ASM for over 20 years. Specifically, I was the Archivist at the ASM in 1996. I make this declaration of my own personal knowledge.
2. I manage the ASM collection at the Albin O. Kuhn Library & Gallery at the University of Maryland, Baltimore County. My job includes receiving ASM documents from headquarters, such as documents and publications related to ASM scientific meetings, including the abstract books for these meetings. I catalog and archive these documents, and ensure that they are available to the public.
3. I am knowledgeable regarding ASM’s publication procedures and have access to ASM’s publication records and archives which go back to ASM’s formation in 1899.
4. I have been asked to report the date that the following abstracts, presented at the 36th Interscience Conference on Antimicrobial Agents and Chemotherapy (“ICAAC”), an annual meeting of the ASM, were made available to the public: Abstract F78 (H. Ogura, et al., “KP-103 a Novel

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Topical Antifungal Triazole: Structure-Activity Relationships of Azolylamine Derivatives”), Abstract F79 (Y. Tatsumi, et. al., “*In Vitro* Activity of KP-103, a Novel Topical Antifungal Triazole”), and Abstract F80 (Y. Tatsumi, et al., “Therapeutic Efficacy of KP-103, a Novel Topical Antifungal Triazole, on Experimental Superficial Mycoses”) (collectively, “Kaken Abstracts”).

5. Based on my experience working at ASM, I confirm that it is the ASM’s usual practice to distribute scientific meeting abstracts either before the start of the scientific meeting or during the meeting itself.
6. The 36th ICAAC was held from September 15 – 18, 1996.
7. ASM’s records show that the Kaken Abstracts were published in a book (“Abstracts Book”) that was made available to conference participants (i.e., the public) both before the start of and during the 36th ICAAC. Attached hereto as Exhibit A is a true and accurate copy of various pages from the Abstracts Book, including the title page, the copyright page, page iii (containing the table of contents), and page 113 (containing the Kaken Abstracts).
8. ASM publishes a monthly newsletter called the ASM News. I recall that, in 1996, the ASM News was printed and mailed to ASM members each month.

9. The August 1996, issue of the ASM News contained a supplement entitled “Preliminary Program of the 36th ICAAC” (“Preliminary Program.”) A true and accurate copy of various pages of the Preliminary Program is attached hereto as Exhibit B.
10. I am not aware of the exact date that the August 1996 issue of the ASM News and the Preliminary Program were mailed to ASM members. Based on my experience at ASM, however, it was likely mailed to members at the end of July or the beginning of August 1996.
11. Page 4 of the Preliminary Program indicates that the Abstracts Book was provided to attendees of the 36th ICAAC during the preregistration period. The preregistration period occurred prior to the start of the meeting (i.e. before September 15, 1996). Specifically, page 4 of the Preliminary Program states that:

All registrants will receive a copy of the Program and the Abstracts Book as part of the registration fee. These books are mailed to all U.S. and Canadian preregistrants. Canadian preregistrants can pay an optional fee of \$20 to have these books shipped via Federal Express (see registration form). Preregistered attendees in international locations may receive the Program and Abstracts Books (via Federal Express) before the meeting for an additional fee of \$30 (see registration form). If the optional delivery fee is not paid by an international preregistrant, then one copy of each book can be picked up on site at the Preregistration Desk by presenting the Attendee Locator card that is mailed with the badge. Every effort is made to

ensure that Abstracts Books are available at the meeting for purchase by on-site registrants. However, should on-site registration exceed expectations, we cannot guarantee that our supply of Abstracts Books will meet the needs of all on-site registrants. If available, copies of the Abstracts Book may be ordered after the meeting by calling ASM Publication Sales at 703-787-3305.

12. The statements on page 4 of the Preliminary Program confirm that the Abstract Book for the 36th ICAAC, which contains the Kaken Abstracts, was available to preregistered meeting participants in advance of the start of the conference (i.e. before September 15, 1996). Page 4 indicates that the Abstracts Book was mailed to U.S. and Canadian preregistrants, and that preregistered attendees in international locations could receive the Program and Abstracts Books (via Federal Express) before the meeting by paying an additional fee of \$30.
13. The Preliminary Program does not indicate the earliest exact date that the Abstracts Book was made available to the public. However, the cover page of the Preliminary Program indicates that the discounted preregistration deadline was July 12, 1996. Accordingly, it is evident that the Abstract Books were made available to preregistered meeting participants sometime between July 12, 1996 (discounted preregistration deadline) and September 15, 1996 (start of the meeting).

14. The statements on page 4 of the Preliminary Program confirm that the Abstracts Book was also available to participants during the meeting. Specifically, participants could pick up the Abstracts Book “on site at the Preregistration Desk by presenting the Attendee Locator card that is mailed with the badge.” Further, the Abstracts Book was “available at the meeting for purchase by on-site registrants.” Thus, these statements on page 4 of the Preliminary Program confirm that the latest possible day that the Abstracts Books containing the Kaken Abstracts were publicly available was the first day of the 36th ICAAC (i.e. September 15, 1996).
15. Notably, the cover page of the Preliminary Program indicates that the deadline for receipt of “Late-Breaker” abstracts was August 23, 1996. The Late-Breaker abstracts were not included in the Abstracts Book. Instead, they were included in a separate book, the “Program Addendum,” that also contained program listings (the time, date and location where the late breaking science would be presented). The Program Addendum was made available to attendees, at the latest, by the time the meeting started on September 15, 1996.
16. However, the Kaken Abstracts were not among the Late-Breaker abstracts. Late-Breaker abstracts were assigned identification numbers starting with

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