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

Proceeding	91154688
Party	Defendant Pearpoint Limited Pearpoint Limited Pearpoint House 47 Woolmer Way GBX Bordon Hampshire GU35 9QE,
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Submission	Motion to Dismiss 2.132
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Sreco-Flexible, Inc.,	)	
	)	
v.                   Opposer,	)	Opposition No. 91154688
	)	Application Serial No. 76/399,109
	)	Mark: FLEXI-CAM
	)	Publication Date: October 29, 2002
	)	
Radiodetection Limited,	)	
By Assignment from Pearpoint Limited	)	
	)	
Applicant.	)	
	)	

**APPLICANT’S MOTION FOR JUDGMENT FOR  
FAILURE OF OPPOSER TO TAKE TESTIMONY**

Pursuant to 37 C.F.R. § 2.132(a), Applicant moves the Board to enter an Order dismissing the above-referenced opposition proceeding with prejudice, for failure of Opposer to take testimony. Opposer’s testimony period closed on August 29, 2006.

**STATEMENT OF MATERIAL FACTS NOT IN DISPUTE**

1. The Board issued an Order on December 2, 2005 resuming the proceeding. The Order stated that the discovery period was to close on May 31, 2006; Opposer’s testimony period would close on August 29, 2006; Applicant’s testimony period would close on October 28, 2006; and Opposer’s rebuttal testimony period would close on December 12, 2006. The Applicant was also afforded thirty (30) days from mailing date of the Order to file its Answer in this proceeding.
2. The Board mailed the December 2, 2005 Order to both parties’ counsel of record at their respective addresses of record.
3. On January 3, 2006, Applicant timely filed its Answer in this proceeding.
4. During the discovery period, which expired on May 31, 2006, Opposer’s counsel, Mr. Sean M. Casey, failed to conduct any forms of discovery on Applicant.

5. The testimony period of Opposer expired on August 29, 2006. No Notices of Testimony Deposition were ever received by Applicant prior to that date. No Notices of Reliance have been received by Applicant on or after that date. Opposer adduced absolutely no evidence.

6. Mr. Hines, Applicant's counsel, has attempted to contact Mr. Casey on several occasions regarding this proceeding but has been informed that Mr. Casey is no longer employed at Mr. Casey's last known place of employment, The Webb Law Firm. In fact, the Office Administrator for The Webb Law Firm does not even know where Mr. Casey is now employed.

### **ARGUMENT AND RELIEF SOUGHT**

This Motion by Applicant is timely, since the Board may, in its discretion under 37 C.F.R. §2.132(c), grant such a motion even if the motion is filed after the opening of the testimony period of the moving party. See also *Hewlett-Packard Co. v. Olympus Corp.*, 18 U.S.P.Q.2d 1710 (Fed. Cir. 1991).

The Board's rules governing failure to take testimony are not ambiguous. The language of 37 C.F.R. §2.132(a) refers only to a "time for taking testimony by any party in the position of plaintiff has expired." That time expired now over a month ago – in fact, almost two months ago - without any testimony or other evidence being offered by Opposer. It appears that Mr. Casey, Opposer's counsel, has simply disappeared and neglected this proceeding. Applicant should not suffer or have its application refused in light of Opposer's derelict treatment of this proceeding. There is no factual scenario that Mr. Casey could present to turn his failure to prosecute this proceeding into a situation of "excusable neglect."

The sole pleaded ground for the opposition is a likelihood of confusion pursuant to Title 15, United States Code, §1052(d), and no *prime facie* case has been made by Opposer. There is nothing for Applicant to respond to during its testimony period. Statement made by Opposer in its Notice of Opposition as to its standing and/or its belief that there is a likelihood of confusion are not now in evidence. See TBMP §706. Likewise, there is no statement in the Answer which constitutes an admission against interest sufficient to establish a *prime facie* case of likelihood of confusion. Hence, there is no testimony and no documentary evidence of record whatsoever, to support any of Opposer's allegations.

### **CONCLUSION**

Applicant respectfully requests entry of an Order dismissing the above-referenced proceeding, with prejudice, and enter judgment in favor of Applicant, for failure of Opposer to

take testimony, in accordance with 37 C.F.R. §2.132(a). Should the Board, nonetheless, deny this Motion, Applicant requests that its full testimony period be reset pursuant to 37 C.F.R. §2.132(a).

Respectfully submitted,

**RADIODETECTION LIMITED**

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing **APPLICANT'S MOTION FOR JUDGMENT FOR FAILURE OF OPPOSER TO TAKE TESTIMONY** was served via first-class mail, postage prepaid on this 24th day of October, 2006 to the following:

Sean M. Casey, Esq.  
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436 Seventh Avenue  
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By: Rebecca L. Roby  
Rebecca L. Roby