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

Proceeding	91185884
Party	Defendant Imagini Holdings Ltd
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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

Dating DNA LLC, Opposer/Respondent, v. Imagini Holdings Ltd., Applicant/Petitioner.	Consolidated Opposition Nos.: 91185884/91191912 **APPLICANT/PETITIONER'S MOTION FOR DISMISSAL UNDER TRADEMARK RULE 2.132(a) FOR FAILURE OF THE OPPOSER/RESPONDENT TO PROSECUTE**

Applicant/Petitioner Imagini Holdings Ltd. ("Applicant") hereby requests that the Board dismiss the Opposition Nos. 91185884 and 91191912 ("Consolidated Oppositions") above pursuant to Trademark Rule 2.132(a) due to Opposer/Respondent Dating DNA LLC's ("Opposer") failure to prosecute these matters. Since the Board issued its order on February 22, 2010, consolidating the above-captioned proceedings and denying Opposer's motions to reopen and compel discovery, Opposer has failed to take testimony or offer any evidence prior to the end of its testimony period on November 3, 2010. Because Opposer brought this proceeding and has the burden of moving forward in a timely manner in accordance with the established schedule, the Board should grant Applicant's motion to dismiss the Consolidated Oppositions under Trademark Rule 2.132(a).

STATEMENT OF FACTS

Opposer filed its Oppositions against Applicant on August 19, 2008 and September 14, 2009, respectively. On February 12, 2009, the deadline for Initial Disclosures in Opposition No. 91185884, Applicant timely served Opposer with its Initial Disclosures. Applicant received no response from Opposer and was not served with Opposer's Initial

Disclosures by the deadline. On May 7, 2009, after several attempts to contact Opposer regarding possible settlement with no response, Applicant served Opposer with discovery requests. Opposer served documents and responses to Applicant's discovery requests on June 9, 2009, and on that same day, served its own discovery requests on Applicant. The discovery period in Opposition No. 91185884 closed on July 12, 2009. Opposer did not request to extend the discovery period. Opposer then served its Initial Disclosures upon Applicant on July 29, 2009, five and a half months after the due date for the Initial Disclosures had passed, more than two weeks after the discovery period had closed and after Applicant had informed Opposer that it would not be responding to Opposer's discovery requests due to Opposer's having failed to file its Initial Disclosures. After serving its untimely Initial Disclosures, Opposer made no attempt to serve its discovery requests. On August 25, 2009, Opposer filed motions to reopen and compel discovery which Applicant opposed. The Board denied Opposer's motion to reopen and compel discovery, finding that Opposer had not established excusable neglect necessary to reopen the discovery period. The Board granted Opposer's motion to consolidate Opposition No. 91185884 and 91191912. Opposer then failed to serve expert disclosures by the July 6, 2010 deadline. Opposer then failed to serve its pretrial disclosures by its September 19, 2010 deadline. Opposer's testimony period ended on November 3, 2010. Opposer did not take any testimony or offer any other evidence prior to the end of its testimony period.

DISCUSSION

Trademark Rule 2.132(a) provides that: "If the time for taking testimony by any party in the position of plaintiff has expired and that party has not taken testimony or offered any other evidence, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground of the failure of the plaintiff to prosecute." Dismissal of a proceeding is appropriate where the plaintiff's testimony period has expired and the plaintiff has failed to take testimony or offer any evidence. *See Hewlett-*

Packard Co. v. Olympus Corp., 931 F.2d 1551, 1553 (Fed. Cir. 1991) (affirming dismissal of opposition under 2.132(a)). Applicant respectfully requests that the Board grant its request to dismiss the Consolidated Oppositions because its motion is timely and Opposer has submitted no testimony or other evidence prior to its November 3, 2010 deadline.

Opposer's past actions clearly demonstrate its failure to prosecute these cases. Prior to the Board's order of February 22, 2010, Opposer disregarded *three* deadlines set by the Board - the deadline to serve Initial Disclosures, the deadline to take discovery, and the deadline to serve its Pretrial Disclosures which were originally due August 26, 2009. Opposer has repeatedly ignored the discovery and disclosure deadlines governing these proceedings without any showing of excusable neglect. *See* Board's February 22, 2010 Order at 9. In fact, since the Board's order almost nine months ago, Opposer has done "absolutely nothing to further the merits of [these proceedings]." *SFW Licensing Corp. v. Di Pardo Packing Ltd.*, 60 U.S.P.Q. 2d 1372, 1373 (T.T.A.B. 2001) (granting motion for dismissal under 2.132(a)). Opposer has failed to serve its expert disclosures, its pretrial disclosures, taken testimony or offered any other evidence prior to its testimony period deadline of November 3, 2010. Indeed, Opposer has "had multiple opportunities to present its case and failed to do so." *Hewlett-Packard Co.*, 931 F.2d at 1553. Opposer has demonstrated a continuing pattern of missing deadlines throughout this proceeding – both when represented by counsel and when acting *in pro per.* Opposer is well aware of the consequences for its actions, especially in light of the Board's February 22, 2010 order. Opposer's failure to act cannot be allowed and it is time to put an end to this matter.

Moreover, Opposer cannot make a showing of "good and sufficient cause" for its failure to prosecute. Opposer brought these proceedings and therefore "carries the burden of going forward in a timely manner." *Procyon Pharmaceuticals, Inc. v. Procyon Biopharma Inc.*, 61 U.S.P.Q. 2d 1542, 1544 (T.T.A.B. 2001) (granting motion to dismiss pursuant to 2.132(a)). The Board set out the new deadlines in its February 22, 2010 order and Opposer "had a duty to

diligently plan how it would prove its case during the prescribed testimony period." *Id.* Opposer had a responsibility to take testimony or introduce evidence in support of its claims by the close of the testimony period on November 3, 2010, or in the alternative, to file a motion to extend the testimony period. Opposer did neither. Opposer cannot assert that there is good cause for its failure to do so. Opposer's failure to prosecute this case has historically been, and still is, completely within its control. Opposer was aware of the discovery and trial deadlines and once again, has elected not to take action until it is too late. Opposer has deliberately ignored the deadlines in its own cases, and cannot be excused for its persistent lack of attention to the same. *See Atlanta-Fulton County Zoo, Inc. v. DePalma*, 45 U.S.P.Q. 2d 1858, 1860 (T.T.A.B. 1998) (granting motion to dismiss under 2.132(a) because "opposer's inattention to the set schedule governing this proceeding...has had an adverse impact on the orderly administration of this case...[and] such neglect can be neither overlooked or excused.").

Opposer has failed to take any testimony or offer any other evidence in support of its clams during its testimony period. Accordingly, Applicant respectfully requests that the Board grant its motion and dismiss the Consolidated Oppositions pursuant to Trademark Rule 2.132(a).

Dated: November 17, 2010

ORRICK HERRINGTON & SUTCLIFFE LLP

By: _____

Beth M. Goldman
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **APPLICANT/PETITIONER'S MOTION FOR DISMISSAL UNDER TRADEMARK RULE 2.132(a) FOR FAILURE OF THE OPPOSER/RESPONDENT TO PROSECUTE** is being served upon Opposer/Respondent by First Class Mail on this 17th day of November, 2010, by placing the same in an envelope addressed as follows:

Chad H. Olson
President
Dating DNA, LLC
13804 Torrey Del Mar Drive
San Diego, CA 92130

By: _____
Kristin S. Cornuelle