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

Proceeding	91185884
Party	Plaintiff Dating DNA, LLC
Correspondence Address	CHAD H OLSEN DATING DNA LLC 13804 TORREY DEL MAR DRIVE SAN DIEGO, CA 92130 UNITED STATES olsonchadh@gmail.com
Submission	Motion to Dismiss 2.132
Filer's Name	Michael S. Malmborg
Filer's e-mail	mmalmborg@djplaw.com, gbarrick@djplaw.com, dtufts@djplaw.com, smarshall@djplaw.com, tjones@djplaw.com
Signature	/Michael S. Malmborg/
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Attachments	Motion to Dismiss - Dating DNA.pdf ( 5 pages )(197483 bytes )

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

Imagini Holdings Ltd.,  Plaintiff,  v.  Dating DNA LLC,  Defendant.	Consolidated Opposition Nos. 91185884/91191912  <b>DEFENDANT’S MOTION FOR DISMISSAL UNDER TRADEMARK RULE 2.132(a) FOR FAILURE OF THE PETITIONER TO PROSECUTE</b>
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Defendant Dating DNA LLC, (“Dating DNA” or “Defendant”), by its undersigned counsel, hereby requests that the board dismiss the Plaintiff’s Counterclaim action in the above-referenced proceeding pursuant to Trademark Rule 2.132(a) due to Plaintiff Imagini Holdings Ltd.’s (“Plaintiff”)<sup>1</sup> failure to prosecute these matters. Plaintiff failed to take testimony or offer any evidence prior to the end of its 30-day testimony period on August 8, 2011. Because Plaintiff brought this proceeding through its Counterclaim and has the burden of moving forward in a timely manner in accordance with the established schedule, the Board should grant Defendant’s motion to dismiss the Plaintiff’s counterclaim under Trademark Rule 2.132(a).

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<sup>1</sup> In its May 3, 2011 Order, the Board noted that, because the opposition has been dismissed, the applicant/counterclaim petitioner is now the Plaintiff and the opposer is now the Defendant. Accordingly, Imagini is the Plaintiff, Applicant, and Counterclaim Petitioner, while Dating DNA is the Defendant and Respondent. For simplicity, this pleading will refer to Imagini as the “Plaintiff” and Dating DNA as the “Defendant.”

## **STATEMENT OF FACTS**

Defendant (originally Opposer) filed its Oppositions against Plaintiff's applications on August 19, 2008 and September 14, 2009, respectively. Plaintiff filed counterclaims for cancelation.

On January 11, 2011, Defendant's oppositions were dismissed with prejudice for failure to prosecute. On February 23, 2011, the Board issued a notice that, although the opposition had been dismissed, Plaintiff's counterclaim was still pending. The Board requested the parties to provide notification of how and if they intended to proceed with the counterclaim.

On March 23, 2011, Plaintiff filed a Motion to Extend Time to Proceed on its Counterclaim, indicating that it wished to proceed on its counterclaim but requesting additional time "to prepare its case." On May 3, 2011, the Board issued an order granting Plaintiff's Motion to Extend and setting the trial dates on the counterclaim. Pursuant to that order, Plaintiff's pretrial disclosures were due on June 24, 2011, and Plaintiff's 30-day trial period ended on August 8, 2011.

Plaintiff failed to serve its pretrial disclosures by its June 24, 2011 deadline. Plaintiff's testimony period ended on August 8, 2011. Plaintiff 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.”<sup>2</sup> 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)). Respondent respectfully requests that the Board grant its request to dismiss the Plaintiff's counterclaims because its motion is timely and because Plaintiff has submitted no testimony or other evidence prior to its the August 8, 2011 close of its 30-day trial period.

Plaintiff cannot make a showing of “good and sufficient cause” for its failure to prosecute. Plaintiff, through its counterclaim, 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)). At Plaintiff's request, the Board set out the new trial schedule in its May 3, 2011 order, and Plaintiff “had a duty to diligently plan how it would prove its case during the prescribed testimony period.” *Id.* Plaintiff had a responsibility to take testimony or introduce evidence in support of its claims by the close of the testimony period on August 8, 2011, or in the alternative, to file a motion to extend the testimony period. Plaintiff did neither. Plaintiff cannot assert that there is good cause for its failure to do so. In fact, Plaintiff previously filed in this matter a motion to dismiss Defendant's opposition for failure to prosecute when Defendant failed to provide testimony or evidence in support of its opposition during its trial period, which is exactly what Plaintiff has now done here, by failing to submit any testimony or evidence during its trial period to meet its burden as plaintiff in this matter. Plaintiff was aware of the

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<sup>2</sup> Again, the Board indicated in its May 3, 2011 Order that Petitioner is now the Plaintiff and Respondent is now the Defendant in this matter. *See* May 3 Order at footnote 1.

discovery and trial deadlines, which were set at the request of Plaintiff, but Plaintiff has elected not to take action until it is too late. Plaintiff has deliberately ignored the deadlines in its own case, and cannot be excused for its lack of attention to the same. *See Atlanta-Fulton County Zoo, Inc. v. DePaltna*, 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.").

Plaintiff has failed to take any testimony or offer any other evidence in support of its claims during its testimony period. Accordingly, Defendant respectfully requests that the Board grant its motion and dismiss the Plaintiff's counterclaims pursuant to Trademark Rule 2.132(a).

Dated: August 23, 2010

Attorneys for Dating DNA



David W. Tufts  
Tadiana W. Jones  
Michael S. Malmborg  
Durham Jones & Pinegar, PC  
111 E. Broadway, Suite 900  
Salt Lake City, Utah 84111  
(801) 415-3000  
(801) 415-3500 fax

**CERTIFICATE OF SERVICE**

I hereby certify that on August 23, 2010, I caused a copy of the forgoing  
**DEFENDANT'S MOTION FOR DISMISSAL UNDER TRADEMARK RULE 2.132(a)**  
**FOR FAILURE OF THE PETITIONER TO PROSECUTE** to be served on the attorney for  
Opposer via First Class U.S. Mail addressed to:

Beth M. Goldman  
Kristin S. Cornuelle  
405 Howard Street  
San Francisco, CA 94105

A handwritten signature in black ink, appearing to be "Beth M. Goldman", written over a horizontal line.