

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

HAGIE MANUFACTURING CO., )  
)  
Opposer, )  
)  
v. )  
)  
BAYERISCHE MOTOREN WERKE )  
AKTIENGESELLSCHAFT )  
)  
Applicant. )  
)

Opposition No.: 91158034  
Application No.: 76/454,861  
Mark: XDRIVE

**TTAB**

**APPLICANT'S MOTION FOR DISMISSAL FOR FAILURE TO TAKE  
TESTIMONY UNDER 37 CFR § 2.132**

Applicant, by its attorney, hereby moves for dismissal of this Opposition for failure by Opposer to prosecute under 37 CFR § 2.132. Opposer's testimony period ended on September 18, 2004 without Opposer taking any testimony or otherwise submitting evidence. This motion is being filed prior to the opening of the Applicant's testimony period.

Opposer's failure to take testimony is consistent with its previous actions in this matter. Exhibit A, attached hereto, is table outlining Opposer's dilatory responses to Applicant's discovery requests. The table provides the service dates of Applicant's discovery requests, the response deadlines, the dates Opposer served its responses, and the number of days late each response was served. As indicated, Opposer responded late, to all but one of Applicant's discovery requests, and responded as many as 75 days late in one instance.

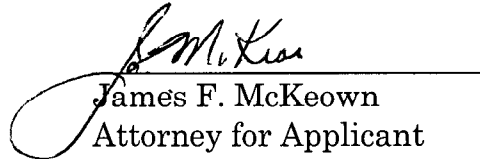


Accordingly, Applicant hereby moves that the Board dismiss this Opposition  
with prejudice.

Respectfully submitted,

BAYERISCHE MOTOREN WERKE  
AKTIENGESELLSCHAFT

October 12, 2004

  
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Attorney for Applicant

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**EXHIBIT A**

| <b>Title of Discovery Request</b>   | <b>Service Date of Applicant's Discovery Request</b> | <b>Date Response Due (with extension, when requested)</b> | <b>Date of Service of Response by Opposer</b> | <b><u>Number of Days Overdue</u></b> |
|---|--|---|---|--------------------------------------|
| <b>Applicant's First Set of Interrogatories to Opposer</b>                          | Nov. 20, 2003  | Jan. 9, 2004  | Jan. 13, 2004                                 | <u>4</u>                             |
| <b>Applicant's First Request of Opposer for Production of Documents and Things</b>  | Nov. 20, 2003  | Jan. 9, 2004  | Mar. 24, 2004                                 | <u>75</u>                            |
| <b>Applicant's First Request for Admissions</b>                                     | Dec. 16, 2003  | Jan. 20, 2004   | Jan. 23, 2004                                 | <u>3</u>                             |
| <b>Applicant's Second Set of Interrogatories to Opposer</b>                         | Feb. 11, 2004  | Mar. 17, 2004   | Apr. 7, 2004                                  | <u>21</u>                            |
| <b>Applicant's Third Set of Interrogatories to Opposer</b>                          | Apr. 30, 2004  | Jun. 4, 2004  | Jul. 15, 2004                                 | <u>41</u>                            |
| <b>Applicant's Second Request of Opposer for Production of Documents and Things</b> | Apr. 30, 2004  | Jun. 4, 2004  | Jul. 13, 2004                                 | <u>39</u>                            |
| <b>Applicant's Second Set of Requests for Admissions</b>                            | Apr. 30, 2004  | Jun. 4, 2004  | May 13, 2004                                  | <u>On time</u>                       |

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing APPLICANT'S MOTION FOR DISMISSAL FOR FAILURE TO TAKE TESTIMONY UNDER 37 CFR § 2.132 was served on counsel for the Opposer, this 12<sup>th</sup> day of October, 2004, by sending same via First Class Mail, postage prepaid, to:

Brett J. Trout, Esq.  
The Law Offices of Brett J. Trout, P.C.  
300 S.W. 5<sup>th</sup> Street, Suite 222  
Des Moines, Iowa 50309

  
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