

ESTTA Tracking number: **ESTTA1010911**

Filing date: **10/24/2019**

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

Proceeding	92067982
Party	Defendant Adam Summers
Correspondence Address	ALISA C SIMMONS FITCH EVEN TABIN & FLANNERY LLP 120 SOUTH LASALLE STREET , SUITE 2100 CHICAGO, IL 60603 UNITED STATES trademark@fitcheven.com, asimmons@fitcheven.com 312-577-7000
Submission	Motion to Dismiss 2.132
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Date	10/24/2019
Attachments	20191023 Registrant Motion for Dismissal for Failure to Prosecute.pdf(106942 bytes )



evidence, or filed any requests for extension of time in which to do so. No such material has been served on counsel for Registrant. Petitioner's failure to take testimony or submit evidence during its trial period is not surprising. During discovery, Petitioner took no discovery of Registrant and failed to respond to Registrant's discovery requests. Registrant's failure to respond to discovery requests caused Registrant to file a motion to compel responses and the Board to review and decide that motion and issue an order requiring Petitioner to respond (TTABVUE 11 and 12). Petitioner has yet to comply with the Board's order to provide discovery responses.<sup>1</sup> Because Plaintiff has not prosecuted its case and Plaintiff's testimony period has completely opened and closed with no evidence being filed, judgment under 37 CFR §2.132(a) is appropriate. *Hartwell Co. v. Shane*, 17 USPQ2d 1569, 1570 n.4 (TTAB 1990) (respondent advised that if petitioner continued to show no interest and failed to take testimony, applicant may avail itself of § 2.132(a)); *Hester Industries Inc. v. Tyson Foods Inc.*, 2 USPQ2d 1645, 1845-46 (TTAB 1987) (where opposer failed to offer evidence during its testimony period, applicant could have filed motion to dismiss instead of offering its own evidence).

#### PRAYER FOR RELIEF

Registrant Dr. Adam Summers prays that the Board dismiss this cancellation with prejudice for Petitioner's failure to prosecute this case. Registrant requests that the Board suspend action on this case during the pendency of this motion and reset the pretrial disclosure deadline and testimony period for Registrant if this motion should be denied. Registrant reserves and does not waive the right to offer evidence if this motion should be denied.

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<sup>1</sup> Registrant plans to file separately a motion for sanctions to remedy Petitioner's failure to comply with the Board's August 13, 2019, Order to respond to Registrant's interrogatories and document requests.

Respectfully submitted,

Date: October 23, 2019

s/Alisa C. Simmons/  
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**CERTIFICATE OF SERVICE**

The undersigned, one of the Attorneys for Registrant, certifies that a true and correct copy of the foregoing REGISTRANT'S MOTION FOR DISMISSAL FOR FAILURE TO PROSECUTE was served by email on the parties of record at the address of record:

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*Attorney for Petitioner*

on this 23rd day of October, 2019.

s/Alisa C. Simmons/  
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