

Sample Litigation Document created by a lawyer at the law firm of Peter M. Agulnick, P.C.:

*Affidavit in Opposition to motion for summary judgment based upon account stated and cross-motion for discovery*

A lawyer at this office can handle this or other matters for you. Please contact us for a free with an attorney. See [www.agulnicklaw.com](http://www.agulnicklaw.com)

- NOTE: Names of parties and, perhaps, other information has been changed or redacted to protect the privacy of this law firm's clients.

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK

-----X Index No. \_\_\_\_\_  
HERAEUS JONES INC.,

Plaintiff,

-against-

SMITH DENTAL LAB INC.,

Defendant.  
-----X

**NOTICE OF CROSS-MOTION**

**(AND OPPOSITION TO PLAINTIFF'S UNDERLYING MOTION)**

**PLEASE TAKE NOTICE**, that upon the affidavit of Lawrence SMITH sworn to April 26, 2005, the affirmation of Peter M. Agulnick, Esq., dated April 26, 2005, the annexed exhibits, and upon all prior pleadings and proceedings, Defendant SMITH DENTAL LAB INC. will cross-move this Court at the at Part 32, of this Court at the courthouse located at 111 Centre Street, Room 325, New York, NY, on **May 2, 2005 at 9:30 A.M.**, or as soon thereafter as counsel or *pro se* parties can be heard, for an Order containing the following relief:

(A) pursuant to CPLR 3126, striking Defendant's answer and sending this case to inquest or, in the alternative, precluding Defendant from offering into evidence any of the items requested in Plaintiff's discovery demands or, in the alternative, compelling Defendant to provide responses to Plaintiff's discovery demands by a date certain; and

(B) such other relief that is appropriate.

**PLEASE TAKE FURTHER NOTICE**, pursuant to CPLR 2214(b), answering papers in opposition to this motion, if any, are to be served at least seven days prior to the

return date of this motion.

Dated: New York, New York  
April 26, 2005

Yours, etc.,

PETER M. AGULNICK, P.C.

By: \_\_\_\_\_  
Peter M. Agulnick  
Attorneys for Plaintiff  
**SMITH DENTAL LAB INC.**  
321 Broadway, 2nd Floor  
New York, New York 10007-1111  
(212) 571-2266

TO: ABLOLISTA & ASSOCIATES P.L.L.C.  
Attorneys for Plaintiff  
**HERAEUS JONES, INC.**  
663 Avenue of the Americas  
New York, New York 10001  
(212) 555-5555

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK

-----X Index No. \_\_\_\_\_  
HERAEUS JONES INC.,

Plaintiff,

-against-

SMITH DENTAL LAB INC.,

Defendant.  
-----X

**AFFIDAVIT IN  
SUPPORT OF CROSS  
MOTION/OPPOSITION  
TO PLAINTIFF'S  
MOTION**

State of New York    )  
                                  ) ss:  
County of New York )

LAWRENCE SMITH, being duly sworn, deposes and says:

1. I am a corporate officer of Defendant SMITH DENTAL LAB INC. As such, I am fully familiar with the facts of this case based upon my own first-hand

personal knowledge.

2. I submit this affirmation in support of the present cross-motion seeking the following relief:

(A) pursuant to CPLR 3126, striking Defendant's answer and sending this case to inquest or, in the alternative, precluding Defendant from offering into evidence any of the items requested in Plaintiff's discovery demands or, in the alternative, compelling Defendant to provide responses to Plaintiff's discovery demands by a date certain; and

(B) such other relief that is appropriate.

3. I also submit this affirmation in opposition to Plaintiff HERAEUS JONES INC.'s motion for summary judgment (Notice of Motion, dated March 22, 2005, and supporting papers).

### **CROSS-MOTION**

4. With regard to the cross-motion, my attorney has informed me (and also submitted an affirmation annexed directly behind this affidavit) of the following:

5. On February 27, 2005, Defendant SMITH served a Demand for Discovery and Inspection and Combined Demand on Plaintiff. A true and correct copy is annexed here as "**Exhibit A.**"

6. To date, Plaintiff has failed to respond to this discovery demand and its time to do so has expired. Despite discovery being overdue, Plaintiff has moved for summary judgment. Plaintiff's failure to provide discovery has hindered SMITH's ability to defend this case and properly oppose Plaintiff's motion for summary judgment motion.

7. Accordingly, this Court should grant the cross-motion.

**OPPOSITION TO PLAINTIFF'S UNDERLYING MOTION FOR SUMMARY JUDGMENT**

8. Despite discovery being outstanding, Plaintiff has moved this Court for summary judgment on its “account stated” cause of action only.

9. As discussed below, this Court should deny this motion not only because discovery is outstanding, but also because numerous issues of fact exist making this case woefully inappropriate for summary-judgment disposition.

10. To start, Plaintiff-Movant’s affidavit’s assertion at paragraph 7 that I never “protested” the invoices is utterly wrong; however, this is not surprising because Plaintiff’s affidavit appears to be a boilerplate hand-write-in-the-blanks affidavit used in many different cases.

11. Plaintiff allegedly shipped dental ovens to my company. The ovens, however, were defective and inoperable. The first invoice I received was on or about 6-11-2003 (this contradicts Plaintiff’s affidavit). Shortly after the delivery of the ovens (and the first invoice), I complained to Dennis Fraiolla, who is a employee or officer of Plaintiff. Specifically, I told him, among other things, that the lifting beds on the ovens were not working. Moreover, I complained that the manual sent with the ovens was in German – not English.

12. In fact, Mr. Fraiolla, himself, acknowledged the problem with the ovens. He sent parts to try and fix the ovens, but to no avail. Further, I also complained to Barbara Beddia, another employee of Plaintiff.

13. Had Plaintiff provided discovery, there would be documentary proof of my complaints and even that Plaintiff shipped parts to me in direct response to my

complaints about the ovens being inoperable and defective. Interestingly, Plaintiff's Beddia affidavit states that it is based upon a review of "the books and records of the plaintiff, kept in the regular course of business." These "books and records" have never been disclosed to Defendant SMITH -- discovery is outstanding.

14. My attorney informed that the First Department holds that "oral objections to an account stated are sufficient to defeat a motion for summary judgment." Prudential Building Maintenance Corp v. Burton Siedman Associates, Inc., 86 A.D.2d 519, 519, 445 N.Y.S.2d 758, 758 (1st Dep't 1982). Moreover, the present affidavit provides sufficient factual detail warranting the denial of Plaintiff's summary-judgment motion on its account stated claim. See Fensterstock & Parnters, LLP v. Shapiro, 7 Misc. 3 1002(a), 2005 WL 736620 (Sup. Ct., N.Y. Co. 2005).

15. Clearly, the foregoing issues of fact and lack of discovery require this Court to deny Plaintiff's motion for summary judgment in its entirety.

**WHEREFORE**, Defendant SMITH DENTAL LAB INC. requests that, this Court issue an Order, pursuant to CPLR 3126, striking Plaintiff's pleadings and dismissing this case, in the alternative, precluding Plaintiff from offering into evidence any of the items requested in Defendant's discovery demands or, in the alternative, compelling Defendant to provide responses to Plaintiff's discovery demands by a date certain; and such other relief that is appropriate. In addition, Defendant SMITH DENTAL LAB INC. requests that this Court deny Plaintiff's motion for summary judgment in its entirety and such other relief that may be appropriate.

\_\_\_\_\_  
LAWRENCE SMITH

Sworn to me this \_\_\_\_\_ day of  
\_\_\_\_\_, 2005

\_\_\_\_\_  
NOTARY PUBLIC

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK

-----X Index No. 3381/05  
HERAEUS JONES INC.,

Plaintiff,

-against-

SMITH DENTAL LAB INC.,

Defendant.  
-----X

**AFFIRMATION IN  
SUPPORT OF CROSS-  
MOTION**

PETER M. AGULNICK, an attorney admitted to practice law in the Courts of the  
State of New York, affirms the following to be true under penalties of perjury:

1. I am a principal of Peter M. Agulnick, P.C., counsel of record for  
Defendant SMITH DENTAL LAB. As such, I am fully familiar with this matter based

upon a review of the file maintained in my office.

2. I submit this affirmation in support of the present cross-motion seeking the following relief:

(A) pursuant to CPLR 3126, striking Defendant's answer and sending this case to inquest or, in the alternative, precluding Defendant from offering into evidence any of the items requested in Plaintiff's discovery demands or, in the alternative, compelling Defendant to provide responses to Plaintiff's discovery demands by a date certain; and

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LAB INC. requests that this Court deny Plaintiff's motion for summary judgment in its entirety and such other relief that may be appropriate.

Dated: New York, New York  
April 26, 2005

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PETER M. AGULNICK