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

Proceeding	91162871
Party	Defendant Hydentra, L.P. Hydentra, L.P. c/o Blank Rome LLP One Logan Square Philadelphia, PA 19103
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CERTIFICATE OF MAILING I hereby certify that this Motion for Leave to Amend is being deposited electronically with the Trademark Trial and Appeal Board at uspto.gov on:

Date: October 3, 2005 By: /anna m vradenburgh/
Anna M. Vradenburgh

Attorney Docket No: 392-74-002

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

Metropolitan Life Insurance Company,)	
)	
Opposer)	Opposition No. 91,162,871
v.)	
)	[Serial Nos. 78/313,440; 78/312,615]
Hydentra, L.P.)	
)	
Applicant)	

**OPPOSITION TO MOTION TO EXTEND TIME FOR DISCOVERY
AND TESTIMONY PERIODS**

Applicant files this motion in response to Opposer's Motion to Extend Time For Discovery and Testimony Periods ("Motion"). Applicant contends that Opposer has failed to show that its failure to act during the time allowed for discovery is the result of excusable neglect with respect to the discovery period, nor has Opposer shown good cause to extend the testimony period.

Statement of Facts

The underlying trademark in this opposition was published for opposition on July 6, 2004. An opposition was filed on November 12, 2004, wherein discovery was originally set to close on May 31, 2005, and testimony period for Opposer was set to close on August 29, 2005. A notice of default was entered against the Applicant on February 4, 2005. A response to the Order to Show Cause and motion for Extension of Time to Answer was filed on February 23, 2005. This Motion was granted on March 17, 2005. The matter was transferred to the undersigned and an Answer was filed by the undersigned on April 4, 2005.

On May 11, 2005, the undersigned contacted the Opposer in an attempt to settle the

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matter. The undersigned spoke with Mr. Dante Naccarato. (Mr. Naccarato is the Intellectual Property Specialist designated for contact in the Opposition.) Declaration of Anna M. Vradenburgh, at 2. Mr. Naccarato requested that Applicant propose terms of settlement. A confirming electronic mail message was transmitted to Mr. Naccarato regarding the call and requesting a return call to settle the matter. *Id.* No return call was received. *Id.* The undersigned transmitted proposed terms of settlement via electronic mail on May 17, 2005, and a follow up electronic mail was again sent on May 31, 2005 requesting when a telephone call might be scheduled to settle the matter. *Id.* No return messages by electronic mail, telephone or post were ever received. *Id.*

On or around June 3, 2005, upon review of the file, the undersigned discovered an error in the Answer. The undersigned immediately telephoned Dante Naccarato on June 3rd and requested a stipulation to amend the answer. *Id.* at 3. An electronic mail message was transmitted to Mr. Naccarato the same day setting forth the error and the proposed correction. *Id.* Mr. Naccarato indicated in an electronic mail message that someone from Opposer's office would contact the undersigned early the next week. *Id.* No contact from Opposer was received. *Id.*

On June 8, 2005, the undersigned telephoned Ms. Susan Ross (General Counsel as listed in the Opposition), who stated that Ms. Heidi Constantine, a trademark attorney in the office, was handling the matter. *Id.* at 4. A call was then placed to Ms. Constantine, coupled with an electronic mail message again setting forth the error and proposed correction. *Id.* Ms. Constantine indicated that she would respond by the end of the day. *Id.* The undersigned telephoned Ms. Constantine again at the end of the day and left a voice mail message requesting a response. *Id.*

As of June 10, 2005, the undersigned had not received any response from Opposer and again left two voice messages on Ms. Constantine's voice mail. *Id.* at 5. In a further attempt to ascertain a response regarding whether Opposer would stipulate to an amendment, the undersigned again telephoned Ms. Ross who stated Ms. Constantine should be able to respond at some point that day, and further instructed the undersigned to again send an electronic mail message to Ms. Constantine. *Id.* at 5. A second electronic mail message was transmitted to Ms. Constantine. *Id.* No response, or comments of any kind, was ever received from Ms. Constantine or anyone else in Opposer's office.

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Id. In light of the fact that Applicant failed to receive any response after approximately two (2) weeks of contacting Opposer, Applicant filed A Motion for Leave to Amend the Answer and Amended Answer on June 16, 2005. The contents of the Motion were known to Opposer since as early as June 3, 2005.

On July 12, 2005, the Applicant served a First Set of Discovery Requests, including interrogatories, document production and admissions. *Id.* at 6. Responses to this First Set of Discovery Requests were due no later than August 16, 2005, and have not yet been received. Ten days after Applicant's First Set of Discovery was served, more specifically, July 22, 2005, the Motion for Leave to Amend was granted by the Board. In that Order the Board mistakenly indicated that discovery had closed. The undersigned contacted the Board and advised them of the error. A corrected Order was issued on August 3, 2005, which clearly states that discovery closes on August 15, 2005.

On August 15, 2005, Applicant served Opposer a Second Set of Discovery Requests, including interrogatories, document production and admissions. *Id.* The due date for response to the Second Set of Requests was Monday, September 19, 2005. On Friday, September 23, 2005, the Applicant received Opposer's responses and objections to the Second Set of Requests. *Id.* The certificate of mailing indicates that the documents were served on September 19, 2005 and were signed by Ms. Heidi Constantine. In addition to the responses, Opposer filed the Motion to Extend Time for Discovery and Testimony Periods.

**Opposer's Failure to Abide By the Discovery Deadline is Not Due to Excusable Neglect
Nor Has Opposer Shown Good Cause to Extend the Testimony Period**

Since the discovery period closed on August 15, 2005, more than one month ago, Opposer must demonstrate that its failure to abide by the discovery deadline is due to excusable neglect. The Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), §509. Further, Opposer must demonstrate good cause for the request to extend the testimony period. *Id.* Opposer has failed to meet these burdens.

Opposer's basis for the request to reset the trial dates, including extending the time for the

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closing of discovery and testimony periods is "to enable Opposer to determine the need for additional discovery and testimony based on Applicant's Amended Answer To Opposition." Even assuming Opposer's reason for the request is true, the underlying basis of this request does not rise to the level of excusable neglect so as to excuse the failure to abide by the discovery schedule.

The determination of whether Opposer's neglect is excusable includes the following elements:

1. danger of prejudice to the nonmovant;
2. the length of delay and its potential impact on judicial proceedings;
3. the reason for the delay, including whether it was within the reasonable control of the movant; and
4. whether the movant acted in good faith.

Pumpkin Ltd. v. Seed Corps., 43 USPQ2d 1582, 1586 (TTAB 1997), citing *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership et al.*, 507 U.S. 380, 395 (1993).

Prejudice to the nonmovant exists. This delay is not only prejudicial, but the filing of the opposition, which Opposer has failed to advance, has caused Applicant to incur costs in its defense. Such costs have now been increased to defend this motion which *could have been avoided* had Opposer advanced the opposition it initiated and abided by the trial schedule or timely requested an extension of time.

Regarding the length of delay, Opposer is requesting the reopening of discovery more than one month after the close of the discovery period. The Motion sets forth no facts as to why discovery could not have been promulgated prior to the August 15, 2005 deadline, despite the granting of Applicant's Motion to Amend on July 22, 2005. Further, no facts are offered as to why this Motion could not, or was not, brought earlier. Thus, the reason for the delay is unknown. Indeed, it is as if Opposer finally remembered that it initiated this Opposition and has

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submitted this motion in the hope of being excused and receiving a reprieve from the consequences of its inaction.

In this instance, “the expiration of the time for taking action and the filing of the motion to reopen, the calculation of the length of delay in the proceedings also must take into account the additional, unavoidable delay arising from the time required for briefing and deciding the motion to reopen.” *Id.* The Board in *Pumpkin* stated that “[t]he impact of such delays on [the] proceeding, and on Board proceedings generally, is *not* inconsiderable.” *Id.* (emphasis added). This Motion is before the Board “solely as a result of ... inattention to deadlines”. *Id.* The Board’s interest in “detering such sloppy practice weighs heavily against a finding of excusable neglect.” *Id.* The reasoning of the Board in *Pumpkin* is not only appropriate, but supports a finding of inexcusable neglect in the present case.

The reasoning set forth by Opposer for the *request*, not the delay in bringing this Motion, is so it can determine the need for additional discovery and testimony. Applicant finds this reason incredulous.

As set forth above, Opposer was notified of the content of Applicant’s amended answer at least as early as June 3, 2005. In fact, every person named in the Opposition, *and* Ms. Heidi Constantine was notified. Regardless that each and every person chose to ignore the Applicant’s request, each was individually notified of the error in the Answer and the proposed amendment, namely, a single word. If the need for additional discovery time existed, the need was not expressed.

Even assuming the amendment caused the Opposer to reassess its strategy, the Board granted the Applicant’s motion on July 22, 2005, twenty-four (24) days *prior* to the close of discovery. In fact, the Board corrected its Order on August 3, 2005, and reaffirmed the discovery closing date in its corrected Order. Despite the Applicant’s repeated contact with the Opposer with regard to the Motion to Amend, the Board’s Order and correction of Order, Opposer failed to request an extension of time to extend discovery.

As set forth above, Opposer’s reason for the request (not the delay) is so it can “determine the need for additional discovery and testimony.” Opposer fails, however, to advise the Board as

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to the reason for its delay in bringing this Motion or with regard to participating, at all, in the discovery period. Indeed, Opposer has not promulgated *any* discovery requests. Thus, Applicant is baffled as to the need for "additional" discovery and testimony since Opposer has requested none. Surely, some discovery requests could have been promulgated that addressed some of the issues in the case. Opposer is asking that the Board believe that the single word amendment of the Answer, which was entered prior to the close of discovery, caused a complete inability of Opposer to take any action. Applicant contends this is Opposer's *excuse* for delay, not the reason for the delay. Indeed, Opposer has offered no reason for its delay. The undersigned contends that the sole reason for the delay is Opposer's own actions, or inaction, namely, the failure of Opposer to take any reasonable steps to preserve its rights. Such inaction was in the direct control of the Opposer.

Overall, it appears that Opposer simply ignored the discovery deadlines, and took no steps to extend those dates. Indeed, Opposer has consistently exhibited behavior that is contrary to the advancement of this Opposition. Ironically, Opposer's Motion maintains the theme of this behavior in its request that "*if Applicant's Motion For Leave To Amend Answer is granted, Opposer requests that the closing of discovery date and testimony periods be extended by an additional sixty (60) days starting from the date such Motion is granted.*" (emphasis added) Since the Motion to Amend was granted on July 22, 2005 (*fifty-eight (58) days before Opposer filed this Motion*), the requested extension of discovery time requests an extension to September 20, 2005, one day after Opposer's Motion was filed! This request further evinces the complete lack of attention to this matter and is simply an attempt to shift the burden of Opposer's inaction to Applicant. Applicant should not be required to subsidize Opposer's blatant disregard for the advancement of an Opposition Opposer initiated. In light of the above, it is clear that Opposer's failure to abide by the discovery closing date was entirely within Opposer's control. Opposer is now simply seeking to reopen the discovery period without providing any reason for the delay and to extend the discovery period without a showing that its behavior was not due to excusable neglect, and to extend the testimony period without showing good cause.

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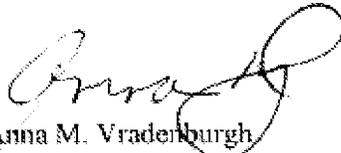
Finally, regarding whether movant acted in good faith. Applicant contends that the lack of facts or reasoning as to why this Motion was not previously filed supports the conclusion that movant has not acted in good faith. Even assuming that Opposer acted in good faith, Applicant contends that this factor is irrelevant in this instance. Opposer simply failed to abide by the trial schedule. Thus, even if Opposer's inaction was in good faith, it fails to excuse the resulting neglect and failure to abide by the trial schedule.

In light of the arguments set forth above, Applicant respectfully requests that the Board deny Applicant's request to extend the discovery and testimony periods.

The Office is hereby authorized to debit Deposit Account No. 11-1580 for any fees required in connection with the filing of this Motion or to credit the Deposit Account for any overpayment.

Respectfully submitted,

Date: October 3, 2005



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Attorneys for Applicant

AMV/em

DECLARATION OF ANNA M. VRADENBURGH

The undersigned, Anna M. Vradenburgh, declares the following:

1. I am an attorney licensed to practice law in the State of California and licensed before the United States Patent and Trademark Office. I am an attorney with the firm of Koppel, Jacobs, Patrick & Heybl, the current attorneys of record for the Applicant, Hydentra, L.P. in Opposition No. 91,162,871.
2. On May 11, 2005, the undersigned contacted the Opposer in an attempt to settle the Opposition and spoke with Mr. Dante Naccarato. Mr. Naccarato requested that Applicant propose terms of settlement. A confirming electronic mail message was transmitted to Mr. Naccarato regarding the call and requesting a return call to settle the matter. No return call was received. The undersigned transmitted proposed terms of settlement via electronic mail on May 17, 2005, and a follow up electronic mail was again sent on May 31, 2005 requesting when a telephone call might be scheduled to settle the matter. No return messages by electronic mail, telephone or post were ever received.
3. An Answer to this Opposition was filed on April 4, 2005. On or around, June 3, 2005, approximately two months after serving the Answer, I discovered an error in the Answer. I immediately telephoned Dante Naccarato on June 3rd and requested a stipulation to amend the Answer. Mr. Naccarato is the Intellectual Property Specialist designated for contact in the Opposition. An electronic mail message was transmitted to Mr. Naccarato the same day setting forth the error and the proposed correction. Mr. Naccarato indicated in an electronic mail message that someone from Opposer's office would contact the undersigned early the next week. No contact from Opposer was received.
4. On June 8, 2005, I telephoned Ms. Susan Ross, General Counsel for Opposer, who stated that Ms. Heidi Constantine, a new trademark attorney in the office, was handling the matter. A call was then placed to Ms. Constantine, coupled with an electronic mail

message again setting forth the error and proposed correction. Ms. Constantine indicated that she would respond by the end of the day. The undersigned telephoned Ms. Constantine again at the end of the day and left a voice mail message requesting a response.

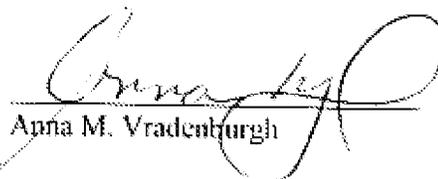
5. As of June 10, 2005, neither myself, nor anyone in my office, had received any response from Opposer and I again left two voice messages on Ms. Constantine's voice mail. In a further attempt to ascertain a response regarding whether Opposer would stipulate to an amendment, the undersigned again telephoned Ms. Ross who stated Ms. Constantine should be able to respond at some point that day, and further instructed the undersigned to again send an electronic mail message to Ms. Constantine. A second electronic mail message was transmitted to Ms. Constantine. To date, no response, or comments of any kind, has ever been received from Ms. Constantine or anyone else in Opposer's office.

6. On July 12, 2005, the Applicant served a First Set of Discovery Requests, including interrogatories, document production and admissions. Responses have not yet been received. On August 15, 2005, Applicant served Opposer a Second Set of Discovery Requests, including interrogatories, document production and admissions. Responses to the Second Set of Requests were due Monday, September 19, 2005, and were received on Friday, September 23, 2005.

The undersigned, Anna M. Vradenburgh, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, that all statements made of my own knowledge are true and all statements made on information and belief are believed to be true.

Dated: October 3, 2005

By:


Anna M. Vradenburgh

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF VENTURA

I am employed in the County of Ventura, State of California. I am over the age of 18 years and am not a party to the within action. My business address is 555 St. Charles Drive, Suite 107, Thousand Oaks, California 91360.

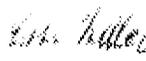
On October 3, 2005, I served the following documents described as Opposition to Motion to Extend Time for Discovery and Testimony Periods; and Declaration of Anna M. Vraderburgh on the interested parties in this action by placing the original a true copy thereof enclosed in a sealed envelope addressed as follows:

Dante Naccarato
Intellectual Property Specialist
MetLife Law Department
1 MetLife Plaza
27-01 Queens Plaza North
Long Island City, NY 11101

- BY MAIL: I caused such envelope to be deposited in the mail at Thousand Oaks, California. I am "readily familiar" with the office's practice of collection and processing correspondence for mailing. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.
- BY PERSONAL SERVICE: I delivered such envelope by hand to the offices of the addressee(s) listed above.
- BY FACSIMILE: I caused the above document(s) to be transmitted to the office of the addressee(s) listed above.
- BY EXPRESS MAIL: I caused the document(s) to be delivered by overnight Express Mail via the United States Postal Service "Express Mail Post Office to Addressee" to the addressee(s) listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 3, 2005, at Thousand Oaks, California.



Esther Miller