

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Mailed: April 20, 2006

Opposition No. **91162871**

Metropolitan Life Insurance  
Company

v.

Hydentra, L.P.

**Frances S. Wolfson, Interlocutory Attorney:**

This case comes before the Board for consideration of opposer's motion (filed September 22, 2005) to extend discovery and trial dates in this case. Applicant has filed a response to the motion.<sup>1</sup>

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<sup>1</sup> On October 13, 2005, at the Board's request, opposer re-filed a copy of its motion by facsimile. Opposer attached a fax cover sheet to the re-filed motion. There is no proof indicated on opposer's faxed transmission that a copy of the fax cover sheet was properly served on counsel for applicant as required by Trademark Rule 2.119. The Board has considered the fax cover sheet, but strict compliance with Trademark Rule 2.119 is required in all further papers filed with the Board or they will not be considered.

In response to opposer's inquiry, opposer is advised that the Board mails copies of all orders issued to each party at the party's correspondence address as indicated in the record. It is each party's responsibility to ensure that the Board has the party's current correspondence address. If a party fails to notify the Board of a change of address, with the result that the Board is unable to serve correspondence on the party, default judgment may be entered against the party. See TBMP § 117.07 (2d ed. rev. 2004).

Reference is made to the discovery materials filed with the Board on November 15, 2005. Discovery papers or materials should only be filed with the Board under circumstances specified in Trademark Rules 2.120(j)(6) and (j)(8); filings not in conformity with the requirements of these rules will not be considered. See Trademark Rule 2.120(j)(8).

Because opposer's motion was filed after the discovery period had closed, the motion has been treated as one to reopen, rather than extend, the discovery period. The showing that must be made to reopen a prescribed time is "excusable neglect." Fed. R. Civ. P. 6(b)(2), made applicable to Board proceedings by Trademark Rule 2.116(a); see *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), as discussed by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).

In *Pioneer*, the Supreme Court clarified the meaning and scope of "excusable neglect," as used in the Federal Rules of Civil Procedure and elsewhere. The Court held that the determination of whether a party's neglect is excusable is:

at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include. . . [1] the danger of prejudice to the [nonmovant], [2] the length of the 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.

*Pioneer*, 507 U.S. at 395. In subsequent applications of this test, several courts have stated that the third *Pioneer* factor, namely the reason for the delay and whether it was within the reasonable control of the movant, might be considered the most important factor in a particular case. See *Pumpkin*, *supra* at footnote 7 and cases cited therein.

Applying *Pioneer* to this case, there does not appear to be any measurable prejudice to applicant should the Board reopen the proceeding. Similarly, under the fourth *Pioneer* factor, there is no evidence that opposer's delay was the result of bad faith.

As to the second and third *Pioneer* factors, however, there is no doubt that opposer was fully aware, from March 17, 2005, that the discovery period was set to expire August 15, 2005. A reading of opposer's motion to amend indicates that opposer believed that, at the time it filed its motion, the Board had not yet ruled on applicant's motion to amend its answer.<sup>2</sup> Despite this mistaken understanding however, the then-operative trial schedule had been set forth by the Board on March 17, 2005. There is nothing in the record to indicate opposer was unaware of, or had failed to receive, the March 17, 2005 order. Even assuming opposer had not received the Board's orders dated July 22 and August 3, 2005 (as opposer indicates in its cover fax of October 13, 2005), the schedule had been instituted on March 17, 2005 and remained unchanged from then. Opposer has offered no reason

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<sup>2</sup> The Board granted applicant's motion to amend its answer on July 22, 2005, entered the amended answer into the record, and stated in error that the discovery period had closed. The Board issued a corrective order on August 3, 2005 explaining that discovery remained open until August 15, 2005, the date set in the Board's March 17, 2005 order as the discovery closing date.

for waiting until September 22, 2005 to file its motion nor showing that it was in any way prevented from taking action.

Accordingly, opposer's motion to reopen the discovery period is hereby denied. Trial dates are reset as indicated below.

DISCOVERY PERIOD TO CLOSE:	<b>CLOSED</b>
30-day testimony period for party in the position of plaintiff to close:	<b>June 1, 2006</b>
30-day testimony period for party in the position of the defendant to close:	<b>July 31, 2006</b>
15-day rebuttal period for party in the position of the plaintiff to close:	<b>September 14, 2006</b>

**IN EACH INSTANCE,** a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within **thirty days** after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.