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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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Submission	Motion to Dismiss 2.132
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Date	07/25/2006
Attachments	MotiontoDismiss.pdf (3 pages)(3778027 bytes) 072606pos.pdf (1 page)(907736 bytes)

CERTIFICATE OF MAILING: I hereby certify that this paper is being transmitted via electronic submission at the Trademark Trial and Appeal Board web site on July 25, 2006.
Date: July 25, 2006 By: Esther Miller
Esther Miller

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	)	

MOTION TO DISMISS FOR OPPOSER'S FAILURE TO PROSECUTE CASE

Section 37 CFR §2.132(a) provides that "if the time for taking testimony by any party in the position of plaintiff has expired and that party has not taken testimony or offered any other evidence, any party in the position of defendant may … move for dismissal on the ground of the failure of the plaintiff to prosecute." In the instant matter, the reset testimony period for the party in the position of plaintiff ("Opposer") closed on June 1, 2006.

This motion is made on the grounds that Opposer has failed to prosecute this opposition, including the failure to propound discovery requests, take testimony or offer any other evidence. Although Opposer instituted this opposition, and by its filing, is attempting to prevent Applicant from obtaining federal registrations for Applicant's trademarks, Opposer has failed to prosecute this opposition, and thus, is inappropriately preventing Applicant from obtaining its registrations by failing to support its objections to the registration.

Opposer Cannot Offer Any "Good and Sufficient Cause"

To Excuse Its Failure to Prosecute

Opposer's testimony period has ended. This period, however, is not the original testimony period. Indeed, on September 19, 2005, Opposer filed a Motion to Extend Time for Discovery and Testimony Periods. This Motion was filed more than one month after the discovery period had closed and was opposed by Applicant. In its Motion, Opposer failed to make any showing that the Opposer's failure to act with respect to the discovery period was the result of excusable neglect. The Board denied Opposer's Motion to reopen discovery; however, the Board granted Opposer's request to extend the testimony periods. The new deadline for Opposer's testimony period was reset to June 1, 2006. Despite the Board granting Opposer's motion with respect to the testimony period and resetting the period, Opposer nonetheless failed to take any testimony, submit any evidence, or request any further extensions of time.

Further, no other evidence has been introduced. Indeed, although Opposer asserted ownership of certain registrations in its Notice of Opposition (see paragraphs 1 and 2), the Applicant denied the assertions of ownership in its Answer, and Opposer has failed to submit, at the time of filing the opposition, or by Notice of Reliance, two certified title and status copies of the registrations upon which it relies as required by the rules. TMBP 703.02(a) and 27 CFR 2.122(d). Also see, *Hewlett-Packard Co. v. Olympus Corp.*, 18 USPQ.2d 1710 (Fed. Cir. 1991) ("denials based on lack of knowledge or belief are valid denials, Fed.R.Civ.P. 8(b); they effectively put [Opposer] on notice that its claim was being challenged, thereby requiring [Opposer] to prove its case" *Id.* at 1713). Thus, Opposer has not even offered proof of ownership of the marks upon which it relies. In light of the failure to submit any evidence during the testimony period, and the Opposer's failure to even provide proof of ownership of the registrations upon which it relies, it is Applicant's contention that Opposer has failed to submit any evidence in this opposition.

Opposer's behavior is consistent with its actions, or more accurately, its inactions, throughout this proceeding. In the only motion Opposer filed, Opposer offered absolutely no grounds for its prior failure to act. As Opposer has taken *no* action during

the reset testimony period, Applicant contends that Opposer cannot offer "good and sufficient cause" to excuse its failure to prosecute, and that the granting of this Motion is proper. ("In the absence of a showing of good and sufficient cause, judgment may be rendered against the party in the position of plaintiff." 37 CFR §2.132; TBMP 535.02)

The undersigned is aware that this motion is being brought subsequent to the commencement of the testimony period of Applicant. However, the undersigned respectfully requests that the Board grant this motion pursuant to its discretionary power, as authorized by 37 CFR §2.132(c), especially in light of Opposer's failure to prosecute this opposition and its ignoring of the reset testimony periods. Also see *Hewlett* at 1712. (Court found that the Board did not abuse its discretion in dismissing the opposition based on a motion filed subsequent to the opening of the moving party's testimony period.) The undersigned further advises that the delay in filing this motion is due to the undersigned only recently realizing that Opposer had failed to even offer any proof of the ownership of the asserted marks at the time of the filing of the opposition (at which time the undersigned was not the attorney of record), and thus believed it was necessary to wait until the expiration of the trial brief period before this case could be dismissed.

Further delay in the registration of these marks is inequitable to Applicant in light of the above facts. Accordingly, the Applicant respectfully requests the Board to grant this motion and dismiss this opposition with prejudice for failure to prosecute.

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: July 25, 2006

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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 July 25, 2006, I served the following document(s) described as Motion to Dismiss For Opposer's Failure to Prosecute Case on the interested parties in this action by placing ☐ the original ☒ a true copy thereof enclosed in a sealed envelope addressed as follows:

Heidi C. Constantine, Esq.
Metropolitan Life Insurance Company
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 July 25, 2006, at Thousand Oaks, California.

Esther Miller