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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 Reply to Opposer's Response to Applicant's Motion to Dismiss is being deposited electronically with the Trademark Trial and Appeal Board at uspto.gov on:
Date: August 22, 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	)	

REPLY TO OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO DISMISS

Applicant files this Reply to Opposer's Response to Applicant's Motion to Dismiss ("Response"). Applicant contends that Opposer has failed to show that its failure to submit any evidence in this case is the result of excusable neglect, or that it is even appropriate to admit Opposer's evidence into the record at this time by a Notice of Reliance.

Statement of Facts

The lack of prosecution, or any action by Opposer in this matter has been consistent throughout this case. In Applicant's prior Opposition to Extend Time for Discovery and Testimony Periods, Applicant set forth a litany of events evincing Opposer's lack of communication with Applicant, and its lack of any action with respect to discovery, including responding to Applicant's first set of discovery requests in a timely manner. Opposer has already been granted an extension of its testimony period and nevertheless, has failed to submit *any* evidence.

Opposer's Failure to Submit Any Evidence in this Matter is Not Due to Excusable Neglect, Nor Should Opposer's Notice of Reliance be Entered At this Time

The *extended* testimony period for Opposer closed on June 1, 2006, almost two months before Applicant filed its Motion to Dismiss. The testimony period would have been the proper time to submit Opposer's Notice of Reliance for its registrations. During the almost two-month period since the closing of its testimony period, Opposer did not seek any redress from the Board to excuse it from its failure to take action; more pointedly, to submit *any* evidence in support of its case. At some point, Applicant has a right to request an end to Opposer's attempt to prevent its registrations, and to hold Opposer accountable for the case that it chose to present, or in this instance, not present. Applicant contends that two months beyond the closing of Opposer's extended testimony period, especially when Opposer has offered no evidence in support of its case, is a proper and reasonable time to request that this matter be put to rest.

Opposer contends that it was a clerical error that the "two copies of each registration certificate on which [it] was relying to be entered into evidence on behalf of MetLife were not attached to the Notice of Opposition." Response, at 2. Opposer continues and asserts that "current trademark counsel was under the belief that copies of all registration certificates had been filed with the original notice of opposition and was not aware until receiving Applicant's Motion to Dismiss that the certificates had not been filed." *Id.*

In keeping with its *modus operandi*, Opposer apparently failed to review its own case during the appropriate testimony period to determine whether it had sufficient evidence to support its case. Indeed, Opposer's only actions in this case have been in response to actions taken by Applicant; first, in response to the receipt of Applicant's Second Set of Discovery Requests, and now, after Applicant has pointed out the deficiencies in Opposer's case.

Opposer argues that it should be allowed to enter by Notice of Reliance copies of the registration certificates for the registrations upon which it relies.1 Applicant notes that even in

1 Applicant notes that the copies submitted by Opposer do not even reflect the registrations listed in the Notice of Opposition.

its current submission, Opposer fails again to even properly submit these documents. For Opposer's pleaded registrations to be received in evidence and made part of the record, the two copies of the registration must be "prepared and issued by the Patent and Trademark Office showing both the current status of and current title to the registration." Rule 27 CFR 2.122(d) and TBMP 704.03(b)(1)(A)(1) Opposer has only submitted photocopies. These, however, are not evidence of its ownership as these copies fails to show a valid and subsisting registration, nor do these demonstrate that Opposer is the current owner of these marks. Indeed, "plain copies of the registration[s] ... are not sufficient." TBMP 704.03(b)(1) at 700-46 - 700-47. Opposer filed this opposition. Opposer, whom is represented by competent counsel, is charged with abiding by and knowing the rules. In this instance, Applicant, in its Motion to Dismiss, even cited the applicable rule, and Opposer chose to ignore the requirements in attempting to submit these photocopies.

Further, it is interesting to note that Opposer's Response implies that it was due to clerical error that the required copies were omitted from the original Notice of Opposition. It appears from the submitted copies that Opposer had never ordered the copies from the Trademark Office, or as now, simply believed that photocopies were sufficient. As stated above, these copies are incapable of providing the required evidence of ownership, and should be excluded not only because they are improper, but because they are being submitted in an untimely manner.

Opposer contends it should be excused from its failure to timely submit this evidence, yet it cannot show excusable neglect. As cited by Opposer, the Board and Federal Circuit has defined "excusable neglect" as:

> Failure to take the proper steps at the proper time not in consequence of the party's own carelessness, in-attention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party.

The failure to submit this evidence is the direct "consequence of the party's own carelessness,

[and] in-attention." The original filing failed to attach the documents resulting from either Opposer's carelessness or in-attention. No filings were offered during Opposer's extended testimony period, again, resulting from Opposer's carelessness or in-attention. And now, in "willful disregard" for the rules of the Board, Opposer offers photocopies of registrations, not "two copies ... of the registration[s] prepared and issued by the Patent and Trademark Office showing both the current status of and current title to the registration" as required by the rules. TBMP 704.03(b)(1)(A)(1) Opposer offers no reasons as to why the failure to follow the rules and properly submit this evidence should be excused.

Opposer claims that no prejudice to Applicant results from Opposer's failure to properly submit the required evidence. Indeed, Opposer attempts to excuse the failure to place these documents into evidence by stating that it would not prejudice Applicant since these copies were ultimately provided in response to Applicant's First Set of Requests for Documents. However, the rules clearly state that the submission of documents in response to discovery requests do not place these documents into evidence (TBMP 704.11). The failure to place the documents into evidence does prejudice Applicant as Applicant is not advised of the evidence upon which Opposer actually intends to rely in its argument to this Board. Applicant is further prejudiced because Applicant is entitled to have this matter immediately dismissed for lack of evidence and to be relieved of bearing any further expense to defend its rights against a party that has utterly failed to support the rights it asserts.

Opposer further attempts to imply that since Applicant was not aware that this evidence was not originally submitted, then Opposer should be excused. This is truly ridiculous. If Applicant had failed to realize the lack of ownership evidence, and not challenged Opposer's ownership in its final argument to the Board, it is doubtful that the Board would have called it even and dismissed the case because neither side realized the evidence had not been submitted. No, Applicant would have most likely been deemed to have admitted Opposer's ownership, especially since Opposer has no other evidence upon which to rely.

Opposer contends that this case should not be dismissed for "purely mechanical reasons" as it would "prove to be a waste of judicial resources." This is not only laughable, but incredibly

insulting, both to the Applicant and to the Board. THIS ENTIRE CASE HAS BEEN A WASTE OF JUDICIAL RESOURCES. Opposer's only action in this matter, other than the original filing of the Notice of Opposition and this response, was to seek an extension of time for the testimony period. Despite being awarded a reprieve, the Opposer did nothing. If this is not a waste of judicial time and resources, the undersigned does not know what is.

Finally, Opposer states that Applicant's assertions that it denied Opposer's ownership in its Answer are "untrue on its face". Response, at **4**. Opposer supports this contention by stating that "Applicant stated that it was 'without information sufficient to form a belief as to the truth of the allegations'" in response to Opposer's assertions of its ownership in the cited registrations. This is disturbing.

Applicant's answer in its entirety states the following:

1. Applicant is without information sufficient to form a belief as to the truth of the allegations of Paragraph 1 of the Notice of Opposition, and therefore, ***denies*** the same.
2. Applicant is without information sufficient to form a belief as to the truth of the allegations of Paragraph 2 of the Notice of Opposition, and therefore, ***denies*** the same. (emphasis added)

There is no ambiguity in this answer. The allegations are denied, and Opposer's contention that the denial is untrue is false and misleading. Further, TBMP 311.01(c), 37 CFR §2.106(b)(1), and the F.R.C.P. Rule 8(b) states that "[i]f the applicant is without knowledge or information sufficient to form a belief as to the truth of an averment, applicant shall so state and this will have the *effect* of a denial." (emphasis added) Thus, even Opposer's misrepresentation of the answer would have constituted a denial.

In light of the arguments set forth above, Applicant respectfully requests that the Board deny Opposer's request to enter the Notice of Reliance, and to simply dismiss this action. Opposer has ignored every deadline, and now has not even properly attempted to submit evidence it should have

submitted months ago. Further delay in dismissing this action is a waste of judicial resources. Opposer's actions should warrant monetary sanctions for the monumental waste of the Board's time, and Applicant's time and money in defending this action. Although the Board cannot order monetary sanctions, the Board can dismiss this action, which in light of the lack of any evidence offered by Opposer is a proper ruling. Accordingly, Applicant respectfully requests that the Board dismiss this action and allow Applicant's registrations to proceed.

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: August 22, 2006

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AMV/

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 August 22, 2006, I served the following document(s) described as Reply to Opposer's Response to Applicant's Motion to Dismiss 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 August 22, 2006, at Thousand Oaks, California.

Esther Miller