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

Proceeding	91199018
Party	Plaintiff Amylin Pharmaceuticals, Inc.
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Date	08/22/2011
Attachments	Opposition to Motion for 90 Day EOT.pdf (19 pages)(677896 bytes)

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

In re: Application Serial No. 85/094,790	:	
Filed: July 28, 2010	:	
For the Mark: DR. AMLIN & Design	:	Opposition No. 91199018
Published: March 8, 2011	:	
Amylin Pharmaceuticals, Inc.,	:	
Opposer,	:	
v.	:	Attorney Docket No.: 32377-1
Amlin Health, LLC	:	
Applicant.	:	

OPPOSITION TO MOTION FOR 90 DAY EXTENSION OF TIME
AND MOTION TO REOPEN TIME FOR SERVING INITIAL DISCLOSURES

Amylin Pharmaceuticals, Inc. ("Opposer") respectfully requests the Board deny Applicant's request to extend and reopen the deadlines in this matter by 90 days. The deadline for Initial Disclosures long passed before Applicant requested this "extension of time," and the requested 90 days is not a reasonable period for an extension considering the response time for the discovery requests at issue is 30 days. Moreover, Applicant has not set forth the good cause for the extension by providing facts in sufficient detail, no less made any showing that the extension is not necessitated by a lack of diligence or unreasonable delay, as required by the Rules.

Opposer recognizes that Applicant's counsel filed a Motion to Withdraw on July 6, 2011.[1] However, this Motion was filed well after the June 24, 2011 deadline for the Initial Disclosures which was set in the Board order instituting the Opposition and was specifically discussed at the May 23, 2011 Discovery Conference between Applicant's counsel, Opposer's counsel and the Interlocutory Attorney. Additionally, in the Motion to Withdraw, counsel represented that Applicant had copies of all papers, had sufficient time to locate new counsel, if desired, and indicated that Applicant requested such withdrawal. In view of these circumstances, Applicant has failed to meet the standard to extend and reopen, and a 90 day extension is not warranted.

I. BACKGROUND

On March 16, 2011, Opposer filed a Notice of Opposition against Application No. 85/094,790 for the mark "DR. AMLIN & Design" for the goods "dietary and nutritional supplements; dietary supplements; vitamins." On the same day, the Board instituted this proceeding and set discovery to open on May 25, 2011 with Initial Disclosures due June 24, 2011. Counsel for Applicant and Opposer held the discovery conference, with Board participation, on May 23, 2011. During the conference, among other things, the parties agreed to send courtesy copies of documents by e-mail and also discussed the Initial Disclosures. This conference was memorialized in a May 24 Notice from the Board.

[1] Opposer also copied Applicant's current counsel on correspondence inquiring as to the Initial Disclosures while the Motion to Withdraw was pending and while Opposer awaited confirmation as to whether Applicant will proceed pro se. This Motion was granted by the Board on August 5, 2011, and the TTAB suspended the proceeding pending Applicant's confirmation as to whether it would represent itself. The Order also required Applicant to provide proof of service for the "Motion to Extend" and include a Certificate of Service for future papers. Applicant provided proof of service and confirmed it will proceed pro se on August 12, 2011. The TTAB Order indicated the proceeding would then be suspended pending consideration of the Motion to Compel and then the Motion for Extension. As this Opposition is germane to these Motions, Opposer is filing this Opposition.

On June 24, 2011, Opposer timely served Applicant with Opposer's Rule 26 Initial Disclosures (see attached Certificate of Service at Exhibit A). Opposer did not receive Applicant's Rule 26 Initial Disclosures by this deadline. On June 29, four days after discovery opened, Opposer promptly served Applicant with Opposer's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission, for which responses would be due August 3 (copies of the Certificates of Service are attached at Exhibit B). Opposer still had not received Applicant's Initial Disclosures so, on July 7, by e-mail and again on July 8 by first class mail, Opposer sent an e-mail/letter to both Applicant and counsel for Applicant inquiring as to the status of Applicant's Initial Disclosures. Opposer advised that if they did not hear from Applicant (or current counsel of record) advising as the status of the Initial Disclosures, Opposer would have to raise the issue with the Board and file a Motion to Compel. Opposer did not receive the Initial Disclosures by the requested date, i.e., three weeks after they were due, and did not receive any communication from Applicant or Applicant's counsel so, on July 14, Opposer filed a Motion to Compel.

After filing the Motion to Compel, on July 25, Applicant e-mailed Opposer's counsel claiming he was out of the country from May 30-July 19 and asking Opposer's counsel the status of the case. Such e-mail was sent in "reply" to the courtesy copy of the Motion to Compel that was e-mailed to Applicant and his counsel. Subsequently, after Opposer's counsel advised Applicant that Opposer's counsel cannot provide advice and directing him to the PTO website and his current attorney, Opposer's counsel provided additional copies of the outstanding discovery requests. Since that time, the required Initial Disclosures have not been served.

On July 28, Applicant filed a "letter" "re: extension of time to respond disclosures" (see attached Exhibit C, hereinafter referred to as "Motion to Extend"). As indicated in the letter, Applicant was "writing to inquire the extension of time for the Initial Disclosures which were due during the time I was out of the country."[2] No Request for Extension was filed prior to the deadline and no Request to Reopen has been filed for these documents.

This letter also indicated that Applicant also received some "(e)-documents (i.e. Interrogatories and Admission...) from the Opposer's attorney last week" and "I inquire to extend 90 days for me to complete all of the documents" (presumably the Initial Disclosures and Discovery Requests).[3] No mention of the Motion to Compel was made in the letter. Other than the reference to dates during which time Applicant claims he was out of the country, Applicant did not provide *any* factual detail or set forth the good cause for the extension, nor provide any explanation as to why the papers were not timely filed. Additionally, Applicant did not explain why the extension was not necessitated by Applicant's own lack of diligence or unreasonable delay in taking action.

II. APPLICANT'S REQUEST FOR 90 DAYS SHOULD BE DENIED

A. THE REQUEST FOR ADDITIONAL TIME FOR INITIAL DISCLOSURES DID NOT MEET THE STANDARD TO REOPEN TIME

The period for serving Initial Disclosures has long since expired and no request for extension was made to Opposer or the Board prior to the deadline. Moreover, because the time

[2] Despite the agreement to provide courtesy copies by e-mail, this letter was not provided by e-mail to counsel and no Certificate of Service was included. Applicant did mail a copy and subsequently provided a Certificate of Service in response to a Board Order.

[3] The letter also attached "background information...for your reference only." Opposer objects to this "information" and the accuracy of the statements made in this paper; however, Opposer expects it will not be considered by the Board and thus no formal Motion to Strike appears necessary.

has expired, to reopen time Applicant must now set forth specific facts explaining the reason for the delay and showing the failure to act during the allotted time is the result of excusable neglect. Applicant has not made any such showing. Additionally, regardless of Applicant's failure to identify any facts or legitimate justification, 90 days is too long a period for an extension and the length of delay is also a factor to be considered. Fed. R. Civ. P. Rule 6(b); Trademark Board Manual of Procedure (TBMP) Section 509.01(b).

As explained in Fed. R. Civ. P. Rule 6(b) and TBMP 509,

> When an act may or must be done within a specified time, the court may, for good cause, extend the time:
>
> > (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
> >
> > (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Applicant's letter requesting more time for the Initial Disclosures and Discovery Responses did not provide any factual details or any explanation as to why the Initial Disclosures were not timely filed. The reason for the delay, including whether it was in the control of movant, is typically the most important factor to be considered in assessing whether the extension should be granted. *Pumpkin Ltd. v. Seed Corps.*, 43 USPQ2d 1582, 1586, n. 7 (TTAB 1997).[4] Not only did Applicant wholly fail to provide any explanation or facts as to why counsel and Applicant and any employees failed to act by the deadline, Applicant did not assert any

[4] See also *Gaylord Entertainment Co. v. Calvin Gilmore Productions Inc.*, 59 USPQ2d 1369 (TTAB 1999) (failing to provide reasons for former counsel's inaction).

reason why this was excusable neglect.[5] Moreover, assuming *arguendo*, the trip by a member of Applicant's company was *a* reason, this excuse is not sufficient because Applicant was represented by counsel at the time, and both were aware of this deadline in advance and failed to take any action for weeks even after Opposer's counsel served their Initial Disclosures, discovery requests and then inquired as to the status. It is also well-established that a party is accountable for acts/omissions of chosen counsel. *Gaylord Entertainment Co. v. Calvin Gilmore Productions Inc.*, 59 USPQ2d 1369 (TTAB 1999). Applicant and Applicant's counsel have known about this deadline since the opposition was instituted and it was also discussed at the discovery conference, long prior to Dr. Zhang's trip, the only "excuse" proffered for the extension. Moreover, simply stating one person was on a "trip" does not set forth sufficient facts to show the missed deadline was not necessitated by a lack of diligence or unreasonable delay. It is clear such a conclusory allegation is insufficient and, in today's world in particular, deadlines noticed well in advance do not cease and business does not stop because Applicant had counsel, advance notice, reminders and, also practically speaking, e-mail and other communications are available worldwide. None of these considerations were addressed in the Motion.

Applicant has the burden of persuading the Board it has been diligent in meeting its responsibilities and such has not been done. TBMP Section 509.01(a), n.2. The Rules explain the Board should carefully scrutinize any motion to determine if the requisite good cause has been shown. TBMP Section 509.01(a). It is clear Applicant's Motion has not set forth good cause or satisfied the excusable neglect standard.

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[5] The excusable neglect determination must take into account all relevant circumstances surrounding the party's omission or delay, including (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. *Pumpkin Ltd. v. Seed Corps.*, 43 USPQ2d 1582 (TTAB 1997).

Ninety days is also a long period of time to extend a deadline and this delay, its impact on the proceedings and prejudice to movant must be considered. As suggested by Opposer's prompt service of discovery requests, this matter is important to Opposer. This Opposition involves Opposer's housemark and delay totally within Applicant's control, which is unsupported by any legitimate reason or facts, which implicates several missed deadlines, and creates prejudice through difficulty in prosecuting the opposition. For example, Opposer was forced to file a Motion to Compel to try to obtain the Initial Disclosures and information regarding Applicant's case and to move this matter forward. Instead of simply preparing Initial Disclosures and instead of contacting Applicant to request a modest extension, Applicant filed a wholly deficient paper, improperly served it, did not address the outstanding Motion to Compel in any way, and has also sought Opposer's advice instead of contacting his attorney, seeking new counsel and/or reviewing the Rules. With so many piecemeal actions, yet no responsive documents, Applicant has hindered moving this case forward, forced Opposer to respond to inappropriate papers and inquiries by Applicant, and is inhibiting Opposer's strategy to pursue the merits of the case and promptly resolve this important issue. Moreover, while Opposer recognizes Applicant is *now* proceeding pro se, it must still pay attention to deadlines and follow the Rules. The deadline for Initial Disclosures is typically 30 days after the deadline for the discovery conference and 90 days is in no way a reasonable period to extend time, apart from the other deficiencies in the request, as detailed above.

B. THE 90 DAY REQUEST FOR EXTENSION TO RESPOND TO DISCOVERY RESPONSES DID NOT SET FORTH GOOD CAUSE AND IS AN UNREASONABLE PERIOD FOR AN EXTENSION

As discussed above, Applicant wholly failed to set forth the good cause for the extension or any facts showing the failure to act during the time was the result of excusable neglect. No

facts showing its diligence have been provided. Such facts are also required for Motions to Extend under TBMP Section 509.01(a) and the Board will scrutinize carefully any motion to extend time. Considering the requisite facts have not been proffered, Applicant has not met its burden to show good cause and, moreover, considering the responses themselves are due 30 days after service (or 35 days for mail service), ninety days is an unreasonable period to extend time.

III. CONCLUSION

Opposer respectfully requests that the Board enter an order denying Applicant's request for a 90 day extension and to reopen time and/or take any other appropriate action the Board deems just and proper.

Respectfully submitted,
Amylin Pharmaceuticals, Inc.

Date: August 22, 2011

/s/ Jennifer Fraser

Jennifer Fraser
Christina M. Hillson
Connolly Bove Lodge & Hutz LLP
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P.O. Box 2207
Wilmington, DE 19899
Attorneys for Opposer

4415284_1.DOC

CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of August 2011 a true and correct copy of the foregoing document was caused to be served on the following parties as indicated:

VIA E-MAIL AND FIRST CLASS MAIL

Linus Zhang, M.D.
Amlin Health, LLC
451 Hungerford Drive
Suite 119-132
Rockville, MD 20850
amlinhealth@gmail.com

/s/ Jennifer Fraser
Jennifer Fraser

EXHIBIT

A

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Opposer's Initial Disclosures** was served today, June 23, 2011, by First Class Mail, postage prepaid, on the following party with a courtesy copy sent via e-mail:

FIRST CLASS MAIL

Matthew H. Swyers, Esq.
The Trademark Company, PLLC
344 Maple Avenue West, Suite 151
Vienna, VA 22180-5612
mswyers@TheTrademarkCompany.com
Attorneys for Applicant

Breanne M. Staley

Breanne M. Staley
Trademark Paralegal

EXHIBIT B

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June 2011 a true and correct copy of the foregoing **Opposer's First Set of Requests for Admission to Applicant (Nos. 1-66)** was served on Applicant's Counsel, Matthew H. Swyers, The Trademark Company, PLLC, 344 Maple Avenue West, Suite 151, Vienna, Virginia 22180, with a courtesy copy served via e-mail to mswyers@TheTrademarkCompany.com.

Breanne Staley

Breanne Staley
Trademark Paralegal

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June 2011 a true and correct copy of the foregoing **Opposer's First Set of Requests for Production of Documents and Things to Applicant (Nos. 1-38)** was served on Applicant's Counsel, Matthew H. Swyers, The Trademark Company, PLLC, 344 Maple Avenue West, Suite 151, Vienna, Virginia 22180, with a courtesy copy served via e-mail to mswyers@TheTrademarkCompany.com.

Breanne Staley

Breanne Staley
Trademark Paralegal

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June 2011 a true and correct copy of the foregoing **Opposer's First Set of Interrogatories To Applicant (Nos. 1-27)** was served on Applicant's Counsel, Matthew H. Swyers, The Trademark Company, PLLC, 344 Maple Avenue West, Suite 151, Vienna, Virginia 22180, with a courtesy copy served via e-mail to mswyers@TheTrademarkCompany.com.

Breanne Staley
Trademark Paralegal

EXHIBIT C

ESTTA Tracking number: **ESTTA422288**

Filing date: **07/28/2011**

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

Proceeding	91199018
Party	Defendant Amlin Health, LLC
Correspondence Address	LINUS ZHANG, M.D. AMLIN HEALTH, LLC 451 HUNGERFORD DRIVE, SUITE 119-132 ROCKVILLE, MD 20850 UNITED STATES amlinhealth@gmail.com
Submission	Motion to Extend
Filer's Name	Linus Zhang
Filer's e-mail	amlinhealth@gmail.com
Signature	Linus/7-28-2011/
Date	07/28/2011
Attachments	Request extension of time for disclosures 7-28-2011.pdf (2 pages)(86179 bytes)

AMLIN HEALTH, LLC

July 28, 2011

The United States Patent and
Trademark Office
The Trademark Trail and
Appeal Board

RE: Extension of time to respond disclosures
Application Serial No. 85/094,790
Filed: July 28, 2010
For the Mark: Dr. Amlin
Published: March 8, 2011

Opposition No. 911990018
AMYLIN PHARMACEUTICAL, Inc.

Dear Sir/Madam:

Today is July 28, 2011, I am writing to inquire the extension of time for the Initial Disclosures which were due during the time I was out of the country between May 30 and July 19, 2011.

I received some (e)-documents (i.e. Interrogatories and Admission...) from the opposer's attorney last week after I came back, I do not have sufficient time to review and respond it, I inquire to extend 90 days for me to complete all of these documents. I really appreciated if the board could approve my request for the extension of time.

Please contact me if you have any questions. Thank you very much for your kind consideration.

Best regards,

Linus Zhang, M.D.
President
Amlin Health, LLC
451 Hungerford Drive
Ste. 119-132
Rockville, MD 20850
Tel: 301.256.7780
email: amlinhealth@gmail.com

Below are some background information about myself and our mark: Dr. Amlin for your reference only.

Our mark (Dr. Amlin) was filed in July 28, 2010.

My personal background and experience included but not limited to medical training at National Cancer Center of Japan as a visiting scholar, I worked at National Cancer Institute, NIH as a postdoctoral fellow, then I worked for FDA-CDER contractor for 12 years. I am knowledgeable about the difference between drug and food/dietary supplement and FDA regulation between two.

I have reason to believe that our mark: Dr. Amlin and the opposer's mark AMYLIN is totally different and no confusion and similarity whatsoever.

The Following Are the Detail Differences between Dr. Amlin And AMYLIN Pharmaceuticals, Inc.

Company Name	Amlin Health, LLC	AMYLIN Pharmaceutical Inc.
Trademark	Dr. Amlin	AMYLIN
Industry	Food and dietary supplement	Drug development/manufacturing
FDA Regulation	Under food category	Under drug/CDER category and regulation
Risk of Confusion	Dr. Amlin ≠AMYLIN	AMYLIN ≠ Dr. Amlin
	Amlin Health, LLC≠ AMYLIN Pharmaceuticals, Inc.	AMYLIN Pharmaceuticals, Inc. ≠Amlin Health, LLC
Pronunciation*	|'däktər|'am'lin	ˌamə'li ng
Definition	Dr.=Doctor..., Lin is my first name	None or N/A
Similarity	Dr. Amlin (just like Dr. Davis, Dr. Lin and Dr. Smith…)	AMYLIN only No Dr. (doctor) , spelling and Pronunciation differently
* Source from: Apply computer dictionary		

Base on above detail differences, anyone can easily tell and notice the differences between these two marks.

451 Hungerford Drive, Ste. 119-132 Rockville, MD 20850 USA