

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

Mailed: October 28, 2011

Opposition No. 91199018

Amylin Pharmaceuticals, Inc.

v.

Amlin Health, LLC

Cheryl S. Goodman, Interlocutory Attorney:

Proceedings were suspended on August 5, 2011, due to applicant's counsel's withdrawal. The Board allowed applicant time to appoint new counsel or advise the Board whether it would represent itself. Applicant advised on August 12, 2011 that it would represent itself.

Prior to the suspension of proceedings due to withdrawal of counsel, opposer filed, on July 14, 2011, a motion to compel, and applicant filed, on July 28, 2011, a motion to extend. Applicant amended its motion to extend on August 24, 2011. The motions are fully briefed.

The Board will now consider the pending motions.

Motion to Compel and Motion to Extend (Initial Disclosures)

Opposer moved to compel applicant's initial disclosures which were due on June 24, 2011. Opposer advises that applicant has not served its initial disclosures and it made a good faith effort to resolve the dispute.

In response, applicant advises that it needs an extension of time of ninety days because its representative was out of the country between May 30, 2011 through July 19, 2011. In its amended motion to extend, it now seeks an extension of 180 days. Applicant's representative states that while abroad it "was not able to correspond directly" with counsel and upon return to the United States applicant "tried his best effort [sic] to communicate with his counsel and opposer's counsel."

Because disclosures were due on June 24, 2011, the Board construes applicant's motion to extend regarding its initial disclosures as one to reopen time. To reopen time, applicant must establish excusable neglect. TBMP Section 509.01(b) (3d ed. 2011); Fed. R. Civ. P. 6(b)(1)(B). Opposer argues that applicant has not set forth sufficient facts to establish excusable neglect.

The Board considers the following factors as set forth in *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), and adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997) with regard to excusable neglect: (1) the danger of prejudice to the non-moving party; (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 moving party; and (4) whether the moving party has acted in good faith.

With regard to the first and fourth *Pioneer* factors, the Board finds no specific prejudice to opposer beyond mere delay and no indication of bad faith on applicant's part. With regard to the second *Pioneer* factor, the Board find the length of delay would have an administrative impact on this proceeding as applicant is seeking a significant extension of time to provide its initial disclosures which were due on June 24, 2011; applicant seeks a six month extension which would effect all dates in this proceeding.

With regard to the third *Pioneer* factor, the reason for delay, the Board finds the delay was within applicant's control. Applicant was represented by counsel during the period when applicant's representative was out of the country, as applicant's counsel's withdrawal was not granted until August 5, 2011. Applicant has not explained why its counsel did not provide the initial disclosures or why it did not attempt to communicate with counsel so that the disclosures could be provided. Even if applicant's representative was out of the country, applicant had a duty to communicate with its counsel, and/or appoint someone in its representative's absence to assist counsel with the initial disclosures. A party is bound by the actions and failure to act of their counsel. *Pioneer*, 507 U.S. at 396-

97. Accordingly, the Board finds that the reason for delay was within applicant's reasonable control.

On balance, the Board finds that applicant has not established excusable neglect to reopen the time for serving initial disclosures.

Accordingly, the motion to reopen is denied.

Turning next to opposer's motion to compel, the Board finds that opposer has made a good faith effort to resolve the dispute. Additionally, no initial disclosures have been provided by applicant.

In view thereof, the motion to compel is granted.

Applicant is allowed until **FIFTEEN DAYS** from the mailing date of this order to serve its initial disclosures. The Board fully expects applicant to be able to provide these disclosures within the time set forth herein as applicant will now have had nearly four months to prepare such disclosures.

#### Motion to Extend Time - Discovery Responses

The Board now turns to applicant's motion to extend time to respond to opposer's discovery requests.

Opposer's discovery requests were served on applicant's counsel on June 29, 2011. Although it is not clear from the certificate of service the method of service used (other than courtesy copy by e-mail), the Board presumes that

applicant was entitled to five days for mailing, with responses due on August 3, 2011. Trademark Rule 2.119.

Applicant initially sought a 90-day extension of time to respond to these requests, but it now seeks a 180-day extension of time. Applicant's basis for needing an extension of 90 days is that applicant's representative does "not have sufficient time to review and respond."

Applicant's basis for requiring a 180-day extension is that 90 days was "not sufficient to prepare and answer all 131 questions properly and in a timely manner" as well as the fact that applicant is a "woman and minority-owned small disadvantaged business."

In response, opposer argues that applicant has not set forth sufficient facts to establish good cause for a 90-day extension, other than stating its representative was out of the country. Opposer argues that applicant's motion does not demonstrate that its need for an extension is not the result of applicant's own lack of diligence or unreasonable delay in taking action. Opposer submits that a 90-day extension is unreasonable. With regard to the request for a 180-day extension, opposer reiterates its prior arguments with respect to the 90-day extension request, including that the amended extension request lacks good cause. Opposer submits that the amended extension request provides "no facts as to why 180 days is warranted."

In reply, applicant has provided a chronology of events and asserts that it must respond to 66 requests for admission, 38 requests for production, and 27 interrogatories which will take some time since applicant must conduct its business while also handling the proceeding. Applicant further states that its representative is the executive in charge of applicant and needs additional time to complete the responses.

The standard for granting an extension of time is good cause. See Fed. R Civ. P. 6(b) and TBMP § 509 (3d ed. rev. 2011) and authorities cited therein. The Board generally is liberal in granting extensions of time before the period to act has elapsed so long as the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused. See *e.g.*, *American Vitamin Products Inc. v. DowBrands Inc.*, 22 USPQ2d 1313 (TTAB 1992).

In this case, this is the first request for an extension of time for applicant to respond to opposer's discovery requests and therefore, the privilege of extensions has not been abused. The Board also finds that applicant has not been guilty of negligence or bad faith in seeking an extension. Moreover, affording applicant additional time to respond to discovery will potentially avoid more motion practice before the Board.

Accordingly, the Board finds good cause for granting an extension given the withdrawal of counsel and applicant's representative's need to balance work responsibilities with this proceeding. However, the Board also finds that a 180-day extension is not warranted.

In view thereof, the motion to extend is granted, and applicant's discovery responses are due within **FIFTEEN DAYS** of the mailing date of this order.<sup>1</sup> The Board fully expects applicant to have been working on the discovery responses during the pendency of its motion to extend, and that it should be able to provide response by this date.

In summary, applicant's motion to reopen time to serve its initial disclosures is denied, opposer's motion to compel initial disclosures is granted, and applicant's motion to extend time to respond to opposer's discovery requests is granted. Applicant is allowed until FIFTEEN DAYS from the mailing date of this order to serve its initial disclosures and discovery responses on opposer.

Proceedings are resumed.

Dates are reset as follows:

Expert Disclosures Due	2/3/12
Discovery Closes	3/4/12
Plaintiff's Pretrial Disclosures	4/18/12
Plaintiff's 30-day Trial Period Ends	6/2/12
Defendant's Pretrial Disclosures	6/17/12
Defendant's 30-day Trial Period Ends	8/1/12
Plaintiff's Rebuttal Disclosures	8/16/12

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<sup>1</sup> The extension is granted from the date of the motion to extend filed July 28, 2011.

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.

**Pro Se Information**

Applicant is reminded that it will be expected to comply with all applicable rules and Board practices during the remainder of this case. The Trademark Rules of Practice, other federal regulations governing practice before the Patent and Trademark Office, and many of the Federal Rules of Civil Procedure govern the conduct of this opposition proceeding. Applicant should note that Patent and Trademark Rule 10.14 permits any person or legal entity to represent itself in a Board proceeding, though it is generally advisable for those unfamiliar with the applicable rules to secure the services of an attorney familiar with such matters.

If applicant does not retain new counsel, then applicant will have to familiarize itself with the rules governing this proceeding. The Trademark Rules are codified in part two of Title 37 of the Code of Federal Regulations

(also referred to as the CFR). The CFR and the Federal Rules of Civil Procedure, are likely to be found at most law libraries, and may be available at some public libraries. Finally, the Board's manual of procedure will be helpful.

On the World Wide Web, applicant may access most of these materials by logging onto <http://www.uspto.gov/> and making the connection to trademark materials.

Applicant is reminded that Trademark Rule 2.119 requires a party filing any paper with the Board during the course of a proceeding to serve a copy on its adversary, unless the adversary is represented by counsel, in which case, the copy must be served on the adversary's counsel. The party filing the paper must include "proof of service" of the copy. "Proof of service" usually consists of a signed, dated statement attesting to the following matters: (1) the nature of the paper being served; (2) the method of service (e.g., first class mail); (3) the person being served and the address used to effect service; and (4) the date of service.

Also, applicant should note that any paper it is required to file herein must be received by the Patent and Trademark Office by the due date, unless one of the filing procedures set forth in Trademark Rules 2.197 or 2.198 is utilized. These rules are in part two of Title 37 of the

previously discussed Code of Federal Regulations. Electronic filing is recommended for all Board filings.

Files of TTAB proceedings can now be examined using TTABVue, accessible at <http://ttabvue.uspto.gov>. After entering the 8-digit proceeding number, click on any entry in the prosecution history to view that paper in PDF format.

The first revision of the third edition (2011) of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) has been posted on the USPTO web site at [http://www.uspto.gov/trademarks/process/appeal/Preface\\_TBMP.jsp](http://www.uspto.gov/trademarks/process/appeal/Preface_TBMP.jsp).