

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

ENVISIONET COMPUTER SERVICES, )  
INC., )  
 )  
Plaintiff )  
 )  
v. ) Civil No. 00-CV-225-P-H  
 )  
MICROPORTAL.COM, INC., )  
WORLDSPY.COM, INC., )  
ICENTENNIAL VENTURES, LLC, and )  
ICENTENNIAL OVATION I, L.P., )  
 )  
Defendants )

**ORDER ON PLAINTIFF’S MOTION TO STRIKE ANSWER  
(DOCKET NO. 26)  
AND DEFENDANT’S MOTION TO EXTEND TIME TO ANSWER  
(DOCKET NO. 35)**

This matter has been referred to me on Plaintiff’s Motion to Strike Answer (Docket No. 26) and Defendant’s Motion to Extend Time to Answer (Docket No. 35). I now deny Plaintiff’s Motion to Strike Answer and grant the Defendant’s Motion to Extend Time to Answer. I also note that terms of the Scheduling Order issued this date will govern all further proceedings.

**Background**

The factual background of this dispute is set forth in the Recommended Decision filed October 25, 2000. EnvisioNet is a contract provider of technical support services for various software vendors. This action stems from a contract dispute between EnvisioNet and MicroPortal.com ("MicroPortal"). According to affidavits submitted by

EnvisioNet, EnvisioNet agreed to provide technical support service to the customers of MicroPortal and its affiliates, WorldSpy.com ("WorldSpy"), iCentennial Ventures and iCentennial Ovation I ("the iCentennials"). These companies all maintain home offices in the State of New York. On August 3, 2000, EnvisioNet filed suit for nonpayment of services rendered, allegedly valued at over \$1 million, asserting claims against MicroPortal for breach of contract, account stated and quantum meruit and against WorldSpy & the iCentennials for unjust enrichment. The reply deadline set by Rule 12, August 28, 2000, came and went without any of the defendants filing an answer or other responsive pleading. EnvisioNet filed its motion for entry of default as to World Spy and the iCentennials on September 1 and the clerk entered a default on September 7. (Docket No. 5.) MicroPortal, whose counsel had signed an acknowledgment and acceptance of service of process, was not the subject of Plaintiff's application for default and motion for default judgment.

Plaintiff's counsel sent MicroPortal's counsel a copy of its motion for default judgment as to the other Defendants. There followed a flurry of activity culminating in my Recommended Decision denying Plaintiff's Motion for Default Judgment and granting Defendants' Motion to Set Aside Default on October 25, 2000. On October 27, 2000, Defendant Microportal filed its untimely Answer without obtaining leave of Court to do so. Plaintiff then responded a week later with this Motion to Strike Answer and Defendant replied one month later with its Motion to Extend Time to Answer. Since October 27<sup>th</sup> the other three defendants have filed a Motion to Dismiss based on lack of personal jurisdiction, Plaintiff has withdrawn its request for Temporary Restraining Order

and Prejudgment Attachment, and Plaintiff has apparently initiated a number of discovery events.

### **Standard of Review**

The issue presented by these motions is governed solely by Fed. R. Civ. P. 6(b)(2). When a party files a motion for enlargement after the expiration of the specified period, that party must show that its failure to act was “excusable neglect.” It is generally agreed that the term “excusable neglect” as used in Rule 6(b) is governed by the definition propounded by the U.S. Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380 (1993). See *Pratt v. Philbrook*, 109 F.3d 18, 19 & n.1 (1<sup>st</sup> Cir. 1997). To determine whether neglect, which includes by definition a party’s negligence, is excusable, the Court has established a balancing test which requires an equitable determination “taking into account all relevant circumstances surrounding the party’s omission.” *Pioneer*, 507 U.S. at 395. Such factors include “the danger of prejudice to [an adverse party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *Id.*

### **Discussion**

I note as a preliminary matter that Plaintiff has never made an application for default as to Defendant MicroPortal. Although I do not countenance MicroPortal’s failure to comply with Rule 6(b)(2), I think that it is apparent from the procedural history of this case that EnvisioNet did not consider MicroPortal to be in default and fully expected that an Answer would be filed when the status of the other defendants was resolved. Had MicroPortal filed the required motion with its Answer on October 27,

2000, I doubt if we would be where we are today. I am also satisfied that if MicroPortal had filed that motion at the appropriate time, I would not have been troubled in finding 'excusable neglect' based on the circumstances that existed at the end of October.

Plaintiff<sup>1</sup> apparently views MicroPortal's conduct as inexcusably dilatory and has seized upon the circumstances of these motions as the mechanism by which it might ultimately obtain default judgment. MicroPortal, on the other hand, offers no real explanation as to why it did not file the requisite motion at the time it attempted to file its late answer.

As EnvisioNet notes, MicroPortal has made no attempt to describe a meritorious defense for its failure to pay for services rendered and *if* this matter were before me on a Motion to Strike Default under Rule 55(c) that issue would, of course, be a primary consideration. *See Coon v. Grenier*, 867 F.2d 73, 76 (1<sup>st</sup> Cir. 1989). However, the procedural posture of the case is somewhat different, as no application for default has ever been made. This case illustrates, however, the dangerous waters that counsel enter when they either "agree" or have "an understanding" that the deadlines imposed by the Rules or by order of this court will be disregarded.

Given the broad reading of the term "excusable neglect" which the First Circuit has counseled trial courts to adopt, *see Pratt*, 109 F.3d at 22, I believe that based on the totality of the circumstances of this case it is appropriate to grant Defendant's Motion to Extend Time to File Answer as though it had been filed contemporaneously with the Answer filed on October 27, 2000. Although Defendant's neglect here is woefully apparent, given the "gamesmanship" which has appeared to color this litigation on both sides to date, I find that the equitable balancing test tips slightly against the Plaintiff.

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<sup>1</sup> I note that other pleadings in the file suggest that MicroPortal has not been responsive to discovery overtures and has failed to cooperate with the scheduling of depositions. The Court is available to resolve discovery disputes if necessary.

Virtually all of the delay between these two parties since October 27<sup>th</sup> is attributable to Plaintiff itself. If the Answer had been unopposed the Scheduling Order would have issued well over a month ago and some of the deadlines established in today's scheduling order would have already expired. It is my intent that both parties to these motions be put on notice today that the Court intends the scheduling order issued forthwith to be followed and that this matter will be resolved within its parameters. The pendency of the other parties' Motions to Dismiss will not delay this litigation.

### **Conclusion**

Based upon the foregoing, I now **DENY** Plaintiff's Motion to Strike Answer (Docket No. 26) and **GRANT** Defendant's Motion to Extend Time to Answer (Docket No. 35). All parties having now appeared in the action and filed responsive pleadings in the nature of either an answer or a motion to dismiss, the scheduling order in this case will issue forthwith.

### CERTIFICATE

- A. The Clerk shall submit forthwith copies of this Order to counsel in this case.
- B. Counsel shall submit any objections to this Order to the Clerk in accordance with Fed. R. Civ. P. 72.

***So Ordered.***

Dated this 9<sup>th</sup> day of January, 2001.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

U.S. District Court  
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-225

ENVISIONET COMPUTER v. MICROPORTAL.COM INC, et al  
08/03/00

Filed:

Assigned to: JUDGE D. BROCK HORNBY  
Demand: \$15,000,000  
Lead Docket: None  
Dkt# in other court: None

Jury demand: Plaintiff  
Nature of Suit: 190  
Jurisdiction: Diversity

Cause: 28:1332 Diversity-Contract Dispute

ENVISIONET COMPUTER SERVICES  
INC  
    plaintiff

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v.

MICROPORTAL.COM INC  
    defendant

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WORLDSPIY.COM INC  
    default defendant

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ICENTENNIAL VENTURES LLC  
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TODD S. HOLBROOK, ESQ.  
(See above)  
[COR LD NTC]

ICENTENNIAL OVATION I LP  
    default defendant

TODD S. HOLBROOK, ESQ.  
(See above)  
[COR LD NTC]