

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

WINTER

Mailed: July 31, 2017

Opposition No. 91229667

Cybernet Entertainment LLC

v.

Michael R. Radcliff

BY THE TRADEMARK TRIAL AND APPEAL BOARD:

This case now comes up for consideration of Opposer's contested motion¹ (filed June 16, 2017) for default judgment² and Applicant's cross-motion for an extension of time to file his answer.

By way of background, in its order mailed on May 18, 2017, the Board denied Applicant's motion to set aside the notice of default issued on October 12, 2016, but reopened Applicant's time to file its answer until June 9, 2017 (8 TTABVue 6). Applicant did not file his answer as required. Opposer filed a motion for default judgment on June 16, 2017, arguing that Applicant had not filed an answer as

¹ Opposer is reminded that submissions to the Board must be double-spaced. *See* Trademark Rule 2.126(a)(1).

² The Board notes that Opposer did not serve its motion by email, as required by the Trademark Rules that became effective on January 14, 2017. *See* Trademark Rule 2.119. The Board expects Opposer to comply with all relevant rules in any future submission. Insofar as Applicant clearly received a copy of Opposer's motion, the Board will consider it in this instance.

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required by the Board and that it would not consent to an extension of time. In response thereto, Applicant's counsel explained that Applicant "was very sick and hospitalized and has had a long recovery period during the period granted Applicant to respond ..." (10 TTABVUE 2). Additionally, Applicant requests that the Board allow Applicant thirty more days to answer, and provided a partial copy of an email assertedly sent to Opposer's counsel, requesting an extension until July 19, 2017. Opposer did not reply to Applicant's responsive brief and cross-motion to extend (reopen) his time to answer.

As explained in the Board's May 18, 2017 order, it is well settled that the law favors deciding cases on their merits. Generally, the Board is reluctant to grant judgment by default for failure to file a timely answer and tends to resolve any doubts by setting aside default. *See, e.g., Paolo's Associates Ltd. Partnership v. Boda*, 21 USPQ2d 1899 (Comm'r Pats. 1990); TBMP § 312.02 (June 2017). In view thereof, and because Opposer did not respond to Applicant's cross-motion, Applicant's motion for an extension of time to file his answer is **granted** to the extent discussed below. *See* Trademark Rule 2.127(a). Accordingly, Opposer's motion for default judgment is moot and will be given no further consideration.

Because the thirty days contemplated by Applicant for its extension of time has passed, Applicant is allowed until **AUGUST 11, 2017**, to file an answer in this proceeding. NO FURTHER EXTENSIONS OF TIME WILL BE ALLOWED, unless Applicant submits proof of extraordinary circumstances supported by a declaration, including proof of Applicant's hospitalization. Applicant is reminded that the notice

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of default issued on October 12, 2016 has not been discharged; therefore, should Applicant not file an answer by August 11, 2017, default judgment shall be entered against Applicant and the opposition will be sustained.

Trial dates are reset as shown in the following schedule:

Time to Answer	8/11/2017
Deadline for Discovery Conference	9/10/2017
Discovery Opens	9/10/2017
Initial Disclosures Due	10/10/2017
Expert Disclosures Due	2/7/2018
Discovery Closes	3/9/2018
Plaintiff's Pretrial Disclosures Due	4/23/2018
Plaintiff's 30-day Trial Period Ends	6/7/2018
Defendant's Pretrial Disclosures Due	6/22/2018
Defendant's 30-day Trial Period Ends	8/6/2018
Plaintiff's Rebuttal Disclosures Due	8/21/2018
Plaintiff's 15-day Rebuttal Period Ends	9/20/2018
Plaintiff's Opening Brief Due	11/19/2018
Defendant's Brief Due	12/19/2018
Plaintiff's Reply Brief Due	1/3/2019
Request for Oral Hearing (optional) Due	1/13/2019

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125, 37 C.F.R. §§ 2.121-2.125. These include

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pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b), 37 C.F.R. §§ 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a), 37 C.F.R. § 2.129(a).



NOTICE: CHANGES TO THE TRADEMARK TRIAL AND APPEAL BOARD (“BOARD”) RULES OF PRACTICE EFFECTIVE JANUARY 14, 2017

The USPTO published a Notice of Final Rulemaking in the Federal Register on October 7 2016, at 81 Fed. Reg. 69950. It sets forth **several** amendments to the rules that govern *inter partes* (oppositions, cancellations, concurrent use) and ex parte appeal proceedings. A correction to the final rule was published on December 12, 2016, at 81 Fed. Reg. 89382.

For complete information, the parties are referred to:

- The Board’s home page on the uspto.gov website:
<http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab>
- The final rule:
<http://www.uspto.gov/sites/default/files/documents/81%20FR%2069950.pdf>
- The correction to the final rule:
<http://www.uspto.gov/sites/default/files/documents/81%20FR%2089382.pdf>
- A chart summarizing the affected rules and changes:
http://www.uspto.gov/sites/default/files/documents/RulesChart_12_9_16.pdf

For **all** proceedings, including those **already in progress on January 14, 2017**, some of the changes are:

- All pleadings and submissions must be filed through ESTTA. Trademark Rules 2.101, 2.102, 2.106, 2.111, 2.114, 2.121, 2.123, 2.126, 2.190 and 2.191.
- Service of all papers must be made by email, unless otherwise stipulated. Trademark Rule 2.119.
- Response periods are no longer extended by five days for service by first-class mail, Priority Mail Express®, or overnight courier. Trademark Rule 2.119.

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- Deadlines for submissions to the Board that are initiated by a date of service are 20 days. Trademark Rule 2.119. Responses to motions for summary judgment remain 30 days. Similarly, deadlines for responses to discovery requests remain 30 days.
- All discovery requests must be served early enough to allow for responses prior to the close of discovery. Trademark Rule 2.120. Duty to supplement discovery responses will continue after the close of discovery.
- Motions to compel initial disclosures must be filed within 30 days after the deadline for serving initial disclosures. Trademark Rule 2.120.
- Motions to compel discovery, motions to test the sufficiency of responses or objections, and motions for summary judgment must be filed prior to the first pretrial disclosure deadline. Trademark Rules 2.120 and 2.127.
- Requests for production and requests for admission, as well as interrogatories, are each limited to 75. Trademark Rule 2.120.
- Testimony may be submitted in the form of an affidavit or declaration. Trademark Rules 2.121, 2.123 and 2.125
- New requirements for the submission of trial evidence and deposition transcripts. Trademark Rules 2.122, 2.123, and 2.125.
- For proceedings **filed on or after January 14, 2017**, in addition to the changes set forth above, the Board's notice of institution constitutes service of complaints. Trademark Rules 2.105(a) and 2.113(a).

This is only a summary of the significant content of the Final Rule. All parties involved in or contemplating filing a Board proceeding, regardless of the date of commencement of the proceeding, should read the entire Final Rule.