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

Proceeding	91229667
Party	Plaintiff Cybernet Entertainment LLC
Correspondence Address	JULIEN SWANSON AUSTIN LAW GROUP 799 CASTRO STREET SAN FRANCISCO, CA 94114 UNITED STATES swanson@austinlawgroup.com
Submission	Opposition/Response to Motion
Filer's Name	Julien Swanson
Filer's e-mail	swanson@austinlawgroup.com
Signature	/Julien Swanson/
Date	03/02/2017
Attachments	2017.3.2 Opp to req for default.pdf(32396 bytes)

ALEX AUSTIN (SBN
JULIEN SWANSON (SBN 193957)
AUSTIN LAW GROUP
799 Castro Street
San Francisco CA 94114
austin@austinlawgroup.com
swanson@austinlawgroup.com

Attorneys for CYBERNET ENTERTAINMENT LLC

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

CYBERNET ENTERTAINMENT, LLC

Opposer;

v.

MICHAEL R.RADCLIFF

Applicant.

Opposition No.	91229667
In re App. No:	86700538
For the Mark:	KINK STARTER
App. Filed:	July 22, 2015
Applicant:	MICHAEL R.RADCLIFF
Published:	July 26, 2016

Opposer: Cybernet Entertainment LLC
799 Castro Street
San Francisco CA 94114

Applicant: Michael R.Radcliff
P.O. Box 70
Elka Park, New York, 12427

Represented by:
RICHARD M. BLANK
Richard Mark Blank Esquire
19 Ledgewood Cmns
Millwood, New York, 10546-1026

Opposition to Request for Relief from Default

Procedural And Factual History

The above opposition was filed by Cybernet Entertainment LLC (Opposer) on August 23, 2016. See TTAB filing 1.

On that same date, the Trademark Trial and Appeal Board ("TTAB") issued an order indicating among other things, that " *As required in the schedule set forth below, applicant must file an answer within forty (40) days from the mailing date of this order... Failure to file a timely answer may result in entry of default judgment and the abandonment of the application.* " See TTAB filing #2, Order dated 8/23/16. The TTAB set the following deadlines in this case as follows:

Time to Answer	10/2/2016
Deadline for Discovery Conference	11/1/2016
Discovery Opens	11/1/2016
Initial Disclosures Due	12/1/2016
Expert Disclosures Due	3/31/2017
Discovery Closes	4/30/2017
Plaintiff's Pretrial Disclosures	6/14/2017
Plaintiff's 30-day Trial Period Ends	7/29/2017
Defendant's Pretrial Disclosures	8/13/2017
Defendant's 30-day Trial Period Ends	9/27/2017
Plaintiff's Rebuttal Disclosures	10/12/2017
Plaintiff's 15-day Rebuttal Period Ends	11/11/2017

Although an answer was to be filed on October 2, 2016, no answer has yet to be filed by Applicant in this proceeding.

On October 12, 2016, a Notice of Default was filed by the TTAB in this case, providing:

An answer to the notice of opposition was due in this proceeding on October 02, 2016. Inasmuch as it appears that no answer has been filed, nor has Applicant filed a motion to extend the time to file an answer, notice of default is hereby entered against Applicant pursuant to Fed. R. Civ. P. 55(a).1

The October 12, 2016 TTAB Order provided a thirty-day period for Applicant to show good cause why judgment should not be entered in the case.

Applicant is allowed until thirty days from the date of this order to show cause why judgment by default should not be entered against Applicant in accordance with Fed. R. Civ. P. 55(b)(2).

Applicant failed to respond to the order to show good cause why judgment should not be entered by the deadline of November 12, 2016.

On December 2, 2016, sixty (60) days after the deadline for filing its answer had passed, fifty (50) days after default had been entered, twenty (20) days after the deadline to provide good cause as to why judgment should not be entered, following the opening of discovery, and following the expiration of the deadline to hold a Discovery Conference and to exchange Initial Disclosures, Applicant filed the following request in full:

Applicant hereby motions to the court that the default be withdrawn and that the court

allow Applicant to appear and answer through counsel, Richard Mark Blank, Esquire by January 15, 2017 under special circumstances.

Counsel has had family medical issues that have caused counsel to need the requested delay. The road has been tough as we are now at hospices stage.

Applicant failed to properly serve opposer with the above filing and attached only an email sent to Opposer's attorney requesting that Mr. Swanson consent to his request.

Applicant requested time to answer only through January 15, 2017, and failed to supplement its request through the present day, despite the fact that January 15th passed some 46 days ago.

On March 2, 2017, the TTAB ordered that Applicant properly serve all future filings, and allowed Opposer twenty days to file a response to the motion for relief.

Argument

The time for filing an answer may be extended or reopened by stipulation of the parties, approved by the Board, or on motion granted by the Board, or by order of the Board. See TBMP § 509. Here, no such motion was filed or stipulation was made. Rather, time to answer has passed, and time to put forth good cause as to why judgment should not be entered has passed.

TTAB regulations further provide that when a defendant who has not yet filed an answer, but instead files a response to a notice of default, the late answer should be submitted with the response. TBMP 312.01. Here, Applicant has failed to furnish the required answer with his request for an extension and its request for relief from default. Moreover, the requested extension was though January 15, 2017 only, and despite the passing of an additional forty-six (46) days, Applicant has failed to provide any supplemental information, including the required, proposed answer.

A notice of default may be set aside on a showing of good cause. See TBMP § 312.02. The applicable standard for showing good cause for failure to timely file an answer, which supports a request for additional time or for relief from default, is as follows:

Good cause why default judgment should not be entered against a defendant, for failure to file a timely answer to the complaint, is usually found when the defendant shows that (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action. The showing of a meritorious defense does not require an evaluation of the merits of the case. All that is required is a plausible response to the allegations in the complaint.

(*Id.*)

Here, Applicant requests that the TTAB (i) withdraw entry of default and (ii) allow it to appear and answer by January 15, 2017, on the basis that "*Counsel has had family medical issues that have caused counsel to need the requested delay. The road has been tough as we are now at hospices stage.*"

Although medical issues in some circumstances may reasonably form the basis for good cause, here, Applicant's request fails to meet the required standard as it is silent to necessary facts and details, including that it fails to address the prejudice that will result if its request is granted, it fails to set forth any showing of merit for its underlying case, and it fails to detail a lack of unreasonable neglect. See *HKG Indus. v. Perma-Pipe, Inc.*, 1998 TTAB LEXIS 399, 49 U.S.P.Q.2D (BNA) 1156, 49 U.S.P.Q.2D (BNA) 1156 (Trademark Trial & App. Bd. Oct. 16, 1998) ["The Board was unable to find good cause to reopen discovery in view of the absence of evidence linking the reason for the delay with the expiration of

petitioners' testimony period."]

On December 2, 2016, Applicant attached an email from its counsel to the undersigned, attached to its request, which provided that Counsel of record had been "mostly out for the last 90 days" dealing with a serious medical issue. This is a circumstance that all can agree is worthy of compassion. However, there is no detailed explanation as to how this circumstance wholly prevented counsel from taking action to, including delegating the responsibility to, respond to this Board's multiple orders and the rules that govern this proceeding during this 90-day period, and ultimately in the time that has passed since the answer was initially due aside from the cursory email and filing on December 2, 2016. This is insufficient under *Johnston Pump/General Valve Inc. v. Chromalloy American Corp.*, 13 USPQ2d 1719, 1720 n.3 (TTAB 1989), which requires "the presentation of one's arguments and authority should be presented thoroughly in the motion or the opposition brief thereto." See also *Fairline Boats plc v. New Howmar Boats Corp.*, 59 USPQ2d 1479, 1480 (TTAB 2000) (*motion denied where party failed to provide detailed information regarding apparent difficulty in identifying and scheduling its witnesses for testimony and where sparse motion, containing vague reference to possibility of settlement, demonstrated no expectation that proceedings would not move forward during any such negotiations.*)

The rules make clear that the Board will "scrutinize carefully" any motion to extend time, to determine whether the requisite good cause has been shown. See *Miscellaneous Changes to Trademark Trial and Appeal Board Rules*, 63 FR at 48086 (1998), 1214 TMOG at 149 (September 29, 1998). Moreover, a party moving to extend time must demonstrate that the requested extension of time is not necessitated by the party's own lack of diligence or unreasonable delay in taking the required action during the time previously allotted. *Luemme, Inc. v. D. B. Plus Inc.*, 53 USPQ2d 1758, 1760-1 (TTAB 1999) (*sparse motion for extension of time for discovery contained insufficient facts on which to find good cause*); see also *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1851 (TTAB 2000) (*applicant's motion to extend discovery denied when counsel knew of unavailability of witness a month before, yet delayed until last day to seek an agreement on an extension of time*). Here, Applicant has explained there was a medical issue, but he has provided no associated details, and unfortunately, it is impossible for the undersigned or the Board to determine how the medical issue has prevented counsel from acting diligently for the entire time in question, including specifically, how it prevented him from responding after the requested time period had lapsed - that is, Counsel required a 45-day extension through January 15th, 2017 only, to provide an answer. Nonetheless, as of March 2, 2017 no supplemental filing has been made by Applicant. Indeed, following Applicant becoming aware of the default, a date which its counsel has not alleged but can be ascertained to have occurred at least by December 2nd, when it requested relief from default, there was no subsequent effort made to mitigate prejudice or further delay, or to follow the regulations that define good cause after this date.

Here, Applicant has made no showing of merit in its underlying position which would be accomplished by presenting a proposed answer - something that Applicant has failed to do despite 46 days passing from the January 15, 2017 date it stated it would be able to present such a filing.

Because further delays will result in prejudice here, because relief here will require re-setting all dates in this case, this prevents Opposer from moving forward with the rights it has established in the mark "Kink" and "Kink.com" which includes, affirming that its trademark rights are superior. The timing of this is significant as Opposer is currently in federal litigation and set to start trial in a case that is based in part on its ability to establish its superior rights in the standalone mark KINK.

Conclusion

Accordingly, although the undersigns wishes counsel for Applicant well and does not relish in opposing its motion, the present circumstances do not justify the relief requested. Moreover, Opposer requests judgment be entered against Applicant.

Dated: March 2, 2017

AUSTIN LAW GROUP

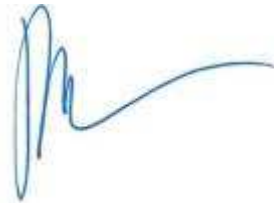
By: /Julien Swanson/
JULIEN SWANSON
Attorney for CYBERNET
ENTERTAINMENT LLC

CERTIFICATE OF MAILING

I hereby certify that on March 2, 2017, the following OPPOSITION TO REQUEST FOR RELIEF for Application Serial No: 86700538 is being deposited in the United States Postal Service with sufficient postage as first class mail, using normal business practices, in an envelope addressed to:

RICHARD M. BLANK
Richard Mark Blank Esquire
19 Ledgewood Cmns
Millwood, New York, 10546-1026

Executed this 2nd Day of March, 2017, at San Francisco, California.

By:  _____
Julien Swanson