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

Proceeding	92045648
Party	Plaintiff Fremantle Media North America, Inc.
Correspondence Address	Susan L. Heller Greenberg Traurig, LLP 2450 Colorado Avenue, Suite 400E Santa Monica, CA 90404 UNITED STATES latm2@gtlaw.com, nyleng@gtlaw.com, mantellw@gtlaw.com
Submission	Reply in Support of Motion
Filer's Name	Wendy M. Mantell
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Date	01/05/2009
Attachments	REPLY - IDOL WRITER_001.pdf ( 12 pages )(944011 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark Registration No. 3,049,295  
For the mark IDOL WRITER  
Registered on January 24, 2006

FREMANTLEMEDIA NORTH AMERICA, )  
INC. )

Petitioner, )

CANCELLATION NO. 92045648

vs. )

IDOL WRITER, LLC )

Registrant. )

**REPLY IN SUPPORT OF MOTION FOR SANCTION OF**

**DEFAULT JUDGMENT FOR FAILURE TO COMPLY WITH BOARD ORDER**

**I. INTRODUCTION**

Registrant's Opposition is merely an attempt to avoid the clearly warranted sanction of a default judgment, and provides no valid reason for Registrant's continued failure to engage in this proceeding. Moreover, it declines to account for the overwhelming number of chances Registrant has already been given to respond to Fremantle's discovery requests, served *over eight months* ago. Registrant's virtual ignorance of this proceeding for the last eight months should not be excused for the invalid reasons set forth in its Opposition, and Fremantle's Motion should be granted in its entirety.

## II. FREMANTLE IS ENTITLED TO DEFAULT JUDGMENT

As set forth in Fremantle's opening brief, Trademark Rule 2.120(g) provides that "if a party fails to comply with an order of the Trademark Trial and Appeal Board relating to disclosure or discovery, . . . the Board may make any appropriate order, including those provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure [for sanctions]." 37 C.F.R. § 2.120(g)(2). Appropriate sanctions include "entering judgment against the disobedient party." TBMP § 527.01(b); *see also* FRCP 37(b)(2) (listing "rendering a default judgment against the disobedient party" as an appropriate sanction). Registrant has not provided any responses to Fremantle's discovery requests and did not comply with the Board's October 3, 2008 Order requiring it to serve responses to Fremantle's Discovery Requests by November 3, 2008.

Moreover, Registrant has made no attempt to meaningfully engage in this proceeding at all in the eight months since Fremantle served its requests. Fremantle granted several extensions of time for Registrant to respond to its discovery requests, but Registrant never did so. Registrant failed to respond at all to Fremantle's August 13, 2008 meet and confer letter and its August 21, 2008 Motion to Compel filed in this Proceeding.

Registrant's only excuse for not complying with its discovery obligations (set forth for the first time in its Opposition to Fremantle's Motion) is that the information relevant to the requests apparently was in storage and was "unavailable" to Registrant. Such an excuse rings particularly hollow since Fremantle served Requests for Admissions and Interrogatories, responses to which would not have required access to any documents, but which are within Registrant's own knowledge.

Registrant also states that it is in the process of “actively seeking” counsel, but, as the Board is aware, Registrant has used this excuse before. *See* FremantleMedia’s Motion to Compel, at pp. 3-4 (filed August 21, 2008); Mantell Declaration In Support of Motion to Compel, Exh. D (filed August 21, 2008). Registrant’s *pro se* status also is not a valid excuse given that Fremantle already has granted it numerous chances to comply with its discovery obligations, in part based on Registrant’s assertion that it would be retaining counsel, which it has not done. Moreover, “the Board does not recognize ‘potential counsel.’” Order Granting Consent Motion for Extension, July 9, 2008. Registrant must be considered to be “proceeding *pro se*” unless and until that status is changed with the Board. *Id.*

Although Registrant states that it did not intentionally disregard the Board’s October 3, 2008 Order granting Fremantle’s Motion to Compel, deeming Fremantle’s Requests for Admission admitted,<sup>1</sup> and requiring Registrant to respond to Fremantle’s Requests for Production and Interrogatories by November 3, 2008, Registrant has made absolutely no attempt to comply with the Order. While Registrant states that it has telephoned counsel for Fremantle on at least three occasions, it provides no record of these phone calls, nor does it provide any specifics regarding who it called, when it called, and whether it left any messages and if so, with whom. Counsel for Fremantle has no knowledge of any attempt by Registrant to contact it. *See* Supplemental Declaration of Wendy M. Mantell in Support of Motion For Sanctions (“Supp. Mantell Dec.”), ¶ 2. Registrant has counsel for Fremantle’s email addresses but has never attempted to contact counsel for Fremantle by email. *See* Supp. Mantell Dec., ¶ 3.

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<sup>1</sup> Although Registrant’s Opposition includes a request that Fremantle’s Requests for Admission not be deemed admitted, in fact the Board has already ordered that these Requests for Admission be deemed admitted in its October 3, 2008 Order.

In addition, the cases cited by Registrant are inapposite. In *Martin v. Coughlin*, 895 F. Supp. 39, 43 (N.D.N.Y. 1995), the court only declined to enter default judgment against the defendant who failed to respond because of “the specter of inconsistent adjudications” between that defendant and his co-defendant, who “responded in a professional and timely manner.” Here, no such risk of inconsistent adjudications exists. In *Richardson v. Nassau County*, 184 F.R.D. 497, 501-02 (E.D.N.Y. 1999), the defendant’s failure to engage in the proceeding did not rise to the level of bad faith necessitated by the standard in the Second Circuit based in part on the fact that the county was handling “4500 active cases with only 14 attorneys.” In addition, as of the time of the decision, defendant had complied with the outstanding discovery requests. *See id.* Here, Registrant has not engaged in this proceeding although it appears this is the only Board proceeding it is involved in at this time. *See* <http://ttabvue.uspto.gov/ttabvue/v?pnam=Idol%20Writer,%20LLC>. Moreover, Registrant still has not provided any responses to Fremantle’s Discovery Requests. Instead, Registrant has engaged in a pattern of dilatory tactics and has purposefully avoided its responsibilities in this case. “Default judgment is a harsh remedy, but it is justified where no less drastic remedy would be effective, and there is a strong showing of willful evasion.” *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 U.S.P.Q.2d 1848, 2000 WL 1300412, at \* 7 (T.T.A.B. 2000) (finding default judgment was warranted where applicant and its counsel engaged in a pattern of dilatory tactics, purposely avoided applicant's discovery responsibilities in this case, and failed to comply with a Board Order).

Instead of providing responses to those outstanding discovery requests within its own personal knowledge (which it certainly could have done in the time that has passed since Fremantle filed its motion), Registrant now unbelievably seeks *an additional 60 days* within

which to respond to Fremantle's discovery requests, more than is even given under the TTAB and Federal Rules of procedure, and more than the Board gave in its October 3, 2008 Order. Such a request exhibits that Registrant is not serious about engaging in this proceeding and has no intention of responding to Fremantle's Discovery Requests. At some point enough is enough. Registrant's request should be denied and the sanction of a default judgment should be imposed.

Registrant has also requested that the Board deny Fremantle's request that its Request for Admissions be deemed admitted; however, this request has already been granted by the Board. *See* October 3, 2008 Order granting Motion to Compel. Registrant's request is therefore an improper motion for reconsideration, as Registrant has failed to comply with any of the requirements for such a motion. Federal Rule of Civil Procedure 60 sets forth the grounds for which a court, or in this case, the Board, may grant relief from a judgment or order. Rule 60(a) states that relief may be granted to correct clerical mistakes. Rule 60(b) states that relief may be granted for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Fed. Rule Civ. Pro. 60(b). Registrant has not cited any reason at all that it should be granted relief from the Board's October 3, 2008 order granting Fremantle's request that its requests

for admission be deemed admitted; indeed, Registrant fails to even acknowledge that Order in its Motion. Hence, Registrant's request must be denied.

### III. CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Petitioner Fremantle's motion for sanctions in the form of a default judgment should be granted in its entirety.

Respectfully submitted,

Dated: January 5, 2009

**FREMANTLEMEDIA NORTH AMERICA, INC.**

By: 

Susan L. Heller  
Gregory A. Nylén  
Wendy M. Mantell  
Christina M. Liu  
Greenberg Traurig, LLP  
2450 Colorado Avenue, Suite 400E  
Santa Monica, CA 90404

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark Registration No. 3,049,295  
For the mark IDOL WRITER  
Registered on January 24, 2006

FREMANTLEMEDIA NORTH AMERICA, INC.	)	
	Petitioner,	CANCELLATION NO. 92045648
vs.		
IDOL WRITER, LLC	)	
	Registrant.	

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**SUPPLEMENTAL DECLARATION OF WENDY M. MANTELL  
IN SUPPORT OF PETITIONER'S MOTION FOR SANCTIONS**

I, Wendy M. Mantell, do declare,

1. I am an associate in the law firm of Greenberg Traurig, LLP, counsel of record for FremantleMedia North America, Inc. ("Fremantle" or "Petitioner") in the above-captioned action. I am licensed to practice law in the States of California and New York. I have personal knowledge of the following facts, and would competently testify as to their truth if called upon to do so.

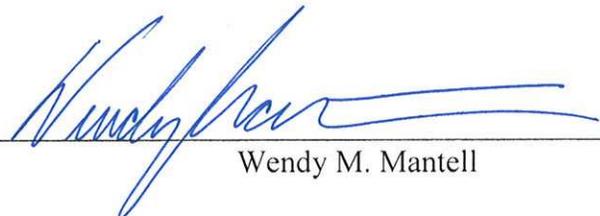
2. Neither I nor my colleagues at Greenberg Traurig LLP representing Fremantle in this proceeding have received any telephone calls or voicemail messages from Mr. Phillip Elden since the time that Fremantle filed its Motion to Compel on August 21, 2008 in this action. Each

of us has our own direct dial telephone line. If a call is not answered, the caller is led to voicemail to leave a message. In addition, the office has a main number, indicated on all of Fremantle's pleadings and its correspondence record in this proceeding, that is answered by a person sitting at reception. A caller who calls during business hours is transferred by the receptionist to the appropriate attorney. Neither I nor my colleagues have received any message from reception that Mr. Phillip Elden called. A caller who calls after business hours may reach a specific attorney or that attorney's voice mailbox by using an automated directory.

3. Neither I nor my colleagues at Greenberg Traurig LLP representing Fremantle in this proceeding have received any email messages from Mr. Phillip Elden since the time that Fremantle filed its Motion to Compel on August 21, 2008 in this action.

4. On December 15, 2008, the day before Idol Writer's response to the present motion was due, Susan Heller and Gregory Nylen of my office were both contacted via email by Thomas I. Rosza. Mr. Rosza requested that Fremantle waive its default motion. On December 18, 2008, Gregory Nylen wrote back explaining that Fremantle would not waive its request for default judgment. A copy of Mr. Rosza's email and Mr. Nylen's response is attached hereto as Exhibit A. Neither Mr. Elden nor Mr. Rosza has contacted counsel for Fremantle since that time. As far as Fremantle is aware and as evidenced by the TTABVUE website, Mr. Rosza has not substituted in as counsel for Idol Writer.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed this 5<sup>th</sup> day of January, 2009 at Santa Monica, California.

  
Wendy M. Mantell

## **EXHIBIT A**

**Mantell, Wendy M. (Assoc-LA-LT)**

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**From:** Nylén, Gregory (Shld-LA-IP/LT)  
**Sent:** Thursday, December 18, 2008 12:59 PM  
**To:** lau@rozsawalaw.com  
**Cc:** Heller, Susan L. (Shld-LA-IP/Tech); Mantell, Wendy M. (Assoc-LA-LT); Liu, Christina (Assoc-LA-IP/Tech)  
**Subject:** RE: Fremantle Media North America, Inc. v. Idol Writer, LLC

Dear Mr. Rozsa:

We cannot agree to waive or set aside the default. Please let me know if you have any other questions regarding this proceeding.

**Gregory Nylén**

Greenberg Traurig, LLP  
2450 Colorado Avenue, Ste. 400E  
Santa Monica, CA 90404

Direct Dial: (310) 586-7733  
Direct Fax: (310) 586-0233  
E-mail: [nyleng@gtlaw.com](mailto:nyleng@gtlaw.com)  
Web: [www.gtlaw.com](http://www.gtlaw.com)

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**From:** Lauraine Kirby [<mailto:lau@rozsawalaw.com>]  
**Sent:** Monday, December 15, 2008 4:54 PM  
**To:** Heller, Susan L. (Shld-LA-IP/Tech); Nylén, Gregory (Shld-LA-IP/LT)  
**Subject:** Fremantle Media North America, Inc. v. Idol Writer, LLC

December 15, 2008

By Email - Hard Copy By Mail

[hellers@gtlaw.com](mailto:hellers@gtlaw.com)  
[nyleng@gtlaw.com](mailto:nyleng@gtlaw.com)

Susan L. Heller, Esq.  
Greg Nylén, Esq.  
Greenberg Traurig, LLP  
2450 Colorado Avenue  
Suite 400E  
Santa Monica, California 90404

**Re: Fremantle Media North America, Inc. v. Idol Writer, LLC  
Cancellation No. 92045648**

Dear Susan and Greg:

Phillip Elden of Idol Writer, LLC has requested that I take over representation of his case in the above-referenced matter. I have just received the file and in reviewing the file, I have found that apparently you propounded discovery on my client which was not responded to and you have filed a Motion to Compel and Request for Sanctions for failure to respond. The Trademark Trial and Appeal Board has apparently suspended all proceedings pending your request for a default to be entered.

What I would request is that you permit me to file responses to your discovery within a reasonable period of time and waive the default. If this is not acceptable, then of course I will have to file motion paperwork to set aside the default for good cause and this will result in needless expense to all parties. Therefore, please let me know if you are willing to waive the default motion and grant me a reasonable period of time to respond to your discovery.

Thank you for your courtesy and cooperation in this matter.

Sincerely,

Thomas I. Rozsa  
Rozsa Law Group LC  
18757 Burbank Boulevard, Suite 220  
Tarzana, California 91356-3346  
Telephone: (818) 783-0990  
Telecopier: (818) 783-0992

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Thank you.

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the foregoing **REPLY IN SUPPORT OF MOTION FOR SANCTION OF DEFAULT JUDGMENT FOR FAILURE TO COMPLY WITH BOARD ORDER, SUPPLEMENTAL DECLARATION OF WENDY M. MANTELL IN SUPPORT OF PETITIONER'S MOTION FOR SANCTIONS** upon Registrant by depositing one copy thereof in the United States Mail, first-class postage prepaid, on January 5, 2009, addressed as follows:

Phillip Elden  
Idol Writer, LLC  
P. O. Box 551  
Bonsall, CA 92003



Pamela Pascual