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

Proceeding	91221613
Party	Plaintiff CaseWare International Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

CASEWARE INTERNATIONAL INC.,	)	
	)	
Opposer,	)	
	)	Opposition No. 91/221,613
v.	)	
	)	Serial No. 85/955,337
NXTBIGTHING, LLC,	)	
	)	Mark: IDEAMATCH
Applicant.	)	
	)	

OPPOSER'S MOTION FOR SANCTIONS AND FOR
SUSPENSION PENDING DETERMINATION OF THIS MOTION

The Opposer, CaseWare International Inc. ("Opposer" or "CWI"), pursuant to 37 C.F.R. § 2.120(g) and TBMP § 527 respectfully moves for sanctions against the Applicant, NxtBigThing, LLC ("Applicant"), in the form of a default judgment for the Applicant's failure to comply with the Board's Order of May 13, 2016. *See* Dkt. 23. In the alternative, if the Board deems that a default judgment is not warranted as of yet, CWI moves for sanctions in the form of an order precluding the Applicant from relying at trial upon information that was properly sought but not produced in discovery.

CWI requests that the proceeding, other than the briefing schedule for the Parties in relation to CWI's contemporaneously filed motion for leave to amend,[1] be suspended pending disposition of this Motion.

[1] CWI understands that the filing of the instant motion for sanctions should toll all filings that are not germane to the sanctions request. CWI's motion for leave to amend addresses a new cause of action based on the small amount of information that can be gleaned from the Applicant's discovery responses. CWI files its motion for leave to amend contemporaneously with the instant motion in case the Board does not enter a default judgment so that the Parties and the Board would not need to suffer through another suspension while the motion to amend is considered.

I. FACTUAL BACKGROUND

On April 28, 2016, CWI brought a motion to compel substantive discovery responses from the Applicant. Dkt. 19. This motion was necessary due to the Applicant's staunch insistence that it did not have an obligation to respond to CWI's discovery requests. *Id.*, p. 2-4. CWI had explained to the Applicant numerous times prior to bringing its motion to compel that the Applicant's refusal to respond was based on inapplicable law and in direct contradiction to the Rules governing the Board. *Id.* The Applicant refused to reconsider its position. *Id.*

While CWI was trying to resolve its discovery dispute with the Applicant, the Applicant filed a motion to "strike" CWI's initial disclosures. *See* Dkt. 17; *see also* Dkt. 19, pp. 2-3. Prior to CWI filing its response the Board issued an order *sua sponte*, denying the motion to "strike" (the "Order denying Applicant's Motion to Strike"). Dkt. 18. In its Order denying Applicant's Motion to Strike, the Board further addressed the possibility that the Applicant "may be seeking to avoid serving responses to discovery requests that Opposer served concurrently with its initial disclosures" and addressed this possibility. *Id.* Specifically, the Board (1) noted TBMP § 403.02, (2) quoted from *Luster Products, Inc. v. Van Zandt*, 104 U.S.P.Q.2d 1877, 1878-79 (T.T.A.B. 2012), (3) informed the Applicant that "the parties could have timely served discovery requests on Monday, March 28, 2016," and (4) held that "[d]ates remain as last reset in the Board's October 28, 2015 order. Applicant's discovery responses are due in accordance with Trademark Rule 2.119(c) and 2.120(a)(3)." *Id.*

After the Order denying the Applicant's Motion to Strike, CWI tried one more time to demonstrate to the Applicant that its objections and refusal to respond to CWI's discovery responses were unfounded. The Applicant refused to reconsider, and CWI brought its motion to compel discovery responses and test the sufficiency of the Applicant's responses. Dkt. 19, p. 4.

On May 13, 2016, the Board issued an order granting CWI's motion to compel (the "Order granting CWI's Motion to Compel"). Dkt. 23. In addition to noting that the Applicant's theories for its refusal to respond were "wrong" and based on inapplicable case law from district courts, the Board's Order granting CWI's Motion to Compel provided the following instructions to the Applicant:

> Applicant's discovery responses are otherwise [apart from the objection of timeliness] largely identical boilerplate objections that indicate Applicant's failure to make a good faith effort to meet Opposer's discovery needs. *See* TBMP 408.01.
>
> Applicant's repeated objections that certain document requests are "compound, unduly burdensome and oppressive" are improper because Applicant has provided no specific reasons for each objection with regard to each request at issue. *See* Fed. R. Civ. P. 34(b)(2)(B); TBMP § 406.04.
>
> [T]he compound nature of a document request is not a basis for objection to that document request.
>
> To the extent that Applicant objects to discovery requests on the ground that they seek confidential/trade secret information, the Board's standard protective order is operative herein. *See* Trademark Rule 2.116(g); TBMP § 412. Accordingly, any confidential/trade secret information that is otherwise discoverable must be disclosed pursuant to the standard protective order.
>
> Applicant is allowed until thirty days from the mailing date set forth in this order [June 13, 2016] to serve amended **substantive** responses . . . and to produce copies of documents responsive to those document requests. (Emphasis added).
>
> Regarding Applicant's interrogatory responses, Applicant should review Federal Rule of Civil Procedure 33 and TBMP Section 405.
>
> Regarding Applicant's amended responses to document requests, Applicant must first state in response to each request whether it has responsive documents and, if so, that documents will be produce[d] or that documents are being withheld based on a specific objection or claim of privilege.

While the Board did not preclude the Applicant from raising new objections to CWI's discovery responses, the Board did instruct that any objections must be "properly stated . . . to individual discovery requests," that the Applicant's responses were served timely "in compliance

with this order," and that the Applicant had "a good faith basis for asserting" the objections. *Id.*, p. 4, n.7. The Board specifically referred the Applicant to TBMP 414 "regarding the discoverability of various types of information in Board proceedings." *Id.*

Finally, the Board stated that if the Applicant failed to comply, then CWI's remedy was to file a motion for sanctions under Trademark Rule 2.120(g)(1) and referred to the FED. R. CIV. P. 37(c)(1). *Id.*, p. 4, n. 6.

II. THE APPLICANT'S "SUBSTANTIVE" DISCOVERY RESPONSES

Pursuant to the Board's Order granting CWI's Motion to Compel, the Applicant's substantive discovery responses were due on or before June 13, 2016.[2] On the afternoon of Friday, June 10, 2016, the Applicant contacted CWI's counsel inquiring into entering into settlement negotiations. *See* Composite Exhibit 1, e-mails of June 10-12, 2016, between Mr. Batterman and Ms. Stempien Coyle. When CWI's counsel informed the Applicant that it was not possible to discuss settlement that same day, the Applicant finally (at 7 p.m.) asked for an extension of time of the Board's discovery deadline. *Id.* CWI's counsel informed the Applicant on Sunday, June 12, 2016, that she could not agree to the Applicant's request for an extension of time. *Id.* The Applicant then asked for a response by 6 p.m., Monday, June 13, 2016,the deadline for its discovery responses. *Id.* On the afternoon of June 13, 2016, CWI confirmed with the Applicant that CWI would not agree to an extension of time for the Applicant's ordered discovery responses. *Id.* Then, in contrast to the deadline set by the Board, the Applicant served its allegedly "substantive" discovery responses on Tuesday, June 14, 2016. The Applicant alleged that this delay was due to "lost power in [its] office [the night of June 13,

[2] The actual deadline of 30 days fell on Sunday, June 12, 2016.

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