March 28, 2007

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RE: ***Light Action Inc. Productions v. VBC Hosting LLC and Michael Register***
C.A. No.: 2006-07-418

Date Submitted: March 16, 2007
Date Decided: March 28, 2007

LETTER OPINION

Dear Counsel:

On January 31, 2007 Defendants VBC Hosting LLC and Michael Register filed a Motion for Relief from Default Judgment that had been entered against them on October 20, 2006. After a hearing on March 16, 2007, the Court reserved decision. This is the Court's Decision and Order

Plaintiff Light Action Inc. Productions filed its Complaint on Appeal in this Court on July 25, 2006. Defendants filed a Motion to Quash on September 19, 2006. The Motion to Quash was heard on September 22, 2006, at which time—and with counsel for all parties present—the Court denied the Motion. On October 20, 2006, after Defendants

failed to file an Answer to the Complaint within ten (10) days, the Plaintiffs directed the Clerk of the Court to file an Entry of Default Judgment for Want of an Answer pursuant to Civil Rule 55(b)(1). Judgment was then entered for Plaintiff and against Defendants in the amount of $11,631.99. Defendants did not file their Answer until November 13, 2006.

A defendant must serve an answer within twenty (20) days after service of process. CCP Civ. R. 12(a). However, the filing of certain motions alters the time period in which the defendant must file. *Id*. When the Court denied Defendants' Motion to Quash, Defendants' Answer should have been served "within 10 days after *notice of the Court's action*." CCP Civ. R. 12(a)(1) (emphasis added). Put another way, the filing of the Motion to Quash "tolled the time for filing answer until ten days after *decision on the motion*." *Bewick v. De Leuw, Cather & Co.*, 1986 WL 4254, at *1 (Del. Super.) (emphasis added). Defendants have attempted to characterize their failure to timely file an Answer as excusable neglect, arguing that they reasonably believed that the ten-day period would not begin to run until the Court had issued a written order. (It should be noted that Defendant provided no proposed form of Order with their Motion to Quash, nor did Plaintiff with their Response.) However, the clear language of the rule should have alerted the Defendants that the time would begin to run as soon as they had "notice" of the Court's decision. Defendants first received such notice on September 22, 2006, when the Court explicitly—and on the record—denied their Motion to Quash.

Defendants' claims of reasonable delay are also defeated by the prolonged nature of the delay. According to Defendants counsel's own sworn affidavit, a representative of the Court informed counsel for Defendants on October 13, 2006 that the transcript from

the September 22, 2006 hearing served as the record of the Court's decision and that no written order would be forthcoming. In spite of this communication—effectively giving Defendants a second, more explicit notice of the Court's action—Defendants still waited an entire month before filing an Answer on November 13, 2006. The fact that Defendants did not file an Answer until more than fifty (50) days after denial of the Motion to Quash and at least thirty (30) days after being put on direct notice that the ten-day period had already begun to run eviscerates any conceivable case for excusable neglect.

However, the fact that Defendants failed to timely file their Answer does not mean that default judgment could automatically be entered against them by written direction to the Clerk of the Court. The rules of this Court provide that a plaintiff may only direct the Clerk of the Court to enter judgment against a defendant "if the defendant has failed to appear in accordance with these Rules." CCP. Civ. R. 55(b)(1). Conversely, the rules provide that "[i]f the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application." CCP Civ. R. 55(b)(2). The rules of this Court make clear that a defendant may appear "by the service or filing of any motion or pleading purporting to be responsive to, or affecting the complaint." CCP Civ. R. 5(aa)(1).

Because Defendants effectively made their appearance by filing a Motion to Quash, the default judgment provisions of Rule 55(b)(1) were not available to Plaintiff. Instead of filing a direction with the Clerk of the Court, Plaintiff should have filed a

noticed motion under Rule 55(b)(2). Thus, the Court's acceptance of such direction was a mistake, and the default judgment must be vacated.

At the March 16, 2007 hearing, counsel for Plaintiffs condemned Defendants's inaction by referencing *Vechery v. McCabe*. In that case, Judge Layton observed:

> [T]here comes a time when negligence may be so gross as to amount to sheer indifference. This, I believe is such a case. If the prayer of this petition were granted, this Court would be forced to open and vacate judgments upon any excuse a petitioner elected to advance, and the words "excusable neglect" would cease to have meaning. 100 A.2d 460, 461 (Del. Super. 1953).

Although this reference may be a fitting comment on Defendants' behavior, the Court has no choice but to vacate the default judgment entered against them. Regardless of the level of neglect, the entry of default was clearly an error of the Court, all other arguments made before the Court during the March 16, 2007 hearing are moot.

ORDER

For the aforementioned reasons, Defendants' Motion for Relief is hereby GRANTED and the Default Judgment is hereby VACATED.

IT IS SO ORDERED this 28th day of March, 2007.

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Joseph F. Flickinger III
Judge