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

Proceeding	91236715
Party	Defendant Theatricality LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Application Serial No.:	**87/371,308**
Mark:	**WAR BOT**
International Classes:	**16 & 28**
Applicant:	**Theatricality LLC**
Published in *Official Gazette*:	**July 18, 2017**

ROBOT WARS, LLC, Opposer, vs. THEATRICALITY LLC, Applicant.	**Opposition No. 91236715**

REPLY MEMORANDUM IN SUPPORT OF

APPLICANT'S MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO

OPPOSER'S OPPOSITION MEMORANDUM

I. INTRODUCTION

In light of the Board's noted disfavor of Reply Briefs, Applicant will endeavor to keep this short and to the point. Applicant's motion for summary judgment is based on an appropriate analysis of the *DuPont* factors and extensive judicial precedent. The analysis clearly confirms that there is no genuine issue of material fact bearing on the determination of whether Applicant's use of the mark WAR BOT on toys and comic books is likely to cause confusion with or dilute Opposer's use of ROBOT WARS for use in connection with entertainment services.

Opposer filed the subject Opposition on March 14, 2017 and has thus had well over 2.5 years to assemble facts to support the claims raised in the Opposition. For example, such a well-

funded company[1] easily could have conducted a consumer survey in an attempt to demonstrate that its mark is "famous" or (ii) that there is confusion between the parties' respective uses of WAR BOT and ROBOT WARS. Opposer does not submit such a survey – either it conducted a survey, which confirmed that there was no confusion or decided not to conduct a survey because it knew the results would not be favorable. Instead, as discussed in more detail below, it relies on the conjecture and speculation of its attorneys in an unsuccessful attempt to create a genuine issue of material fact.

II. Opposer's Attempt to Add a New Claim is a Red Herring

Opposer spends a good portion of its brief discussing its new claim that the Application for toys is invalid because the WAR BOT mark was not used in "commerce". First of all, as Opposer concedes, this claim is not part of the case and therefore it is not improper to raise it here. More importantly, as discussed in Applicant's Opposition to Robot Wars motion for leave to amend, Opposer's contentions are procedurally and factually wrong rendering the proposed amendment futile. First of all, the WAR BOT mark was in fact used in interstate commerce. (See Applicant's Memo in Opposition to Motion for Leave to Amend, pp. 3-4). Moreover, if the Board grants this motion for summary judgment, it will demonstrate that Opposer will not be damaged by the registration of WAR BOT and therefore will lack standing. As the grounds for the above are clearly laid out in Applicant's concurrently filed Opposition to the Motion for Leave to Amend, which is hereby incorporated by reference, there is no need to belabor the issues any further here.

III. **No <u>Material</u> Issue of Genuine Fact**

Opposer acknowledges that for the Board to deny the pending motion it must find a "material" issue of fact. Nevertheless, Opposer then uses its brief to (i) focus on differences that are not

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[1] Opposer contends that "Worldwide sales of Robot Wars toy robots and associated merchandise have exceeded $50,000,000 since the show's inception." (Opp. Brief, p. 4)

material or (ii) create material facts by relying purely on attorney argument and conjecture. Applicant sees no need to address all the problems with Opposer's argument, however, it will address a few of them below:

1) "Visitors to Applicant's Website encounter Applicant's Mark and immediately see a robot equipped for war – a "War Bot" equipped for a "Robot War" described by Applicant as a "fighting machine." The **possibility of this perception** creates the chance that such a visitor would consider a WAR BOT to be similar to ROBOT WARS." (Opp. Breif. p. 13) This type of speculation merely discusses an attorney's argument regarding his biased view of the website, combined with absolute speculation regarding how a visitor may perceive things. Again, Opposer had ample time and opportunity to conduct a survey but chose not to. The above example falls well short of creating an issue of material fact.
2) …"the public encounters Applicant's Mark either on Applicant's Website, upon receiving a business card from Applicant, and/or upon receiving product packaged by Applicant, and in each case will immediately understand that "War Bot" means "War Robots". "This creates at least a material fact issue regarding confusing similarity, because "War Robot" is simply the reverse of "Robot Wars". Again, this type of attorney speculation does not create a triable issue of material fact, as there is no evidence that consumers will change War Bot into War Robots or take the even larger leap and reverse and pluralize the terms from War Bot to Robot Wars. As noted by Opposer, Robot Wars refers to battles/wars between robots (i.e., an activity); War Bot on the other hand connotes an object, not an activity. Opposer agrees that it is appropriate to analyze the site, sound and meaning of the terms. Here, Opposer clearly goes 0 for 3.
3) "A person who has not seen the Robot Wars TV Show, but has heard of and is curious about Robot Wars, encounters "War Bots" online and sees the Robo Soldier toy. He purchases the toy without further research, on impulse, because he believes that the Robo Soldier is associated with Robot Wars. The purchaser receive the toy, is dissatisfied with

it, and determines not to further investigate Robot Wars without even discovering that Applicant's War Bot toys are in no way connected to Robot Wars. As a result, Opposer loses potential revenue and is damaged." (Opp. Brief p. 22) Again, there is no basis in fact for Opposer's attorney's conjecture upon conjecture. First of all, the Robo Soldier toy costs $99, which is pretty expensive for a toy and therefore would not be considered an "impulse purchase". More importantly, however, there is no factual basis for the entire hypothetical. Opposer has no evidence that a customer upon viewing Applicant's website, would have any reason to make a connection with Robot Wars, that a customer would be dissatisfied with the toy and not investigate Robot Wars, and how that would lead to the loss of potential revenue.

4) Opposer spends a considerable amount of paper identifying huge franchises, like Disney, Ninja Turtles, the Harry Potter movies, Batman, etc…which offer merchandise to coincide with their TV or Movie productions. (Opp. Brief p. 19) None of the cited examples, however, are on par with Opposer's United Kingdom production of actual robots going to war against one another and Opposer provides no evidence to justify any connection. As a result, such "facts" are irrelevant and, again fail to create a material issue of fact.
5) Ironically, Opposer sites to websites to demonstrate the third party use of marks in connection with both TV and movie productions, while at the same time alleging that Applicant's reliance on websites depicting the widespread use of Robot, Wars and Bot is not proper. (Opp. Brief, p. 24). It can't have it both ways. Moreover, evidence of third-party use can establish that the mark is not strong. *In re Coors Brewing Co.* 343 F.3d. 1340, 1345 (Fed. Cir. 2003). There is no question that Opposer's Robot Wars is not a strong mark and, as discussed in Applicant's moving papers, Opposer uses the mark in a generic way to describe its service.
6) Opposer concedes that it only licenses the sale of merchandise in the UK but tries to bootstrap third party resellers, as sales made into the United States. Tellingly, however,

these "sales" refer to the BBC Robot Wars and the licensees brand name (e.g,.. "Pull Back Toy). (Exhibit 10). Again, while an interesting aside, it has no bearing on whether consumer are likely to be confused by Applicant's use of War Bot.

CONCLUSION

In light of the above, upon a thorough reading of the Opposition it is clear that there are no issues of material fact, which preclude granting Applicant's motion for summary judgment.

Respectfully submitted,

BUCHALTER, A Professional Corporation

DATED: December 30, 2019 By: 

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PROOF OF SERVICE

I am employed in the County ofLos Angeles , State of California. I am over the age of 18 and not a party to the within action. My business address is at BUCHALTER, A Professional Corporation, 1000 Wilshire Boulevard, Suite 1500, Los Angeles, CA 90017-1730.

On the date set forth below, I served the foregoing documents described as:

REPLY MEMORANDUM IN SUPPORT OF APPLICANT'S MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO OPPOSER'S OPPOSITION MEMORANDUM

on all other parties and/or their attorney(s) of record to this action by ☐ faxing, ☒ e-mailing, ☐ electronic transmission and/or ☐ placing a true copy thereof in a sealed envelope as follows:

Robert B. Golden
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☑ **BY EMAIL** On December 30, 2019, I caused the above-referenced document(s) to be sent in electronic PDF format as an attachment to an email addressed to the person(s) on whom such document(s) is/are to be served at the email address(es) shown above, as last given by that person(s) or as obtained from an internet website(s) relating to such person(s), and I did not receive an email response upon sending such email indicating that such email was not delivered.

☑ I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed on December 30, 2019, at Los Angeles, California.

☑ I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on December 30, 2019, at Los Angeles, California.

Janet E Gass

/s/ Janet E. Gass
(Signature)