

ESTTA Tracking number: **ESTTA869429**

Filing date: **01/07/2018**

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

Proceeding	91236715
Party	Defendant THEATRICALITY LLC
Correspondence Address	KATHRYN A TYLER LAW OFFICES OF KATHRYN A TYLER 931 ALTA VISTA DRIVE ALTADENA, CA 91001 UNITED STATES Email: ktyler931@gmail.com
Submission	Other Motions/Papers
Filer's Name	Kathryn A. Tyler
Filer's email	ktyler931@gmail.com
Signature	/Kathryn A. Tyler/
Date	01/07/2018
Attachments	RESPONSE TO OPPOSER ROBOT WARS MOTION TO STRIKE AND FOR JUDGMENT ON THE PLEADINGS.pdf(65949 bytes )

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

Application Serial No.: 87/371,308  
Trademark: WAR BOT  
International Classes: 16 and 28  
Applicant: Theatricality LLC  
Publication Date: July 18, 2017

ROBERT WARS, LLC )  
 )  
Opposer, )  
 )  
vs. )  
 )  
THEATRICALITY LLC, )  
 )  
Applicant. )  
\_\_\_\_\_ )

Opposition No. 91236715

RESPONSE TO OPPOSER ROBERT WARS, LLC'S  
MOTION TO STRIKE AND FOR JUDGMENT ON THE PLEADINGS

Applicant Theatricality LLC by and through its undersigned counsel of record, responds to Opposer's Motions to Strike and for Judgment on the Pleadings.

I. INTRODUCTION

Applicant has set forth valid and compelling reasons in its Answer and Affirmative and Equitable Defenses for defending its application. Opposer is seeking to circumvent and deny Applicant its right to defend and also deny Applicant its right to conduct discovery in order to prove its right to use of the mark for its goods as set forth in its application. Applicant has priority of use of the mark WAR BOT for toys. Opposer does not have senior rights but is trying to assert such unfounded rights by way of a Motion. This is not a case of "streamlining" but rather one of bullying one's way out of having to show evidence of a claim of priority. It would be easy to get rid of anything that one does not like or is afraid of if the Board agrees to Opposer's Motion to Strike. In addition, these Motions are filed before the Discovery Conference, Initial Disclosures or Discovery Period even started. How can Opposer be certain of the facts when they have yet to be investigated or proven?

“Motions to strike are not favored, and matter usually will not be stricken unless it clearly has no bearing upon the issues in the case. Ohio State University v. Ohio University, 51 USPQ2d 1289, 1292 (TTAB 1999); Harsco Corp. v. Electrical Sciences Inc., 9 USPQ2d 1570, 1571 (TTAB 1988); Leon Shaffer Golnick Advertising, Inc. v. William G. Pendill Marketing Co., 177 USPQ 401, 402 (TTAB 1973); 5C C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE CIVIL § 1380 (3d ed. 2017). The primary purpose of pleadings, under the Federal Rules of Civil Procedure, is to give fair notice of the claims or defenses asserted. See TBMP § 309.03 (Substance of Complaint) and TBMP § 311.02 (Substance of Answer). Thus, the Board, in its discretion, may decline to strike even objectionable pleadings where their inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis for a claim or defense. A defense will not be stricken as insufficient if the insufficiency is not clearly apparent, or if it raises factual issues that should be determined on the merits.” TBMP Section 506.01.

In this case, Applicant should be allowed to continue with all of its claims, denials, defenses, and should be allowed its day in court.

## II. CONTESTED FACTS

Opposer sets forth many allegations it states as “facts.” However, these alleged facts have yet to be proven and Applicant refuses to acknowledge any of these so-called “facts” as such. Opposer must be put to meeting the burden of proof and evidence just like any other Opposer.

Therefore, Applicant requests the Board to deny Opposer’s Motions in their entirety and to allow the matter to proceed through the normal and regular channels of a formal Opposition under the TTAB and TBMP rules, and the Federal Rules of Civil Procedure.

## III. ARGUMENT

1. First and Eleventh Affirmative Defenses and Paragraphs 18 and 19 of the Answer Should Remain and are Material

Opposer has NEVER used the mark WAR BOT, but Applicant has used WAR BOT for its toys. Therefore, it is obvious that Applicant is the first user of the mark, the prior user of the mark and that Opposer has NEVER used the mark. Thus, Applicant has priority.

The rest of Opposer's argument is not based on priority, but rather on its belief that the marks are confusingly similar. Applicant denies that the marks are similar, but it does not deny that it has priority over the use of its own mark. Denying Applicant priority of its own mark would go to destroy the statements of use set forth in its application, and this is something that would have to be proven during the course of the trial. Now is not the time to deny Applicant this important claim, especially since no discovery has been conducted.

b. The Priority Claim is for Applicant's benefit and is its right

Opposer is trying to remove this claim based on a collateral attack defense. Applicant is allowed to defend its own application and statement of use in an opposition matter, and the priority claim should stand.

c. The Priority Claim is Not Immaterial and is Not Precluded as a Matter of Law

Opposer filed a likelihood of confusion claim. Applicant filed a priority claim, to which it has every right. Opposer's attack is what it considers an efficient way to get rid of the competition, and nothing more. Applicant's priority claim should stand.

2. The Second Affirmative Defense Should Stand

Applicant may assert as many defenses and claims as it believes are valid, material and relevant, even if they appear redundant. Applicant set forth valid, material and relevant allegations. Opposer filed a notice pleading and did not provide uncontested or unrefuted "facts." But Opposer is seeking to have the Board turn a blind eye to this attempt to force acceptance of unproven allegations. The Discovery Period and Trial Periods are the proper phases of this proceeding for proving or disproving such facts.

3. Third Affirmative Defense Should Remain

How does one prove unclean hands when one has a valid belief that this has occurred? This is proven through the discovery process. Applicant already has some evidence that this has occurred by way of pre-litigation investigations. Unclean hands relates to the “getting or using the alleged trademark rights” and would include post registration and maintenance rights and actions. This defense should remain and be investigated more thoroughly during the discovery period.

4. The Fifth Affirmative Defense Should Remain because Applicant had a prior registration that Opposer did not assert a right against

As set forth in the Answer, Applicant had a prior registration in place for at least five (5) years. Opposer had the same registration at issue in place, yet never approached Applicant to assert its alleged rights. This delay has not caused Applicant undue prejudice by way of the filing of this Opposition.

5. The Sixth and Seventh Affirmative Defenses should Remain re Concurrent Use

There was concurrent use. Opposer never approached Applicant during this time. The concurrent use was apparently peaceful and the parties apparently co-existed during. Opposer had every opportunity to approach Applicant in the years prior to this Opposition, but did not. Opposer has already failed on this likelihood of confusion factor and does not wish to have to acknowledge that fact, which is a fact. Therefore, this defense should remain.

6. The Seventh and Eighth Affirmative Defenses should Remain

Opposer has made vague and unfounded claims, which must be proven. There should be no shortcut. Opposer must prove it has been damaged and only the discovery and trial phases will allow the parties adequate time and opportunity to fully analyze and prove anything.

Opposer cites the reasonable basis and standing theory for assertions of claims, but this does not arise to the actual showing of evidence and does not satisfy a burden of proof such that a defense

should be stricken. Thus, Opposer fails to show how it has been damaged, and the defenses are sufficient and should remain.

7. The Ninth And Tenth Affirmative Defense re Abandonment

This goes to concurrent use or the lack thereof. This is material to show that the marks co-existed while Applicant's mark was in use for its goods at the same time that Opposer's mark was in use. Or not. If concurrent use has taken place, then there was peaceful co-existence. This defense should remain.

8. The Thirteenth Affirmative Defense should Remain

Opposer set forth a Section 2(a) claim in its opposition. It must prove how Applicant has made a "false suggestion of a connection with persons, living or dead, institutions, beliefs or national symbols, or brings them into contempt, or disrepute" because it is not readily apparent. Again, Opposer is trying to take short-cuts and kick out valid defenses so that it does not have to prove its points. This goes against allowing a defendant to have its day in court or to be given the opportunity to defend itself.

B. The Priority Claim Should remain and Opposer's Motion for Judgment on the Pleadings Denied

Judgment on the pleadings is NOT APPROPRIATE. Opposer does not "undeniably" have priority over Applicant. The use of a couple of strong adjectives, adverbs, and nouns does not a case make and does not prove anything. This is merely puffery and bombastic language used in order to steamroll ones way to getting rid of an alleged impediment.

IV. CONCLUSION

Basically, we are saying to Opposer that it has to prove its points. Striking Applicant's Defenses, which are valid, material and relevant, is not the correct way to prove anything.

For all of the foregoing, Applicant respectfully requests that Opposer's Motions be denied in their entirety.

Dated: January 7, 2018

Respectfully submitted,

/Kathryn A. Tyler/  
Kathryn A. Tyler  
LAW OFFICES OF KATHRYN A. TYLER  
931 Alta Vista Drive  
Altadena, CA 91001  
Tel: (626) 296 9601  
Fax: (626) 296 0475  
e-mail: [ktyler931@gmail.com](mailto:ktyler931@gmail.com)

Attorney for Applicant Theatricality LLC

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA            )  
  ) ss  
COUNTY OF LOS ANGELES        )

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 931 Alta Vista Drive, Altadena, CA 91001.

On January \_\_\_\_, 2018 I timely filed and served a copy of the Stipulated Extension of Time to Respond to the Opposition via e-mail on the following party:

Robert B. Golden                    [RGolden@LSLLP.COM](mailto:RGolden@LSLLP.COM)  
Howard N. Aronson                 [HAronson@LSLLP.COM](mailto:HAronson@LSLLP.COM)  
One Chase Road  
Lackenbach Siegel Building,  
Penthouse Floor  
Scarsdale, New York 10583

I caused the attached document to be transmitted via e-mail to the addressees as listed above.

I declare that I am a member of the federal bar and licensed to practice before the USPTO and TTAB.

/Kathryn A. Tyler/ \_\_\_\_\_  
Kathryn A. Tyler