

ESTTA Tracking number: **ESTTA1334820**Filing date: **01/18/2024**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91288244
Party	Plaintiff Mr. James K. Duck
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Submission	Reply in Support of Motion
Filer's name	James K. Duck
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Signature	/James K. Duck/
Date	01/18/2024
Attachments	P MOT TO DISMISS FRCP 12B.pdf(603364 bytes)

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

Appl. No. : 97024008
Filed : September 13, 2021
Published : July 18, 2023
Mark : Big Time Becks
Applicant : World Wrestling Entertainment, Inc.
CORPORATION DELAWARE

James K. Duck)	
Opposer,)	Opposition No. <u>91288244</u>
)	
v.)	
)	
World Wrestling Entertainment, Inc.)	
CORPORATION DELAWARE)	
Applicant.)	

**OPPOSER'S REPLY BRIEF IN SUPPORT OF ITS
MOTION FOR DEFAULT JUDGMENT AGAINST WORLD WRESTLING
ENTERTAINMENT, INC. IN OPPOSITION NO. 91288244**

I. ARGUMENT

Opposer James K. Duck (“Opposer”), hereby submits this reply to Applicant World Wrestling Entertainment, LLC's, formerly known as World Wrestling Entertainment, Inc. (“Applicant” or “WWE”) January 8, 2024 Response to Motion for Default (the “Response”) in the above-identified action.

Opposer respectfully submits that there is no good cause to set aside the Notice of Default, no good cause to accept the proposed Answer to Opposition No. 91288244, and no good cause to resume the Opposition proceeding. Applicant's failure to file an Answer to Opposition was not inadvertent or a result of a good faith error as claimed by the Applicant. Instead, Applicant's failure to file an Answer to Opposition was done deliberately and in bad faith. In addition, the Opposer will be substantially prejudiced by the delay. Finally, Applicant's late filed Answer to Opposition did not provide any defense at all to the Notice of Opposition, let alone any defense that can be deemed meritorious.

Therefore, Opposer requests that The Board rejects Applicant's late filed Answer to Opposition, and immediately cease this proceeding by granting Opposer a Default Judgment.

II. APPLICANT DOES NOT MEET THE STANDARD FOR SETTING ASIDE A NOTICE OF DEFAULT

Applicant's attempt to set aside a Notice of Default for "good cause" is neither conceivable nor plausible. Furthermore, it's driven by deceptive intent. While the Board keeps in mind that the law strongly favors the determination of cases on their merits, Applicant has provided no defense that can be classified as "meritorious".

Furthermore, there was no "docketing error" due to the deadline having fallen on Christmas Day when counsel's offices were closed. A fact that they admit to when they admitted in their Response that they didn't become aware of the deadline to file until January 3rd, 2024 when they were served with the Motion for Default Judgment.

Lastly, Opposer will be substantially prejudiced by this delay due to Applicant's continued infringing use of "Big Time Becks" at their live events, on their Website, on their social media, and on their television/streaming programming, all of which reach hundreds of millions of international viewers/customers weekly. Opposer will also be substantially prejudiced by this delay due to the legal fact that this proceeding should be over due to default when Applicant failed to meet the December 25th, 2023 deadline to respond. The continuation of this proceeding after the missed deadline will force Opposer to incur more expense and spend more time on this matter that interferes with Opposer's daily living.

III. THE DELAY WAS THE RESULT OF WILLFUL CONDUCT OR GROSS NEGLIGENCE BY APPLICANT

Applicant was made aware of Opposer's "Bigtime" Trademark as far back as 2006 when Opposer, through his attorney, sent a cease and desist to Applicant due to their infringement of Opposer's "Bigtime" Trademark at that time. Applicant's attorney of record, Lauren Middledien-Dienes, had extensive communication with Opposer's attorney and subsequently offered a monetary settlement during those communications, of which was not accepted.

Regarding this current matter, Opposer has been in communication with Applicant's Attorney of Record, Lauren Middledien-Dienes, directly and through his Attorney since September 22nd, 2021. A mere 9 calendar days after Applicant filed Application Serial No. 97024008 for the "Big Time Becks" mark on September 13th, 2021. Applicant has been aware of Opposer's opposition to their application for over 2 years as well as Opposer's intent to legally oppose Applicant's application. Applicant responded to Opposer's cease and desist request of 2021 by hiring the Law Firm of K & L Gates and having Attorney Christopher Verdini communicate directly with Opposer and then with Opposer's attorneys beginning September 29th, 2021. Opposer's attorney made Applicant's attorney Verdini aware via written communication that Applicant's continued infringing use of the "Big Time Becks" mark with full knowledge of Opposer's Rights rendered that infringing use as willful and intentional. Applicant's attorney Verdini opened settlement discussions that included monetary considerations at that time, stated that he'd take the settlement request back to his client, and then follow up with Opposer's attorney. Since March 2022, Applicant's attorney never communicated with Opposer or his attorneys again. Subsequently Opposer filed with the USPTO two (2) separate Letters of Protest against Applicant's application in 2022, one of which can be found in the prosecution history dated February 17th, 2022. Opposer also filed a 90 day extension of time to oppose Applicant's

application on August 17th, 2023. Opposer initiated Opposition Proceedings on November 15th, 2023. Applicant was repeatedly made aware over the course of nearly 2 years and 4 months that an Opposition was imminent and that Applicant would need to respond to an Opposition by Opposer.

Applicant receives email notification updates from the USPTO on their Application the same as Opposer receives updates from the USPTO on his Opposition proceeding. Opposer is one person. Applicant is a multi-billion dollar LLC that is part of an even larger multi-billion Corporation. Applicant changed their business structure from a Corporation to an LLC due to recently being purchased for 9 Billion Dollars. Applicant has a massive and extensive legal department that employs hundreds of lawyers, paralegals, and various office staff. Applicant is trying to claim that while having a legal department of that massive size, they missed the last day of a 40 day deadline due to Christmas. This application, if approved, is worth tens of millions of dollars in merchandising alone for the Applicant. It is not plausible that a company of Applicant's size with a massive legal department could be incompetent to the level that Applicant's Response claims to be. Applicant was notified by the USPTO on November 15th, 2023 that an opposition had been initiated and was given 40 days in which to file an Answer. They had 39 calendar days to file an answer previous to the Christmas Day deadline. Additionally, Applicant admits in their Response that they did not become aware of the December 25th, 2023 deadline until the Motion for Default Judgment was filed on January 3rd, 2024. Therefore Applicant cannot claim that they intended to file the Answer by the deadline if they admit that they didn't know what the deadline was until nine (9) calendar days later. Furthermore, Applicant did not retain their current attorney until after the deadline, as is evidenced by their attorney not having filed a Notice of Appearance until January 8th, 2024, fourteen (14) calendar days after the deadline. These facts clearly show that Applicant had no intention of filing an Answer by the required deadline of December 25th, 2023. These facts also clearly show that the deadline falling on Christmas Day had no relevance to their late filing since they did not immediately file their Answer on December 26th, 2023 as allowed under the Manual of Examining Procedure Chapter 505 Date of Receipt Stamp [R-07.2015] which says in relevant part:

"When the last day for taking any action or paying any fee in the Office falls on a Saturday, Sunday, or a Federal holiday within the District of Columbia, the action or the fee is considered timely if the action is taken or the fee is paid on the next succeeding business day."

Coupled with Applicant's awareness of Opposer's Trademark Rights since 2006 and notification since September 22nd 2021 that Opposer opposed and intended to legally oppose Applicant's registration of the "Big Time Becks" mark, Applicant's attempt to blame the failure to answer on one (1) day, the Christmas Day deadline, is disingenuous, deceitful, and amounts to willful conduct and gross neglect.

IV. OPPOSER WILL BE PREJUDICED BY THE DELAY

According to FindLaw.com, the legal term "prejudiced" is defined as:
"injury or detriment to one's legal rights or claims".

Opposer's Rights and claims to his "Bigtime" mark have been injured to detrimental effect since Applicant began infringing upon Opposer's Rights in mid-2021 by using the "Big Time Becks" mark in commerce throughout Applicant's vast international reach via their live productions, website, social media, and television/streaming programming. Applicant has sold merchandise using the "Big Time Becks" mark and advertised appearances/services of the "Big Time Becks" character, all illegally profiting from infringing upon and weakening Opposer's Rights to the "Bigtime" mark. Allowing this Opposition proceeding to continue after Applicant failed to file an Answer by the required deadline will allow Applicant to continue weakening and illegally profiting from their infringement of Opposer's "Bigtime" Trademark. Applicant's ability to weaken Opposer's rights to the "Bigtime" Trademark cannot be overstated. Applicant reaches hundreds of millions of people around the world on a weekly basis through various platforms. Opposer does not have a fraction of that reach and thus cannot counter the damage that Applicant has done and will continue to do to the "Bigtime" Trademark if you allow this proceeding to continue.

Opposer has been in communication with Applicant's Attorney of Record, Lauren Midden-Diennes, directly and through his attorney since September 22nd, 2021. These communications have been vast, encompassing a wide variety of legal maneuvering by Opposer's attorneys that have cost Opposer significant legal fees thus far. These fees have been for multiple communications with Applicant's attorneys in verbal and written form. These fees have also included 2 separate Letters of Protest to be drafted and sent by Opposer's attorneys as well as the many communications regarding such. These fees have further included multiple correspondence to discuss legal options and strategies with Opposer for nearly 2 years and 4 months. Applicant did not file an Answer by the required deadline. Allowing Applicant to circumvent the USPTO's deadline by allowing this Opposition Proceeding to continue unjustly rewards Applicant and injures Opposer. Applicant will be allowed more time to financially benefit from their illegal infringement and Opposer will suffer additional significant injury from the continued weakening of his "Bigtime" Trademark Rights and by having to spend significantly more amounts of time and money on an Opposition that should legally be ruled in Opposer's favor due to default on the part of Applicant.

V. APPLICANT DOES NOT HAVE A MERITORIOUS DEFENSE

According to the website LSD.com, which stands for Law School Data, "meritorious defense" is defined as:

"A defense that addresses the substance or essentials of a case rather than dilatory or technical objections."

Applicant submitted an "Answer" that amounts to 18 numbered paragraphs (1-8, 13-15, 20-26) of "well, we don't know" disguised in the legalese of "Applicant lacks sufficient information to form a belief as to the allegations in this paragraph". This amounts to Applicant having provided no defense at all for 64% of Opposer's claims in the Notice of Opposition.

Applicant's "Answer" denies 4 paragraphs (16-19) by attempting to claim that the words "Big Time" and the word "Bigtime" are not visually similar nor sound exactly the same when spoken. In addition to Applicant's claim being absurd on its face, the USPTO has already set precedence

by denying a previous application for "Big Time Wrestling" (Registration No 5319898) while citing likelihood of confusion with Opposer's "Bigtime" Trademark Registration. The USPTO deemed that the separate words "Big Time" would in fact be likely to be confused with the single word "Bigtime". Case ID 86745778 #14 Outgoing Office Action submitted as Exhibit A. Applicant cannot deny these 4 paragraphs when a USPTO decision to the contrary is publicly available to them.

Applicant's "Answer" admits 3 paragraphs (10-12) that use the same factual basis that Opposer used in paragraphs 1-2 (information as retrieved from the Government run USPTO Website) Their "Answer" to Opposer's paragraphs 1-2 was "Applicant lacks sufficient information to form a belief as to the allegations in this paragraph". The standard in paragraphs 1, 2, 10-12 is the fact that the information is entered into the USPTO Website by the USPTO and publicly available and accepted as true. Applicant is clearly being selective as to which information on the USPTO Website constitutes "sufficient information". It is this blatant deceitfulness that negates any claim that Applicant is acting in good faith.

In summary, Applicant makes no defense to 64% of Opposer's Notice of Opposition. Applicant's 14% denial of Opposer's Notice of Opposition, denies legal facts and case law that The USPTO previously cited to rule that "Big Time" and "Bigtime" create a likelihood of confusion. Applicant admits 11% of Opposer's Notice of Opposition using the same Government source to verify information that they claimed was insufficient in their denials. Applicant claims the remaining 11% of Opposer's Notice of Opposition are legal conclusions and refuse to respond on the basis that they do not need to. In layman's terms, Applicant's "meritorious defense" consists of 100% of "I don't know, the facts on the USPTO Website cannot be believed, the facts on the USPTO Website can only be believed when they apply to my application, and we don't have to respond to certain things!" That "Answer" possesses no merit at all.

VI. CONCLUSION

For the reasons set forth above, Opposer respectfully requests that the Board conclude this proceeding by rejecting Applicant's proposed Answer to Opposition, issuing an order of Default Judgment, sustain Opposer's Notice of Opposition, and denying Applicant's application Serial No. 97024008.

Respectfully submitted,
James K. Duck, Trademark Owner
/James K. Duck/
James K. Duck
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(847)243-7574
wcpwowner@gmail.com
Trademark Owner Reg.# 3255186

Dated: January 16th, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above Reply Brief was served upon all parties at their address of record by email on January 18th, 2024:

laura.pitts@bipc.com
mark.kornfeld@bipc.com
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/James K. Duck/
James K. Duck

EXHIBIT A

Case Id
86745778Document Description
14. Offc Action OutgoingMail/ Create Date
Dec. 16, 2015

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"BIG TIME WRESTLING" vs. "BIGTIME"

In this case, the following factors are the most relevant: similarity of the marks as to BIG TIME, similarity and nature of the wrestling services, and similarity of the trade channels of the services. See *In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §1207.01 *et seq.*

Both marks feature the same dominant portion BIG TIME giving the same commercial impression of the highest or most successful level in a career.

The compared marks are identical as to BIG TIME portion except as to the slight difference in appearance between registrant's mark, which appears as a compound word with no space separating the words, that is, BIGTIME and applicant's mark, which appears as multiple words with space separating the words, that is, BIG TIME. As such, the marks are identical as to his portion in sound and virtually identical in appearance, and are thus confusingly similar for the purposes of determining likelihood of confusion. See, e.g., *Seaguard Corp. v. Seaward Int'l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) ("[T]he marks 'SEAGUARD' and 'SEA GUARD' are, in contemplation of law, identical [internal citation omitted]."); *In re Best W. Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) ("There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical"); *Stock Pot, Inc., v. Stockpot Rest., Inc.*, 220 USPQ 52, 52 (TTAB 1983), *aff'd* 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) ("There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical.").

Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. See *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Greater weight is often given to this dominant feature when determining whether marks are confusingly similar. See *In re Nat'l Data Corp.*, 753 F.2d at 1058, 224 USPQ at 751.

Consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions).

Greater weight is often given to this dominant feature when determining whether marks are confusingly similar. See *In re Nat'l Data Corp.*, 753 F.2d at 1058, 224 USPQ at 751.

Disclaimed matter that is descriptive of or generic for a party's goods and/or services is typically less significant or less dominant when comparing marks. See *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d at 1060, 224 USPQ at 752; TMEP §1207.01(b)(viii), (c)(ii).

Services:

The applicant features entertainment in the nature of wrestling contests in Int. Class 41. The registrant features sports and entertainment services, namely, appearing and performing in wrestling exhibitions, and providing wrestling news and information via a global computer network in Int. Class 41. Both parties are in the wrestling field.

Where the services of an applicant and registrant are identical or virtually identical, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse goods and/or services. See *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014) (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992)); TMEP §1207.01(b).

The trademark examining attorney has attached evidence from the USPTO's X-Search database consisting of a number of third-party marks registered for use in connection with the same or similar goods and/or services as those of both applicant and registrant in this case. This evidence shows that the goods and/or services listed therein, namely wrestling exhibitions and contests are of a kind that may emanate from a single source under a single mark. See *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); TMEP §1207.01(d)(iii).

Although applicant's mark has been refused registration, applicant may respond to the refusal(s) by submitting evidence and arguments in support of registration.

Due to poor transfer quality of the screencap in this Exhibit, here is a transcription of what the Exhibit says. This Exhibit can be seen in its original form on the USPTO Website in the prosecution history of Registration No. 5319898, dated December 16th, 2015.

“BIG TIME WRESTLING” vs. “BIGTIME”

In this case, the following factors are the most relevant: similarity of the marks as to BIG TIME, similarity and nature of the wrestling services, and similarity of the trade channels of the services. *See In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin’s Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

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