

ESTTA Tracking number: **ESTTA68543**

Filing date: **02/28/2006**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	ISI Brands Inc.
Granted to Date of previous extension	03/01/2006
Address	3133 Orchard Vista Drive, SE Grand Rapids, MI 49546 UNITED STATES
Correspondence information	Chester Rothstein, Esq. Attorney Amster, Rothstein & Ebenstein LLP 90 Park Avenue New York, NY 10016 UNITED STATES ptodocket@arelaw.com Phone:212-336-8000

Applicant Information

Application No	78620254	Publication date	11/01/2005
Opposition Filing Date	02/28/2006	Opposition Period Ends	03/01/2006
Applicant	Herbalife International, Inc. 1800 Century Park East Los Angeles, CA 900671501 UNITED STATES		

Goods/Services Affected by Opposition

Class 032. All goods and services in the class are opposed, namely: Non-alcoholic beverages, namely, sports drinks, energy drinks, effervescent drinks and soft drinks; syrups, mixes, powders, concentrates and effervescent tablets used in the preparation of soft drinks, energy drinks, sports drinks and effervescent drinks

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Application No	78526845	Publication date	12/06/2005
Opposition Filing Date	02/28/2006	Opposition Period Ends	
Applicant	Herbalife International, Inc. 1800 Century Park East Los Angeles, CA 900671501 UNITED STATES		

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Attachments	DOCS1-#335319-v1-Notice_of_Opposition_Herbalife.pdf (5 pages)
Signature	/Chester Rothstein/
Name	Chester Rothstein, Esq.
Date	02/28/2006

1. On information and belief, Applicant Herbalife International, Inc. is a corporation organized and existing under the laws of Nevada located and doing business at 1800 Century Park East, Los Angeles, CA 90067-1501.

2. Applicant seeks to register Serial No. 78,620,254 in International Class 32 for the mark FIZZ. FOCUS. FUEL GOOD! in connection with non-alcoholic beverages, namely, sports drinks, energy drinks, effervescent drinks and soft drinks; syrups, mixes, powders, concentrates and effervescent tablets used in the preparation of soft drinks, energy drinks, sports drinks and effervescent drinks in International Class 32 (the “FIZZ. FOCUS. FUEL GOOD! Mark”). The application to register the same was filed on April 29, 2005 based upon an intent to use the FIZZ. FOCUS. FUEL GOOD! Mark in commerce.

3. Applicant also seeks to register Serial No. 78/526,845 in International Class 32 for the mark FUEL GOOD! in connection with non-alcoholic beverages, namely, sports drinks, energy drinks, effervescent drinks and soft drinks; syrups, mixes, powders, concentrates and effervescent tablets used in the preparation of soft drinks, energy drinks, sports drinks and effervescent drinks in International Class 32 (the “FUEL GOOD! Mark”). The application to register the same was filed on December 3, 2004 based upon an intent to use the Accused Mark in commerce. (the FIZZ. FOCUS. FUEL GOOD! Mark and the FUEL GOOD Mark shall be referred to individually and collectively as the “Accused Marks”).

4. Since 1968, ISI Brands Inc. (“Opposer” or “ISI”), through its predecessors-in-interest, has been engaged in the manufacture and sale of a complete line of vitamins, minerals, dietary and nutritional supplements, food and candy bars, and drinks which are sold either directly or through distributors to health food stores, gyms, health clubs and other establishments for ultimate sale to an individual consumer.

5. Opposer has, over a period of more than twenty (20) years since at least as early as August 1985, used in its business a growing series of marks which can be described as generally containing at least two words, the first of which connotes a health or nutrition benefit or results thereof or nutritional ingredients or consists of a quality or strength related term; and the second of which consists of the term FUEL. All or some of these marks are inherently distinctive individually and the “family” of these marks employing the term FUEL is inherently distinctive as a whole. (ISI’s family of marks will be referred to as “ISI’s [] FUEL Marks”).

6. Opposer is the owner of, *inter alia*, the following U.S. trademark Registrations which cover ISI’s [] FUEL Marks:

- (1) Registration No. 1,388,002 for the trademark CARBO FUEL, covering “dietary supplement, namely, a carbohydrate energy drink” in International Class 5;

- (2) Registration No. 1,437,049 for the trademark AMINO FUEL, covering “dietary supplement” in International Class 5;
- (3) Registration No. 1,487,374 for the trademark HERBA FUEL, covering “dietary supplement” in International Class 5;
- (4) Registration No. 1,501,862 for the trademark VITA FUEL, covering “dietary nutritional supplement” in International Class 5;
- (5) Registration No. 1,508,880 for the trademark GAINERS FUEL, covering “dietary supplement” in International Class 5;
- (6) Registration No. 1,509,858 for the trademark ANABOLIC FUEL, covering “dietary nutritional supplement” in International Class 5;
- (7) Registration No. 1,540,057 for the trademark ULTRA FUEL, covering “dietary supplement energy drink” in International Class 5;
- (8) Registration No. 1,544,159 for the trademark DIET FUEL, covering “dietary supplement” in International Class 5;
- (9) Registration No. 1,583,283 for the trademark CHROMIC FUEL, covering “dietary chromium supplement capsule used as an additive to other dietary supplements” in International Class 5;
- (10) Registration No. 1,584,280 for the trademark OPTI FUEL, covering “body building and athletic dietary supplement” in International Class 5;
- (11) Registration No. 1,597,123 for the trademark MCT FUEL, covering “high energy liquid dietary food supplement” in International Class 5;
- (12) Registration No. 1,698,746 for the trademark PHOS FUEL, covering “dietary supplements” in International Class 5;
- (13) Registration No. 1,655,100 for the trademark HYDRA FUEL, covering “nutritional supplement” in International Class 5;
- (14) Registration No. 1,709,127 for the trademark POWER FUEL, covering “sports nutrition powdered drink mix dietary supplement” in International Class 5;
- (15) Registration No. 1,692,371 for the trademark MASS FUEL, covering “dietary supplements” in International Class 5;

- (16) Registration No. 1,773,392 for the trademark RIPPED FUEL, covering “dietary supplements” in International Class 5;
- (17) Registration No. 1,781,039 for the trademark VEGE FUEL, covering “dietary supplements” in International Class 5;
- (18) Registration No. 1,864,175 for the trademark CREATINE FUEL, covering “dietary supplements” in International Class 5;
- (19) Registration No. 1,885,533 for the trademark ANTIOXIDANT FUEL, covering “dietary supplements” in International Class 5;
- (20) Registration No. 1,920,669 for the trademark ANTI-CATABOLIC FUEL, covering “dietary supplements” in International Class 5;
- (21) Registration No. 1,954,899 for the trademark GLUTAMINE FUEL, covering “dietary supplements” in International Class 5;
- (22) Registration No. 1,954,900 for the trademark SUPER VANADYL FUEL, covering “dietary supplements” in International Class 5;
- (23) Registration No. 2,066,656 for the trademark JOINT FUEL, covering “dietary supplements” in International Class 5;
- (24) Registration No. 2,186,898 for the trademark MEGA GLUTAMINE FUEL, covering “dietary supplements” in International Class 5;
- (25) Registration No. 2,185,075 for the trademark HMB FUEL, covering “dietary supplements” in International Class 5;
- (26) Registration No. 2,188,532 for the trademark MEGA HMB FUEL, covering “dietary supplements” in International Class 5;
- (27) Registration No. 2,970,772 for the trademark MRP NITRATE3 FUEL, covering “dietary supplements” in International Class 5;
- (28) Registration No. 2,350,510 for the trademark ALC FUEL, covering “dietary supplements containing Acety-L-Carnitine” in International Class 5;
- (29) Registration No. 2,744,188 for the trademark ULTRA3 GROWTH FUEL, covering “dietary supplements” in International Class 5;
- (30) Registration No. 2,448,371 for the trademark CREATINE FIZZ FUEL, covering “dietary supplements” in International Class 5;

- (31) Registration No. 2,476,268 for the trademark CLA FUEL, covering “dietary supplements containing conjugated linoleic acid” in International Class 5;
- (32) Registration No. 2,293,619 for the trademark TRIPLE WHEY FUEL, covering “dietary supplements containing three types of whey” in International Class 5;
- (33) Registration No. 2,293,618 for the trademark ANDRO FUEL, covering “nutritional supplements containing rostenedione” in International Class 5;
- (34) Registration No. 2,513,423 for the trademark STRENGTH FUEL, covering “dietary supplements” in International Class 5;
- (35) Registration No. 2,595,723 for the trademark ENERGY FUEL, covering “nutritional supplements” in International Class 5; and
- (36) Registration No. 2,729,521 for the trademark FUEL PLEX, covering “dietary supplements” in International Class 5.

7. Many of these Registrations are incontestible pursuant to Section 15 of the Trademark Act, 15 U.S.C. §1065.

8. ISI’s [] FUEL Marks, by virtue of their wide renown, have developed a secondary meaning and a significance in the minds of the trade and the purchasing public, such that the goods and services offered under these Marks are immediately identified by the purchasing public with Twinlab. ISI’s [] FUEL Marks have become famous marks.

9. Opposer has extensively sold and promoted its products in commerce under the various trademarks set forth herein above. Opposer has also devoted substantial time, money and effort in the establishment and maintenance of high standards of quality for the products marketed under these various trademarks. As a result, Opposer has established substantial recognition and secondary meaning in the aforesaid marks, which identify Opposer’s products and represent the valuable goodwill of Opposer in its business.

10. As a result of the aforesaid efforts and consumer recognition, the terminology “[] FUEL” as described above has taken on the status of a family mark which, when applied to various nutritional and dietary supplement products, including drinks and foods, is considered by the public to identify products of ISI.

11. The above referenced Registrations are in full force and effect and, along with ISI’s goodwill in connection with use of such Marks, have never been abandoned and are widely recognized as representing goods provided by Opposer.

12. Applicant's use or registration of either of the Accused Marks in International Class 32, in view of Opposer's use and/or registration of its family of [] FUEL Marks, is likely to cause confusion, to cause mistake or to deceive consumers into the mistaken belief that Applicant's products in International Class 32 are an extension of Opposer's "[] FUEL" family line of products, so that registration of either of Applicant's Accused Marks in International Class 32 is barred under Section 2(d) of the Trademark Act.

13. Applicant's use of either of the Accused Marks in International Class 32, in view of Opposer's use of its family of [] FUEL Marks is likely to dilute the distinctiveness of Opposer's [] FUEL Marks and "[] FUEL" Registrations, thus increasing the damage from the likelihood of confusion.

14. Each of the Accused Marks in International Class 32 are likely to be confused with each of Opposer's [] Fuel Marks, and each of the Accused Marks in International Class 32 is likely to be confused with all of Opposer's [] Fuel Marks collectively.

* * * * *

WHEREFORE, Opposer requests that this Notice of Opposition be granted, in its entirety, and registration of Application Serial No. 78/620,254 in International Class 32 and Serial No. 78/526,845 in International Class 32 be denied with prejudice.