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Filing date: **05/15/2009**

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

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|------------------------|---|
| Proceeding | 91189611 |
| Party | Defendant Cytosport, Inc. |
| Correspondence Address | PETER M. DE JONGE THORPE NORTH AND WESTERN, LLP. PO BOX 1219 SANDY, UT 84091-1219 UNITED STATES |
| Submission | Answer and Counterclaim |
| Filer's Name | Jed H. Hansen |
| Filer's e-mail | hansen@tnw.com, sisneros@tnw.com, docket@tnw.com |
| Signature | /Jed H. Hansen/ |
| Date | 05/15/2009 |
| Attachments | 32906.PDF (10 pages)(251850 bytes) |

Registrations Subject to the filing

| | | | |
|-----------------|---|-------------------|------------|
| Registration No | 3057061 | Registration date | 02/07/2006 |
| Registrant | Hansen Beverage Company 550 Monica Circle Suite 201 Corona, CA 92880 UNITED STATES | | |

Goods/Services Subject to the filing

Class 032. First Use: 2002/03/27 First Use In Commerce: 2002/04/18

All goods and services in the class are requested, namely: Fruit juice drinks having a juice content of 50% or less by volume that are shelf stable, carbonated soft drinks, carbonated drinks enhanced with vitamins, minerals, nutrients, amino acids and/or herbs, aerated water, soda water and seltzer water, but excluding perishable beverage products that contain fruit juice or soy, whether such products are pasteurized or not

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|-----------------|---|-------------------|------------|
| Registration No | 3044315 | Registration date | 01/17/2006 |
| Registrant | Hansen Beverage Company 550 Monica Circle Suite 201 Corona, CA 92880 UNITED STATES | | |

Goods/Services Subject to the filing

Class 005. First Use: 2002/03/27 First Use In Commerce: 2002/04/18

All goods and services in the class are requested, namely: nutritional supplements in liquid and non-liquid form, but excluding perishable beverage products that contain fruit juice or soy, whether such products are pasteurized or not

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|-----------------|--|-------------------|------------|
| Registration No | 3044314 | Registration date | 01/17/2006 |
| Registrant | Hansen Beverage Company 550 Monica Circle Suite 201 Corona, CA 92880 | | |

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| UNITED STATES |
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Goods/Services Subject to the filing

Class 005. First Use: 2002/03/27 First Use In Commerce: 2002/04/18
 All goods and services in the class are requested, namely: nutritional supplements in liquid and non-liquid form, but excluding perishable beverage products that contain fruit juice or soy, whether such products are pasteurized or not

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|-----------------|---|-------------------|------------|
| Registration No | 3134841 | Registration date | 08/29/2006 |
| Registrant | Hansen Beverage Company 550 Monica Circle Suite 201 Corona, CA 92880 UNITED STATES | | |

Goods/Services Subject to the filing

Class 032. First Use: 2002/03/27 First Use In Commerce: 2002/04/18
 All goods and services in the class are requested, namely: Beverages, namely, carbonated soft drinks, carbonated soft drinks enhanced with vitamins, minerals, nutrients, amino acids and/or herbs, carbonated and non-carbonated energy and sports drinks, fruit juice drinks having a juice content of 50% or less by volume that are shelf stable, and aerated water, soda water and seltzer water, but excluding perishable beverage products that contain fruit juice or soy, whether such products are pasteurized or not

| | | | |
|-----------------|---|-------------------|------------|
| Registration No | 3134842 | Registration date | 08/29/2006 |
| Registrant | Hansen Beverage Company 550 Monica Circle Suite 201 Corona, CA 92880 UNITED STATES | | |

Goods/Services Subject to the filing

Class 032. First Use: 2002/03/27 First Use In Commerce: 2002/04/18
 All goods and services in the class are requested, namely: Beverages, namely, carbonated soft drinks, carbonated drinks enhanced with vitamins, minerals, nutrients, amino acids and/or herbs, carbonated and non-carbonated energy or sports drinks, fruit juice drinks having a juice content of 50% or less by volume that are shelf stable, and water, but excluding perishable beverage products that contain fruit juice or soy, whether such products are pasteurized or not

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Attorneys for CytoSport, Inc.
Opposed Mark: MONSTER PROTEIN
U.S. Trademark Application Serial No.: 77/588,742

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

HANSEN BEVERAGE COMPANY,

Opposer/Counter-Registrant,

v.

CYTOSPORT, INC.,

Applicant/Counter-Petitioner.

Opposition No. 91189611

**ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIMS**

CytoSport, Inc. (hereinafter "CytoSport"), a corporation existing under the laws of the State of California, having a principal place of business at 4795 Industrial Way, Benicia, CA 94510, hereby answer the Notice of Opposition filed by Hansen Beverage Company's (hereinafter "Hansen Beverage") against U.S. Trademark Application Serial No. 77/588,742 for the mark MONSTER PROTIEN as follows:

With regards to the introductory paragraph of Hansen Beverages' Notice of Opposition, CytoSport admits that it has filed trademark application Serial No. 77/588,742, and that the

trademark application speaks for itself. CytoSport denies the averment that Hansen Beverage will be damaged by registration of the trademark that is the subject of trademark application Serial No. 77/588,742. CytoSport is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in the introductory paragraph of Hansen Beverages' Notice of Opposition, and therefore denies the same.

1. Admit.
2. CytoSport is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 2 of Hansen Beverages' Notice of Opposition, and therefore denies the same.
3. CytoSport notes that the referenced trademark registration and trademark application speak for themselves. CytoSport is without knowledge or information sufficient to form a belief as to the truth of the other averments contained in Paragraph 3 of Hansen Beverages' Notice of Opposition, and therefore denies the same.
4. CytoSport notes that the referenced trademark registration and trademark application speak for themselves. CytoSport is without knowledge or information sufficient to form a belief as to the truth of the other averments contained in Paragraph 4 of Hansen Beverages' Notice of Opposition, and therefore denies the same.
5. CytoSport notes that the referenced trademark registration and trademark application speak for themselves. CytoSport is without knowledge or information sufficient to form a belief as to the truth of the other averments contained in Paragraph 5 of Hansen Beverages' Notice of Opposition, and therefore denies the same.
6. CytoSport notes that the referenced trademark registration and trademark application

speak for themselves. CytoSport is without knowledge or information sufficient to form a belief as to the truth of the other averments contained in Paragraph 6 of Hansen Beverages' Notice of Opposition, and therefore denies the same.

7. CytoSport is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 7 of Hansen Beverages' Notice of Opposition, and therefore denies the same.

8. CytoSport is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 8 of Hansen Beverages' Notice of Opposition, and therefore denies the same.

9. CytoSport is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 9 of Hansen Beverages' Notice of Opposition, and therefore denies the same.

10. CytoSport denies the averments contained in Paragraph 10 of Hansen Beverages' Notice of Opposition, and therefore denies the same.

11. CytoSport denies the averments contained in Paragraph 11 of Hansen Beverages' Notice of Opposition.

12. CytoSport denies the averments contained in Paragraph 12 of Hansen Beverages' Notice of Opposition.

Any remaining allegations do not require an admission or denial by Applicant. To the extent a response is required, the allegations are denied. Unless specifically admitted herein, all allegations are denied. Applicant further denies that Opposer is entitled to any relief, including the relief requested in the Notice of Opposition.

WHEREFORE, Applicant respectfully requests that Opposition No. 91189611 be dismissed with Prejudice and that CytoSport's MONSTER PROTEIN mark be allowed.

AFFIRMATIVE DEFENSES

Applicant alleges the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

Hansen Beverage has not stated a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Due to the differences between Opposer and Applicant's mark, goods, product packaging, targeted consumers, channels of trade, and marketing channels, there is no actual confusion or likelihood of confusion, mistake or deception between Opposer's trademarks and Applicants trademarks.

THIRD AFFIRMATIVE DEFENSE

Upon information and belief, Applicant's proposed use and registration of Applicant's mark has not and will not tarnish any alleged goodwill or reputation of Opposer's products or of the asserted marks.

FOURTH AFFIRMATIVE DEFENSE

Hansen Beverage is barred from opposing the registration of trademark application Serial No. 77/588,756 by the doctrine of estoppel.

FIFTH AFFIRMATIVE DEFENSE

Hansen Beverage is barred from opposing the registration of trademark application Serial No. 77/588,742 by the equitable doctrine of unclean hands.

SIXTH AFFIRMATIVE DEFENSE

Hansen Beverage is barred from opposing the registration of trademark application Serial No. 77/588,742 by the doctrine of waiver, laches, and/or acquiescence.

SEVENTH AFFIRMATIVE DEFENSE

Hansen Beverage's claims are invalid and/or unenforceable due to fraud.

There may be additional affirmative defenses to the opposition alleged by Hansen Beverage that are currently unknown to CytoSport. Therefore, CytoSport reserves the right to amend this answer to allege additional affirmative defenses in the event discovery of other information indicates they are appropriate.

APPLICANT'S COUNTERCLAIMS

COUNTER PETITION TO CANCEL

Applicant/Counter Petitioner CytoSport believes it will be damaged by continued registration of Registration No. 3,044,315 for MONSTER ENERGY in International Class 005, Registration No. 3,044,314 for M MONSTER ENERGY in International Class 005, Registration No. 3,134,842 for M MONSTER ENERGY in International Class 032, Registration No. 3,134,841 for M MONSTER ENERGY (stylized) in International Class 032, and Registration No. 3,057,061 for MONSTER ENERGY in International Class 032 (hereinafter collectively the "MONSTER ENERGY Marks" all purportedly owned by Hansen Beverage Company (hereinafter "Hansen Beverage") a corporation organized under the laws of Delaware and having a principal place of business at 1010 Railroad Street, Corona, California, 92882, and hereby counter petitions to cancel the same.

As grounds for this Counter Petition, Applicant/Counter Petitioner CytoSport alleges as follows:

1. CytoSport, Inc. (“CytoSport”) is a California Corporation having a principal place of business at 4795 Industrial Way, Benicia California 94510.

2. Upon information and belief, Hansen Beverage Company (“Hansen”) is a Delaware corporation having a principal place of business at 550 Monica Circle, Suite 201, Corona, California 92880. Monster Beverage Company (“Monster”) is a fictitious business name of Hansen.

3. CytoSport is the owner of U.S. Trademark Registration No. 2,904,119 for the mark MONSTER FOOD for use in connection with “whey protein blend in a powdered drink mix form for use as a nutritional supplement.”

4. On or about October 8, 2008, CytoSport filed an application for registration of the trademark MONSTER PROTEIN for use in connection with “dietary and nutritional supplements,” U.S. Trademark App. No. 77/588,742.

5. Upon information and belief, in certain documents filed with the United States Patent and Trademark Office, CytoSport’s MONSTER FOOD mark has been cited as a basis against registration for certain “MONSTER” trademarks for which Hansen has sought trademark registration.

6. Additionally, in certain documents filed with the United States Patent and Trademark Office, the trademarks B-MONSTER and C-MONSTER were cited as a basis against registration for certain “MONSTER” trademarks for which Hansen sought trademark registration.

7. Upon information and belief, in an effort to secure registration for its “MONSTER” trademark, in response to the MONSTER FOOD citation Hansen noted that the product associated with CytoSport’s MONSTER FOOD mark was intended for building muscles and that Hansen’s product was not a muscle enhancer for bodybuilders.

8. Much like CytoSport’s MONSTER FOOD product, CytoSport’s MONSTER PROTEIN product will be a protein-based product which is intended for use in connection with building muscles.

9. Moreover, Hansen noted that its product “does not purport to be a healthy drink of any kind. Rather, it is a carbonated energy supplement that boosts energy levels and creates a ‘big bad buzz.’”

10. Specifically, Hansen noted that its advertising “invites consumers to ‘[t]ear into a can of the meanest energy supplement on the planet,’ describing its products as a “killer energy brew” and a “wicked mega hit that delivers twice the buzz of a regular energy drink.”

11. Here, CytoSport’s MONSTER PROTEIN product will not be a carbonated energy supplement intended to create a buzz of any kind. Rather, in stark contrast to Hansen’s products, the MONSTER PROTEIN product will be a healthy product very similar to CytoSport’s MONSTER FOOD product.

12. Hansen also noted that “consumers of energy-boosting supplements are careful, sophisticated purchasers who are familiar with the market for such products, know which boosts work best for them, seek out those particular energy supplements, and are unlikely to buy these items on impulse. Such consumers face a saturated marketplace and are accustomed to distinguishing between the range of healthy, all-natural beverages...and the equally brimming but distinct market of alternative, power-sustaining supplements for athletes or others who wish to boost their energy levels.”

13. In addition, Hansen stated that because of the extensive use of “MONSTER” on beverages, including energy or nutritional supplements, consumers would be accustomed to distinguishing between the many “MONSTER” marks.

14. If Hansen’s statements regarding the sophistication of its own customers are truthful, consumers should be able to distinguish between Hansen’s “killer energy brew” and CytoSport’s healthy, muscle-building, MONSTER PROTEIN product.

15. In addition to the above, Hansen stated that there was no likelihood of confusion between its “MONSTER” mark and CytoSport’s MONSTER FOOD mark because the marketing approaches were dissimilar.

16. Specifically, Hansen notes that it targets 16 to 30 year old males seeking an energy

boost and differentiates itself from CytoSport's MONSTER FOOD product which "clearly markets its products specifically to bodybuilders or others who wish to enhance their muscles and sculpt their bodies."

17. Here, CytoSport's MONSTER PROTEIN product will be advertised to exactly the same consumer of its MONSTER FOOD product. That is, it will be sold to bodybuilders or others who wish to enhance their muscles and sculpt their bodies.

18. Hansen also maintained that there was no likelihood of confusion because the marks themselves were sufficiently dissimilar. In fact, Hansen noted that "given the prevalence of MONSTER marks on the Register and in the marketplace...even minor differences in the marks would eliminate any likelihood of confusion."

19. Specifically, Hansen noted that the addition of the words "ENERGY + JUICE KHAOS" at the end of the term MONSTER was sufficient to differentiate its mark in its entirety from CytoSport's MONSTER FOOD mark.

20. In other documents filed with the United States Patent and Trademark Office, Hansen maintained that the addition of the word "JAVA" before the term "MONSTER ENERGY" was sufficient to distinguish its mark from the B MONSTER mark.

21. If Hansen's logic holds true, then CytoSport's MONSTER PROTEIN mark must also be distinguishable from Hansen's MONSTER ENERGY Marks.

22. In addition to the above, upon information and belief, throughout the course of its dealings with other entities, Hansen has conceded that there is no likelihood of confusion between entities using the term "MONSTER" in connection with wine, beer, juice, and powdered protein products.

23. Ironically, Hansen made all of the above statements distinguishing itself from CytoSport's MONSTER FOOD mark and then subsequently opposed registration of CytoSport's MONSTER PROTEIN mark on the basis that the MONSTER PROTEIN mark so resembles Hansen's MONSTER ENERGY Marks as to be likely to cause confusion, or to cause mistake or to deceive consumers.

24. As noted in more detail above, Hansen distinguished itself from CytoSport's MONSTER FOOD mark on the basis that there were differences between the marks themselves, its "MONSTER" mark and CytoSport's MONSTER FOOD mark created different commercial impressions, the underlying goods were dissimilar, and the goods were advertised differently.

25. Here, CytoSport's MONSTER PROTEIN mark is very similar to its MONSTER FOOD mark, CytoSport's MONSTER PROTEIN mark and CytoSport's MONSTER FOOD mark create similar commercial impressions, and the similar underlying goods used with both marks are advertised by similar means and to similar consumers.

26. Accordingly, if a trier of fact determines that CytoSport's MONSTER PROTEIN mark is confusingly similar to Hansen's MONSTER ENERGY Marks, then Hansen's MONSTER ENERGY Marks necessarily must be deemed confusingly similar to CytoSport's MONSTER FOOD mark.

WHEREFORE, Applicant respectfully requests that if CytoSport's MONSTER PROTEIN mark is found to be confusingly similar to Hansen's MONSTER ENERGY Marks, then Hansen's MONSTER ENERGY be cancelled.

CytoSport's Answer to Hansen Beverage's Notice of Opposition is filed herewith concurrently with CytoSport's Counter Petition to Cancel. CytoSport has enclosed herewith the required fee of \$1500. Please charge any additional costs to our Deposit Account No. 20-0100.

DATED this 15th day of May, 2009.

Respectfully submitted,

/Jed H. Hansen/
Peter M. de Jonge
Jed H. Hansen
Gordon K. Hill
THORPE NORTH & WESTERN, LLP

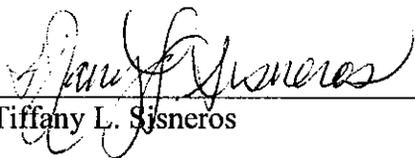
Attorneys for Cytosport, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS was served upon Opposer's counsel by depositing a copy of the same with the United States Post Office via first class mail, postage prepaid, in an envelope addressed to:

Abraham W. Chuang
Knobbe, Martens, Olson & Bear, LLP
2040 Main Street 14th Floor
Irvine, CA 92614

on this 15th day of May, 2009.



Tiffany L. Sjsneros