ESTTA Tracking number: **ESTTA289593**
Filing date: **06/12/2009**

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

| | |
|---|---|
| Proceeding | 91189611 |
| Party | Plaintiff<br>Hansen Beverage Company |
| Correspondence Address | Abraham W. Chuang<br>Knobbe Martens Olson & Bear LLP<br>2040 Main Street Fourteenth Floor<br>Irvine, CA 92614<br>UNITED STATES<br>efiling@kmob.com |
| Submission | Motion to Suspend for Civil Action |
| Filer's Name | Abraham W. Chuang |
| Filer's e-mail | efilint@kmob.com |
| Signature | /Abraham W. Chuang/ |
| Date | 06/12/2009 |
| Attachments | HANBEV471M_MTN_TO_SUSPEND.pdf ( 78 pages )(3596760 bytes ) |

HANBEV.471M TRADEMARK

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

| | |
|---|---|
| HANSEN BEVERAGE COMPANY,<br>Opposer,<br><br>v.<br><br>CYTOSPORT, INC.,<br>Applicant. | Opposition No. 91189611<br><br>Mark: MONSTER PROTEIN<br>Serial No.: 77/588742 |
| CYTOPSORT, INC.,<br>Counterclaimant,<br><br>v.<br><br>HANSEN BEVERAGE COMPANY,<br>Counterdefendant. | |

**MOTION FOR SUSPENSION OF PROCEEDINGS**

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Dear Sir or Madam:

Pursuant to 37 CFR § 2.117(a), and Fed. R. Civ. P. 15(a), Opposer Hansen Beverage Company ("Hansen") hereby moves for a suspension of the above-captioned opposition proceedings ("Opposition") pending the determination of a pending federal lawsuit between Hansen and Applicant CytoSport, Inc. ("CytoSport"). *See Hansen Beverage Company v. CytoSport, Inc.*, Civil Action No. CV 09-00031 VBF (AGRx) ("the Lawsuit").

It is proper for the Board to exercise its discretion and suspend an opposition proceeding where there is a co-pending civil action involving one or more of the parties that may affect an issue of the proceeding. *See* 37 CFR § 2.117(a) ("Whenever it shall come to the attention of the Trademark Trial and Appeal Board that a party or parties to a pending case are engaged in a civil action . . . which may have a bearing on the case, proceeding before the Board may be suspended until termination of the civil action."). "The only question for determination [by the Board], therefore, is whether the outcome of the civil action will have a bearing on the issues involved in the opposition proceeding." *The Other Tel. Co. v. Conn. Nat'l Tel. Co.*, 181 USPQ 125, 126 (T.T.A.B. 1974); *see also Softbelly's, Inc. v. Ty, Inc.*, Opposition No. 150771, 2002 TTAB LEXIS 529, at *6 (T.T.A.B. Aug. 13, 2002) ("Because we determine that the civil action has not been finally determined and that it will directly affect the resolution of the issue of genericness in this case, it would be appropriate to suspend the Board proceedings in this case."). A copy of the complaint from the civil action is sufficient for the Board to make that determination. *The Other Tel. Co.*, 181 USPQ at 126 (Based on the allegations in the complaint, "[i]t is clear . . . that the final determination of the civil suit will directly affect the resolution of the issue of likelihood of confusion which is involved in the proceeding before the Trademark Trial and Appeal Board.").

The Lawsuit before the United States District Court for the Central District of California will have a bearing on issues in this Opposition proceeding. This Opposition involves marks belonging to Hansen, which incorporate MONSTER and/or MONSTER ENERGY (collectively the "MONSTER Marks"), and CytoSport's petition to cancel Hansen's MONSTER Mark registrations. CytoSport's petition to cancel Hansen's MONSTER Marks are based on U.S. Trademark Registration No. 2,904,119 for MONSTER FOOD and Design (hereinafter the "MONSTER FOOD Mark"), which was purportedly assigned to CytoSport by TKE on May 14, 2008. CytoSport alleges that it is being damaged by Hansen's MONSTER Marks because Hansen's use of its MONSTER Marks creates a likelihood of confusion with the MONSTER FOOD Mark. These allegations, which raise an issue of trademark infringement, were previously

asserted by CytoSport in Opposition Nos. 91175473, 91185365, 91185387, 91185389, and 91185391, and led Hansen to file the Lawsuit seeking declaratory judgment of no trademark infringement, and a judgment of trademark invalidity, trademark unenforceability, estoppel, and/or laches against CytoSport. *See* Exhibit A (a true and correct copy of the Complaint). The Lawsuit is still pending and CytoSport recently asserted the same counterclaims in the Lawsuit requesting cancellation of Hansen's MONSTER Mark registrations based on the MONSTER FOOD Mark. *See* Exhibit B (a true and correct copy of CytoSport's First Amended Counterclaims). On June 11, 2009, Hansen replied to CytoSport's counterclaims and asserted its own counterclaims for trademark infringement, false designation of origin, dilution, false advertising and unfair competition against CytoSport arising out of CytoSport's use of various marks incorporating the word MONSTER. *See* Exhibit C (a true and correct copy of Hansen's Reply and Counterclaims to the First Amended Counterclaims of CytoSport).

Proceeding with this Opposition during the pendency of the Lawsuit will waste the resources of the parties and the Board. Indeed, the parties have not begun discovery in this Opposition as discovery is not scheduled to open until July 17, 2009, and a final determination of the Lawsuit will directly affect the resolution of CytoSport's basis for cancelling and opposing the MONSTER Marks. Therefore, it is in the best interest of the parties and the Board to suspend this Opposition pending the outcome of the Lawsuit.

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For the reasons set forth above, Hansen respectfully requests that the Board suspend all proceedings in this Opposition, including any outstanding discovery in this proceeding, pending the outcome of the Lawsuit.

Respectfully submitted,
KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: 6/12/09

By: _____

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(949) 760-0404
Attorneys for Opposer and Counterdefendant,
Hansen Beverage Company

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **MOTION FOR SUSPENSION OF PROCEEDINGS** upon Applicant's and Counterclaimant's counsel by depositing one copy thereof in the United States Mail, first-class postage prepaid on June 12, 2009, addressed as follows:

Peter M. de Jonge
Jed H. Hansen
THORPE NORTH & WESTERN, LLP
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Sandy, UT 84091-1219

Francisca C. Leon Guerrero

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# EXHIBIT A

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FILED
2009 JAN -5 PM 2: 15
CLERK, U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
RIVERSIDE
BY

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 09 - 00031 VBF (AGRx)

| | |
|---|---|
| HANSEN BEVERAGE COMPANY, a Delaware corporation, d/b/a MONSTER BEVERAGE COMPANY,<br><br>Plaintiff,<br><br>v.<br><br>CYTOSPORT, INC., a California corporation,<br><br>Defendant. | Case No.:<br><br>**COMPLAINT FOR DECLARATORY JUDGMENT**<br><br>**DEMAND FOR JURY TRIAL** |

## I. JURISDICTION AND VENUE

1. This is an action for a declaration of no trademark infringement, trademark invalidity, trademark unenforceability, estoppel and/or laches under The Declaratory Judgment Act, 28 U.S.C. § 2201.

2. This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338.

3. Venue is proper in this Judicial District pursuant to 28 U.S.C. §§ 1391(b) and (c).

## II. THE PARTIES

4. Plaintiff HANSEN BEVERAGE COMPANY ("Hansen") is a Delaware corporation having its principal place of business at 550 Monica Circle, Suite 201, Corona, California 92880. MONSTER BEVERAGE COMPANY ("Monster") is a fictitious business name of Hansen.

5. Hansen is informed and believes, and on that basis alleges, that Defendant CYTOSPORT, INC. ("CytoSport") is a California corporation with its principal place of business at 4795 Industrial Way, Benicia, California 94510. CytoSport is subject to the general and specific jurisdiction of this Court by virtue of its substantial contacts with California, including its participation in the acts and events occurring in this Judicial District described herein.

## III. ALLEGATIONS FOR ALL CLAIMS FOR RELIEF

### A. Hansen's MONSTER products and goodwill

6. Hansen is a leader in the business of designing, producing, and selling beverages, including energy drinks.

7. In 2002, Hansen launched its MONSTER energy drink. Hansen's successful line of MONSTER energy drinks has grown to include a variety of products, including Lo-Carb MONSTER, MONSTER Khaos, MONSTER Assault, MONSTER M-80, Monster Mixxd, and various Java MONSTER products.

8. Hansen's launch of the original MONSTER energy drink in 2002, and prior to CytoSport's acts described herein, Hansen has continuously used marks that incorporate MONSTER, MONSTER ENERGY, and M MONSTER ENERGY, individually or in combination with other terms, (collectively the "MONSTER Marks") in connection with its MONSTER energy products.

9. Hansen is the owner of numerous trademark registrations for marks that incorporate MONSTER, MONSTER ENERGY and M MONSTER ENERGY, including California Registration No. 108,124, and U.S. Trademark Registrations Nos. 3,057,061, 3,044,315, 3,044,314, 3,134,841 and 3,134,842.

10. The containers of Hansen's MONSTER energy drinks are prominently marked with Hansen's MONSTER Marks. Since at least 2002, Hansen has spent hundreds of millions of dollars in promoting its MONSTER energy drinks and its MONSTER Marks. Hansen's promotional efforts include, for example, print media, internet advertising, point of sale materials, sponsorship of athletes, sponsorship of live events, contests, and attendance at trade shows. Hansen's MONSTER Marks are prominently featured in advertisements and promotions for the MONSTER energy drinks.

11. Hansen's line of MONSTER energy drinks has been tremendously successful, with retail sales totaling over one billion dollars.

12. By virtue of Hansen's substantial use and promotion of the MONSTER Marks, the MONSTER Marks have become famous. The MONSTER Marks have acquired great value as identifiers of Hansen's products and serve to distinguish Hansen's MONSTER products from those of others. Customers in this Judicial District and elsewhere readily recognize Hansen's MONSTER Marks as distinctive designations of the origin of Hansen's MONSTER products. The MONSTER Marks are assets of enormous value as symbols of Hansen and its quality products and goodwill.

## B. Controversy between Hansen and CytoSport

13. Hansen is informed and believes, and on that basis alleges, that CytoSport is engaged in the business of producing, selling and/or distributing beverages, including energy drinks in this Judicial District and elsewhere.

14. On or about July 17, 2008, CytoSport filed with the Trademark Trial and Appeal Board ("TTAB") a counter petition to cancel Hansen's federally registered MONSTER Marks by filing counterclaims in Opposition No. 91175473 alleging prior use of the mark shown below and in U.S. Trademark Registration No. 2,904,119 for MONSTER FOOD and Design for use in connection with "whey protein blend in a powdered drink mix form for use as a nutritional supplement" (hereinafter the "MONSTER FOOD Mark"). CytoSport purportedly acquired the MONSTER FOOD Mark on or about May 14, 2008 from TKE, Inc. ("TKE") the listed owner of Trademark Registration No. 2,904,119 for the mark shown below:

15. In its counterclaims to cancel Hansen's MONSTER Marks, CytoSport asserts that it is being damaged by Hansen's registered MONSTER Marks because Hansen's registered MONSTER Marks "so resembles CytoSport's MONSTER FOOD mark . . . as to be likely, when used on or in connection with the goods as they are identified in [the registrations of Hansen's federally registered MONSTER Marks], as to cause confusion, or to cause mistake or to deceive."

16. Cytosport's allegations of likelihood of confusion have created a controversy between CytoSport and Hansen regarding whether Hansen's continued use of the MONSTER Marks in connection with sales of its

MONSTER energy products constitutes infringement, and have placed Hansen in reasonable apprehension of a trademark infringement suit by CytoSport.

17. On or about July 23, 2008, CytoSport filed in the TTAB four notices of opposition against Hansen for the marks MONSTER CHAI HAI, BIG BLACK JAVA MONSTER, THE RUSSIAN M JAVA MONSTER, and MONSTER M-80 (collectively "CytoSport's Oppositions"). CytoSport asserts that these MONSTER marks are "likely to damage [CytoSport] in that [Hansen's MONSTER marks], when used on or in connection with the identified goods, so resembles . . . MONSTER FOOD . . . as to be likely to cause confusion, to cause mistake or to deceive . . . [and] is likely to falsely suggest a connection between [Hansen] and [CytoSport]."

18. On or about October 8, 2008, the TTAB consolidated CytoSport's Oppositions with Opposition No. 91175473 on the basis that the proceedings involve common parties and common questions of law or fact.

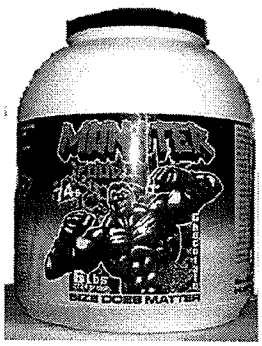
**C. <u>The MONSTER FOOD Mark</u>**

19. The application for registration for the MONSTER FOOD Mark (Registration No. 2,904,119) was filed by TKE after Hansen began using its MONSTER Marks and after Hansen filed for its MONSTER ENERGY® mark (Registration No. 3,057,061).

20. Hansen's MONSTER Marks and the MONSTER FOOD mark, have peacefully coexisted for over six years without a single reported instance of confusion.

21. Hansen is informed and believes, and on that basis alleges, that the purported owners of the MONSTER FOOD Mark, were aware of the MONSTER Marks and the products under those marks for over five years, but sat idly by as Hansen built, at great expense and effort, enormous recognition and goodwill in its MONSTER Marks by continually using and promoting the MONSTER Marks as identifiers of Hansen and its goods.

22. The MONSTER Marks are not confusingly similar to the MONSTER FOOD mark, and the product packaging on which the marks appear is completely different, as shown below.




23. Hansen is informed and believes, and on that basis alleges, that the MONSTER FOOD Mark has never been used in connection with any goods or services other than those identified in U.S. Trademark Registration No. 2,904,119 and has only been used in the manner shown on the product packaging as shown above and in Registration No. 2,904,119.

24. Hansen is informed and believes, and on that basis alleges, that TKE assigned to CytoSport the MONSTER FOOD Mark apart from any goodwill associated with that mark and thus, the assignment was in gross and invalid, and CytoSport owns no enforceable rights in the MONSTER FOOD Mark.

25. Hansen is informed and believes, and on that basis alleges, that the MONSTER FOOD Mark has not been used continuously since it was registered in connection with the goods and services identified in U.S. Registration No. 2,904,119.

26. Hansen is informed and believes, and on that basis alleges, that the purported use of the MONSTER FOOD Mark was de minimis and insufficient to establish priority over Hansen's MONSTER Marks.

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27. An actual controversy exists between the parties in that CytoSport claims prior trademark rights in its MONSTER FOOD mark, seeks to cancel Hansen's valuable registrations for its MONSTER Marks, and accuses Hansen's MONSTER Marks of causing a likelihood of confusion with the MONSTER FOOD mark.

## IV. COUNT I

**(Declaration of Non-infringement of the MONSTER FOOD Mark)**

28. Hansen hereby repeats, realleges, and incorporates by reference Paragraphs 1-27 of this Complaint as though fully set forth herein.

29. This is an action for declaration of non-infringement of the MONSTER FOOD Mark under the Declaratory Judgment Act 28 U.S.C. §2201.

30. Jurisdiction is founded upon U.S.C. §1121 and 28 U.S.C. §§ 1331 and 1338. Venue is proper under 28 U.S.C. § 1391.

31. There is no likelihood of confusion between Hansen's MONSTER Marks used in connection with energy drink products and the MONSTER FOOD Mark used in connection with "whey protein blend in a powdered drink mix form for use as a nutritional supplement."

32. Hansen's use of its MONSTER Marks does not infringe the MONSTER FOOD Mark.

## V. COUNT II

**(Declaration of Invalidity and/or Unenforceability of the MONSTER FOOD Mark)**

33. Hansen hereby repeats, realleges, and incorporates by reference Paragraphs 1-32 of this Complaint as though fully set forth herein.

34. This is an action for declaration of invalidity and unenforceability under the Declaratory Judgment Act, 28 U.S.C. § 2201.

35. Jurisdiction is founded on 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338. Venue is proper under 28 U.S.C. § 1391.

36. Upon information and belief, the MONSTER FOOD Mark is invalid.

37. Upon information and belief, CytoSport owns no enforceable rights in the MONSTER FOOD Mark.

## VI. COUNT III

**(Declaration that CytoSport is Estopped and/or Barred by Laches)**

38. Hansen hereby repeats, realleges, and incorporates by reference Paragraphs 1-37 of this Complaint as though fully set forth herein.

39. This is an action for declaration that CytoSport is estopped and barred by laches under the Declaratory Judgment Act, 28 U.S.C. § 2201.

40. Jurisdiction is founded on 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338. Venue is proper under 28 U.S.C. § 1391.

41. Upon information and belief, CytoSport is estopped from asserting that Hansen's MONSTER Marks infringe the MONSTER FOOD Mark or any purported rights in the mark MONSTER FOOD.

42. Upon information and belief, CytoSport is barred by laches from asserting that Hansen's MONSTER Marks infringe the MONSTER FOOD Mark or any purported rights in the mark MONSTER FOOD.

## PRAYER FOR RELIEF

WHEREFORE, Hansen prays for judgment against CytoSport as follows:

A. For a declaration from this Court that Hansen's MONSTER Marks do not infringe the MONSTER FOOD Mark or any purported rights in the mark MONSTER FOOD;

B. For a declaration from this Court that the MONSTER FOOD Mark is invalid and/or unenforceable;

C. For a declaration from this Court that CytoSport is estopped and/or is barred by laches from asserting that Hansen's MONSTER Marks infringe the MONSTER FOOD Mark or any purported rights in the mark MONSTER

FOOD;

D. For costs of suit incurred, including, but not limited to reasonable attorneys' fees;

E. For such other and further relief as this Court may deem just and proper.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: January 5, 2009

By: Lynda J. Zadra-Symes

John B. Sganga, Jr.
Steven J. Nataupsky
Lynda J. Zadra-Symes
Joseph S. Cianfrani

Attorneys for Plaintiff,
HANSEN BEVERAGE COMPANY

**DEMAND FOR JURY TRIAL**

Hansen demands a trial by jury on all issues raised by this Complaint which are triable by jury.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: January 5, 2009

By: Lynda J. Zadra-Symes

John B. Sganga, Jr.
Steven J. Nataupsky
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Joseph S. Cianfrani

Attorneys for Plaintiff,
HANSEN BEVERAGE COMPANY

6416872

**From:** cacd_ecfmail@cacd.uscourts.gov [mailto:cacd_ecfmail@cacd.uscourts.gov]
**Sent:** Thursday, January 08, 2009 10:59 AM
**To:** ecfnef@cacd.uscourts.gov
**Subject:** Activity in Case 2:09-cv-00031-VBF-AGR Hansen Beverage Company v. CytoSport, Inc. Complaint - (Discovery)

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**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA**

## Notice of Electronic Filing

The following transaction was entered on 1/8/2009 at 10:59 AM PST and filed on 1/5/2009
**Case Name:** Hansen Beverage Company v. CytoSport, Inc.
**Case Number:** 2:09-cv-31
**Filer:** Hansen Beverage Company
**Document Number:** 1(No document attached)

**Docket Text:**
**COMPLAINT against Defendant CytoSport, Inc. (Filing fee $ 350 PAID.) Jury Demanded., filed by Plaintiff Hansen Beverage Company. (et)**

**2:09-cv-31 Notice has been electronically mailed to:**

John B Sganga , Jr john.sganga@kmob.com, litigation@kmob.com

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Lynda J Zadra-Symes ljs@kmob.com, litigation@kmob.com

Steven J Nataupsky litigation@kmob.com

**2:09-cv-31 Notice has been delivered by First Class U. S. Mail or by fax to: :**

# EXHIBIT B

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Attorneys for Defendant/Counter-Claimant
CYTOSPORT, INC.

FILED
2009 MAY 21 PM 11:41
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES
BY

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| HANSEN BEVERAGE COMPANY, a Delaware corporation d/b/a MONSTER BEVERAGE COMPANY,<br><br>Plaintiff,<br><br>v.<br><br>CYTOSPORT, INC., a California corporation,<br><br>Defendant. | Case No. CV-09-0031 VBF (AGRx)<br><br>**CYTOSPORT, INC.'S FIRST AMENDED COUNTERCLAIM TO HANSEN BEVERAGE COMPANY'S COMPLAINT; DEMAND FOR JURY TRIAL** |
| CYTOSPORT, INC., a California corporation,<br><br>Counter - Plaintiff,<br><br>v.<br><br>HANSEN BEVERAGE COMPANY, a Delaware corporation d/b/a MONSTER BEVERAGE COMPANY,<br><br>Counter - Defendant. | |

## AMENDED COUNTERCLAIM

## I. JURISDICTION AND VENUE

1. This is an action for a declaration of no trademark infringement, estoppel and/or laches under The Declaratory Judgment Act, 28 U.S.C. § 2201.

2. This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338.

3. Venue is proper in this Judicial District pursuant to 28 U.S.C. §§ 1391(b) and (c).

## II. THE PARTIES

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

5. 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.

6. Upon information and belief, Hansen is subject to the general and specific jurisdiction of this Court by virtue of its substantial contacts with California, including its participation in the acts and events occurring in this Judicial District described herein.

## III. ALLEGATIONS AND CLAIMS FOR RELIEF

### CYTOSPORT

7. CytoSport is a leader in the business of designing, producing, and selling nutritional products, including protein supplements.

8. Among the products presently offered by CytoSport are protein products sold under the trademark MONSTER MILK, MONSTER MASS, and MONSTER FOOD.

9. MONSTER MILK, MONSTER MASS, and MONSTER FOOD are

similar marks used in connection with similar products. Specifically, all three products are protein powders that are promoted to similar consumers through similar channels of trade.

10. CytoSport is the owner by assignment of all right, title, and interest, including the underlying goodwill, of U.S. Trademark Registration No. 2,904,119 for the mark MONSTER FOOD for use in connection with a "whey protein blend in a powdered drink mix form for use as a nutritional supplement."

11. The MONSTER FOOD mark has been used in commerce since at least as early as June 1999.

12. Applications for registration of the MONSTER MILK mark, and the MONSTER MASS mark have been filed with the United States Patent and Trademark Office as noted herein.

**HANSEN**

13. Upon information and belief, Hansen manufactures, markets, and/or otherwise offers for sale a variety of energy drinks employing numerous trademarks, including MONSTER ENERGY, Lo-Carb MONSTER, MONSTER Khaos, MONSTER Assault, MONSTER M-80, MONSTER Mixxd, Java MONSTER, and MONSTER Hitman (collectively the "Monster Energy Marks").

14. Hansen purports to own U.S. Trademark Registrations related to certain of Hansen's Monster Energy Marks including Registration No. 3,044,315 for MONSTER ENERGY, Registration No. 3,044,314 for M MONSTER ENERGY, Registration No. 3,134,842 for M MONSTER ENERGY, Registration No. 3,134,841 for M MONSTER ENERGY (stylized), and Registration No. 3,057,061 for MONSTER ENERGY in International Class 032 (collectively the "Monster Energy Registrations").

**HANSEN'S CHARACTERIZATION OF ITS MONSTER ENERGY MARKS**

15. 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.

16. 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.

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

18. Much like CytoSport's MONSTER FOOD product, CytoSport's MONSTER MILK and MONSTER MASS products are protein-based products intended for use in connection with building muscles and overall health and nutrition.

19. 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.'"

20. 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."

21. Here, CytoSport's MONSTER MILK and MONSTER MASS products are not carbonated energy supplements intended to create a buzz of any kind. Rather, in stark contrast to Hansen's products, the MONSTER MILK and MONSTER MASS products are healthy products very similar to CytoSport's MONSTER FOOD product.

22. 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."

23. 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.

24. 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 MILK and MONSTER MASS products.

25. 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.

26. 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."

27. Here, CytoSport's MONSTER MILK and MONSTER MASS products are advertised to exactly the same types of consumers of its MONSTER FOOD product. That is, MONSTER MILK and MONSTER MASS products are also sold to bodybuilders or others who wish to enhance their muscles and sculpt their

bodies," in addition to others interested in health and nutrition.

28. 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."

29. 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.

30. 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.

31. If Hansen's logic holds true, then CytoSport's MONSTER MILK and MONSTER MASS marks must also be distinguishable from Hansen's MONSTER ENERGY Marks.

32. 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.

33. Further, upon information and belief, Hansen has resolved disputes with other such entities, resulting in continued commercial use of many products using the term "MONSTER" in their trade name.

**HANSEN'S OPPOSITION TO CYTOSPORT'S MONSTER MILK MARK**

34. On or about June 5, 2005, CytoSport filed an application for registration of the trademark MONSTER MILK for use in connection with "dietary and nutritional supplements," U.S. Trademark App. No. 78/643,905.

35. Generally speaking, CytoSport's MONSTER MILK product is a higher protein version of its extremely popular MUSCLE MILK product. CytoSport's MUSCLE MILK product is a protein supplement which is currently sold in both powdered drink mix form and as a ready-to-drink nutritional supplement. However, as noted above, the MONSTER MILK product is also very similar to CytoSport's MONSTER FOOD product.

36. CytoSport currently markets its MONSTER MILK product in powdered drink mix form. However, CytoSport has created and will soon launch a ready-to-drink MONSTER MILK product ("MONSTER MILK RTD"). That is, CytoSport has engaged in preparations for production of its MONSTER MILK RTD such that except for extraordinary and unforeseen contingencies, CytoSport will soon begin the bottling and packaging of the product.

37. On or about January 31, 2007, Hansen filed a Notice of Opposition ("Hansen Opposition") before the Trademark Trial and Appeal Board ("TTAB") against CytoSport wherein Hansen sought to preclude CytoSport from registering its MONSTER MILK trademark based on Hansen's U.S. Trademark Registration Nos. 3,057,061, 3,134,841, 3,044,314, 3,044,315 ("MONSTER ENERGY Registrations").

38. In contrast to its prior claims made to the United States Patent and Trademark Office, described in paragraphs 15-33, Hansen now alleges that it will be damaged by registration of the MONSTER MILK Application because the MONSTER MILK mark so resembles Hansen's MONSTER ENERGY Marks as to be likely to cause confusion, or to cause mistake or to deceive consumers.

39. During the course of the TTAB proceedings related to the MONSTER MILK trademark, Hansen claimed that it owned the rights to use of the term "monster" in connection with beverages.

40. Additionally, during those same TTAB proceedings, Hansen expressed

concern over CytoSport's potential use of the MONSTER MILK mark in connection with a ready-to-drink ("RTD") product.

41. As noted above, CytoSport is currently preparing to launch a RTD protein product using the MONSTER MILK brand and already sells a protein powder using the MONSTER MILK brand.

42. To that end, CytoSport has announced to the trade that MONSTER MILK RTD will be available to consumers in the summer of 2009.

43. In addition, CytoSport has spent a significant sum of money for a proprietary bottle design to be used in connection the MONSTER MILK RTD and is in the process of finalizing a label for the MONSTER MILK RTD. Moreover, CytoSport has prepared liquid formulations for the MONSTER MILK RTD and negotiated manufacturing and packaging agreements for the product. In sum, CytoSport has taken significant, concrete steps to market its MONSTER MILK RTD which Hansen maintains infringes its MONSTER ENERGY Marks. That is, CytoSport has all but launched its MONSTER MILK RTD which it plans to do in June or July 2009.

44. Hansen's allegations of likelihood of confusion and concerns regarding CytoSport's use of MONSTER MILK in connection with its protein products, including its MONSTER MILK RTD product, have created a controversy between CytoSport and Hansen regarding whether CytoSport's use of its MONSTER MILK mark in connection with its nutritional products constitutes infringement, and have placed CytoSport in reasonable apprehension of trademark infringement suit by Hansen.

**HANSEN'S OPPOSITION TO CYTOSPORT'S MONSTER MASS MARK**

45. On or about October 8, 2008, CytoSport filed an application for registration of the trademark MONSTER MASS for use in connection with "dietary and nutritional supplements," U.S. Trademark App. Serial No. 77/588,756.

46. Generally speaking, CytoSport's MONSTER MASS product is an "ultra-rich" higher protein version of its MUSCLE MILK, MONSTER MILK, and MONSTER FOOD products. CytoSport's MUSCLE MILK product is a protein supplement which is currently sold in both powdered drink mix form and as a RTD nutritional supplement. The MONSTER MASS product is currently on the market and is sold in powdered form.

47. On or about April 7, 2009, Hansen filed a Notice of Opposition before the TTAB against CytoSport wherein Hansen sought to preclude CytoSport from registering its MONSTER MASS trademark based on Hansen's U.S. Trademark Registration Nos. 3,057,061, 3,134,841, 3,044,314, 3,044,315, 3,134842 ("MONSTER ENERGY Registrations").

48. Again, in contrast to its statements previously made to the United States Patent and Trademark Office, described in paragraphs 15-33 herein, Hansen alleges that it will be damaged by registration of the MONSTER MASS Application because the MONSTER MASS mark so resembles Hansen's MONSTER ENERGY Marks as to be likely to cause confusion, or to cause mistake or to deceive consumers.

49. Hansen's allegations of likelihood of confusion and concerns regarding CytoSport's use of MONSTER MASS in connection with its protein products, have created a controversy between CytoSport and Hansen regarding whether CytoSport's use of its MONSTER MASS mark in connection with its nutritional products constitutes infringement, and have placed CytoSport in reasonable apprehension of trademark infringement suit by Hansen.

**HANSEN'S DECLARATORY JUDGMENT ACTION**

50. In distinct contradiction to Hansen's statements that CytoSport's MONSTER MILK mark and MONSTER MASS mark (both used in connection with protein powders) infringe the MONSTER ENERGY Marks, Hansen currently

seeks an order from this Court that the MONSTER ENERGY Marks do not infringe CytoSport's MONSTER FOOD mark (also used in connection with protein powders).

## IV. COUNT I

**(Declaration of Non-infringement of the MONSTER MILK Mark)**

51. CytoSport hereby incorporates by reference paragraphs 1-50 of its Amended Counterclaim as though fully set forth herein.

52. This is an action for declaration of non-infringement of the MONSTER MILK Mark under the Lanham Act or other state statute brought pursuant to the Declaratory Judgment Act 28 U.S.C. §2201.

53. Jurisdiction is founded upon 15 U.S.C. §1121 and 28 U.S.C. § 1331 and 1338. Venue is proper under 28 U.S.C. § 1391.

54. There is no likelihood of confusion between CytoSport's MONSTER MILK mark used in connection with protein products (including powdered protein products and RTD protein products) and the MONSTER ENERGY Marks used in connection with energy drink products.

55. As such, CytoSport's use of its MONSTER MILK mark does not infringe the MONSTER ENERGY Marks.

## V. COUNT II

**(Declaration of Non-Infringement of the MONSTER MASS Mark)**

56. CytoSport hereby incorporates by reference paragraphs 1-55 of its Amended Counterclaim as though fully set forth herein.

57. This is an action for declaration of non-infringement of the MONSTER MASS Mark under the Lanham Act or other state statute brought pursuant to the Declaratory Judgment Act 28 U.S.C. §2201.

58. Jurisdiction is founded upon 15 U.S.C. §1121 and 28 U.S.C. § 1331 and 1338. Venue is proper under 28 U.S.C. § 1391.

59. There is no likelihood of confusion between CytoSport's MONSTER MASS mark used in connection with protein products and the MONSTER ENERGY Marks used in connection energy drink products.

60. As such, CytoSport's use of its MONSTER MASS mark does not infringe the MONSTER ENERGY Marks.

## VI. COUNT III

**(Declaration that Hansen is Estopped)**

61. CytoSport hereby incorporates by reference paragraphs 1-60 of its Amended Counterclaim as though fully set forth herein.

62. This is an action for declaration of non-infringement of the MONSTER MILK and MONSTER MASS Marks under the Declaratory Judgment Act 28 U.S.C. §2201.

63. Jurisdiction is founded upon U.S.C. 15 §1121 and 28 U.S.C. § 1331 and 1338. Venue is proper under 28 U.S.C. § 1391.

64. Hansen knew that its representations about the lack of confusion between its MONSTER ENERGY Marks and the MONSTER FOOD mark, including those set forth in paragraphs 15-33 above, would be accessible to, read by, and relied upon by CytoSport and intended that CytoSport would rely upon such representations.

65. In reasonable reliance upon Hansen's representations, set forth above, CytoSport continued to use and assert its MONSTER MILK mark, take steps toward the production and launch of its MONSTER MILK and MONSTER MASS products, continue to market its MONSTER MILK and MONSTER MASS products, and apply for the registration of its MONSTER MASS mark.

66. Such reliance by CytoSport has been detrimental in light of Hansen's inconsistent opposition to the MONSTER MILK and MONSTER MASS marks and the emergence of a case and controversy regarding the alleged infringement of CytoSport's marks.

67. Upon information and belief, Hansen is estopped from asserting that the MONSTER MILK and MONSTER MASS marks infringe the MONSTER ENERGY Marks.

## VII. COUNT IV

**(Alternative Declaration of Trademark Infringement and Cancellation of Trademarks)**

68. CytoSport hereby incorporates by reference paragraphs 1-67 of its Amended Counterclaim as though fully set forth herein.

69. Jurisdiction is founded upon U.S.C. 15 §1121 and 28 U.S.C. § 1331 and 1338. Venue is proper under 28 U.S.C. § 1391.

70. Upon information and belief, Hansen manufactures, markets, and/or otherwise offers for sale a variety of energy drinks employing numerous trademarks.

71. Upon information and belief, trademarks employed by Hansen in connection with its energy drinks include, MONSTER ENERGY, Lo-Carb MONSTER, MONSTER Khaos, MONSTER Assault, MONSTER M-80, MONSTER Mixxd, Java MONSTER, and MONSTER Hitman ("Monster Energy Marks").

72. Hansen purports to own U.S. Trademark Registrations related to certain of Hansen's Monster Energy Marks including Registration No. 3,044,315 for MONSTER ENERGY, Registration No. 3,044,314 for M MONSTER ENERGY, Registration No. 3,134,842 for M MONSTER ENERGY, Registration No. 3,134,841 for M MONSTER ENERGY (stylized), and Registration No. 3,057,061 for MONSTER ENERGY in International Class 032 (collectively the "Monster Energy Registrations").

73. CytoSport's MONSTER FOOD mark has been used continuously in commerce since at least as early as June 1999.

74. Upon information and belief, CytoSport's MONSTER FOOD mark

has a date of first use prior to that of Hansen's Monster Energy Marks.

75. CytoSport alternatively pleads that Hansen's Monster Energy Marks so resemble CytoSport's MONSTER FOOD mark as to cause confusion, or to cause mistake or to deceive within the meaning 15 U.S.C. §§ 1052(d), 1114 and 1125(a) and therefore the MONSTER ENERGY Registrations should be cancelled.

**PRAYER FOR RELIEF**

WHEREFORE, CytoSport prays for judgment against Hansen as follows:

A. That this Court enter judgment that CytoSport's MONSTER MILK mark does not infringe any of Hansen's MONSTER ENERGY Marks;

B. That this Court enter judgment that CytoSport's MONSTER MASS mark does not infringe Hansen's MONSTER ENERGY Marks;

C. That this Court enter judgment that Hansen is estopped from asserting that CytoSport's MONSTER MILK and MONSTER MASS marks infringe Hansen's MONSTER ENERGY Marks;

D. Alternatively, that this Court enter judgment the MONSTER ENERGY Marks are confusingly similar to the MONSTER FOOD mark and that the MONSTER ENERGY Registrations be cancelled;

E. That CytoSport be awarded the costs of this suit incurred, including but not limited to reasonable attorneys' fees; and

F. For such other and further relief as this Court may deem appropriate.

**DEMAND FOR JURY TRIAL**

CytoSport demands a trial by jury on all issues raised by the Complaint and Amended Counterclaim which are triable by a jury.

Dated: May 22, 2009

**ARENT FOX LLP**

By: _____
Charles P. Rullman
Attorneys for Defendant/Counter-Claimant CYTOSPORT, INC.

## PROOF OF SERVICE

I, Haewon Park, declare:

I am a resident and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 West Fifth Street, 48th Floor, Los Angeles, California 90013-1065. On May 22, 2009, I served a copy of the within document(s):

**CYTOSPORT, INC.'S FIRST AMENDED COUNTERCLAIM TO HANSEN BEVERAGE COMPANY'S COMPLAINT; DEMAND FOR JURY TRIAL**

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

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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 May 22, 2009, at Los Angeles, California.

Haewon Park

**From:** cacd_ecfmail@cacd.uscourts.gov [mailto:cacd_ecfmail@cacd.uscourts.gov]
**Sent:** Tuesday, May 26, 2009 7:55 AM
**To:** ecfnef@cacd.uscourts.gov
**Subject:** Activity in Case 2:09-cv-00031-VBF-AGR Hansen Beverage Company v. CytoSport, Inc. Amended Counterclaim

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**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA**

## Notice of Electronic Filing

The following transaction was entered on 5/26/2009 at 7:55 AM PDT and filed on 5/21/2009
**Case Name:** Hansen Beverage Company v. CytoSport, Inc.
**Case Number:** 2:09-cv-31
**Filer:** CytoSport, Inc.
**Document Number:** 39

**Docket Text:**
**FIRST AMENDED COUNTERCLAIM against Counter defendant Hansen Beverage Company amending Counterclaim [29]; Jury Demand, filed by Counter Claimant CytoSport, Inc. (jp)**

**2:09-cv-31 Notice has been electronically mailed to:**

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**2:09-cv-31 Notice has been delivered by First Class U. S. Mail or by fax to: :**

The following document(s) are associated with this transaction:

**Document description:**Main Document
**Original filename:**M:\POD2\Civil\LA09CV0031 VBF First Amended Counterclaim.pdf
**Electronic document Stamp:**
[STAMP cacdStamp_ID=1020290914 [Date=5/26/2009] [FileNumber=7828773-0]
[81dd8093a4794fac862a18cec094a0a78126426642086da346e6b9a415ff1a012f04
2e6a622f22b10bfc8235f1860eba1592efe74b69f5775d59234ee0c80dcc]]

# EXHIBIT C

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Attorneys for Plaintiff,
HANSEN BEVERAGE COMPANY.

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**WESTERN DIVISION**

| | |
|---|---|
| HANSEN BEVERAGE COMPANY, a Delaware corporation, d/b/a MONSTER BEVERAGE COMPANY,<br><br>Plaintiff/Counterdefendant,<br><br>v.<br><br>CYTOSPORT, INC., a California corporation,<br><br>Defendant/Counterclaimant.<br><br>AND RELATED COUNTERCLAIM | Case No.: CV 09-031 VBF (AGRx)<br><br>Hon. Valerie Baker Fairbank<br><br>**HANSEN BEVERAGE COMPANY'S REPLY AND COUNTERCLAIMS TO THE FIRST AMENDED COUNTERCLAIMS OF CYTOSPORT, INC.** |

Plaintiff/Counterdefendant Hansen Beverage Company ("Hansen") hereby responds to the First Amended Counterclaims of Defendant/ Counterclaimant CytoSport, Inc. ("CytoSport") as follows.

**JURISDICTION AND VENUE**

1. Hansen admits the allegations in Paragraph 1 of CytoSport's First Amended Counterclaims, but denies that CytoSport is entitled to the requested relief.

2. Hansen admits the allegations in Paragraph 2 of CytoSport's First Amended Counterclaims.

3. Hansen admits the allegations in Paragraph 3 of CytoSport's First Amended Counterclaims.

**THE PARTIES**

4. Hansen admits the allegations in Paragraph 4 of CytoSport's First Amended Counterclaims.

5. Hansen admits the allegations in Paragraph 5 of CytoSport's First Amended Counterclaims.

6. Hansen admits that the Court has personal jurisdiction over Hansen, but denies all other allegations in Paragraph 6 of CytoSport's First Amended Counterclaims.

**ALLEGATIONS AND CLAIMS FOR RELIEF**

7. Hansen lacks sufficient information to form a belief as to the truth or falsity of the allegations in Paragraph 7 of CytoSport's First Amended Counterclaims, and on that basis denies them.

8. Hansen lacks sufficient information to form a belief as to the truth or falsity of the allegations in Paragraph 8 of CytoSport's First Amended Counterclaims, and on that basis denies them.

9. Hansen lacks sufficient information to form a belief as to the truth or falsity of the allegations in Paragraph 9 of CytoSport's First Amended

Counterclaims, and on that basis denies them.

10. Hansen denies the allegations in Paragraph 10 of CytoSport's First Amended Counterclaims.

11. Hansen denies the allegations in Paragraph 11 of CytoSport's First Amended Counterclaims.

12. Hansen admits that CytoSport has filed applications for registration of the marks MONSTER MILK and MONSTER MASS with the United States Patent and Trademark Office, but denies any remaining allegations in Paragraph 12 of CytoSport's First Amended Counterclaims.

13. Hansen admits the allegations in Paragraph 13 of CytoSport's First Amended Counterclaims.

14. Hansen admits the allegations in Paragraph 14 of CytoSport's First Amended Counterclaims.

15. Hansen admits that the MONSTER FOOD mark Registration No. 2,904,119 has been cited during prosecution of certain Hansen trademark applications. Hansen denies all remaining allegations in Paragraph 15 of CytoSport's First Amended Counterclaims.

16. Hansen admits that the B MONSTER mark Registration No. 2,809,183 and C MONSTER mark Registration No. 1,970,362 have been cited during prosecution of certain Hansen trademark applications. Hansen denies all remaining allegations in Paragraph 16 of CytoSport's First Amended Counterclaims.

17. Hansen admits that, in a response to an office action dated July 25, 2005 in U.S. Trademark Application No. 78/658,118, it distinguished the MONSTER FOOD mark from the MONSTER ENERGY + JUICE KHAOS mark and stated that "TKE clearly markets its product specifically to bodybuilders or others who wish to enhance their muscles and sculpt their bodies." Hansen denies the remaining allegations in Paragraph 17 of

CytoSport's First Amended Counterclaims.

18. Hansen lacks sufficient information to form a belief as to the truth or falsity of the allegations in Paragraph 18 of CytoSport's First Amended Counterclaims, and on that basis denies them.

19. Hansen admits that the quoted portion in Paragraph 19 of CytoSport's First Amended Counterclaims is an incomplete excerpt from the response to an office action dated July 25, 2005 in U.S. Trademark Application No. 78/658,118. Hansen denies all remaining allegations in Paragraph 19 of CytoSport's First Amended Counterclaims.

20. Hansen admits that the quoted portion in Paragraph 20 of CytoSport's First Amended Counterclaims is an incomplete excerpt from the response to an office action dated July 25, 2005 in U.S. Trademark Application No. 78/658,118. Hansen denies all remaining allegations in Paragraph 20 of CytoSport's First Amended Counterclaims.

21. Hansen lacks sufficient information to form a belief as to the truth or falsity of the allegations in Paragraph 21 of CytoSport's First Amended Counterclaims, and on that basis denies them.

22. Hansen admits that the quoted portion in Paragraph 22 of CytoSport's First Amended Counterclaims is an incomplete excerpt from the response to an office action dated July 25, 2005 in U.S. Trademark Application No. 78/658,118. Hansen denies the remaining allegations in Paragraph 22 of CytoSport's First Amended Counterclaims.

23. Hansen admits that the allegation in Paragraph 23 of CytoSport's First Amended Counterclaims is an incomplete paraphrase from a response to an office action dated July 25, 2005 in U.S. Trademark Application No. 78/658,118. Hansen denies the remaining allegations in Paragraph 23 of CytoSport's First Amended Counterclaims.

24. Hansen denies the allegations in Paragraph 24 of CytoSport's First

Amended Counterclaims.

25. Hansen admits that, in a response to an office action dated July 25, 2005 in U.S. Trademark Application No. 78/658,118, it distinguished the MONSTER FOOD mark from the MONSTER ENERGY + JUICE KHAOS mark and stated that "Applicant markets its energy supplement in a very different manner from the manner in which Odwalla and TKE market their products." Hansen denies the remaining allegations in Paragraph 25 of CytoSport's First Amended Counterclaims.

26. Hansen admits that the quoted portion in Paragraph 26 of CytoSport's First Amended Counterclaims is an incomplete excerpt from the response to an office action dated July 25, 2005 in U.S. Trademark Application No. 78/658,118. Hansen denies all remaining allegations in Paragraph 26 of CytoSport's First Amended Counterclaims.

27. Hansen lacks sufficient information to form a belief as to the truth or falsity of the allegations in Paragraph 27 of CytoSport's First Amended Counterclaims, and on that basis denies them.

28. Hansen admits that the quoted portion in Paragraph 28 of CytoSport's First Amended Counterclaims is an incomplete excerpt from the response to an office action dated July 25, 2005 in U.S. Trademark Application No. 78/658,118. Hansen denies all remaining allegations in Paragraph 28 of CytoSport's First Amended Counterclaims.

29. Hansen admits that, in a response to an office action dated July 25, 2005 in U.S. Trademark Application No. 78/658,118, it distinguished the MONSTER FOOD mark from the MONSTER ENERGY + JUICE KHAOS mark and stated that "[t]he words 'ENERGY + JUICE KHAOS' differentiate Applicant's mark in its entirety from all of the cited marks and create a unique commercial impression." Hansen denies the remaining allegations in Paragraph 29 of CytoSport's First Amended Counterclaims.

30. Hansen denies the allegations in Paragraph 30 of CytoSport's First Amended Counterclaims.

31. Hansen denies the allegations in Paragraph 31 of CytoSport's First Amended Counterclaims.

32. Hansen denies the allegations in Paragraph 32 of CytoSport's First Amended Counterclaims.

33. Hansen denies the allegations in Paragraph 33 of CytoSport's First Amended Counterclaims.

34. Hansen admits the allegations in Paragraph 34 of CytoSport's First Amended Counterclaims.

35. Hansen lacks sufficient information to admit or deny the allegations in Paragraph 35 of CytoSport's First Amended Counterclaims, and on that basis denies them.

36. Hansen admits that CytoSport claims it has created and will launch in June or July 2009 a ready-to-drink product under the mark MONSTER MILK. Hansen lacks sufficient information to admit or deny the remaining allegations in Paragraph 36 of CytoSport's First Amended Counterclaims, and on that basis denies them.

37. Hansen admits the allegations in Paragraph 37 of CytoSport's First Amended Counterclaims.

38. Hansen admits that it alleges that it will be damaged by CytoSport's registration of the MONSTER MILK mark because the MONSTER MILK mark so resembles Hansen's MONSTER ENERGY Marks as to be likely, when used on or in connection with the goods as they are identified in U.S. Trademark Application No. 78/643,905, to cause confusion, or to cause mistake or to deceive within the meaning of 15 U.S.C. § 1052(d). Hansen denies the remaining allegations in Paragraph 38 of CytoSport's First Amended Counterclaims.

39. Hansen admits that it asserted the marks shown in U.S. Trademark

Registration Nos. 3,057,061, 3,044,315, 3,044,314, 3,134,841, and 3,134,842, and its common law rights in those marks, in opposition against U.S. Trademark Application No. 78/643,905. Hansen denies the remaining allegations in Paragraph 39 of CytoSport's First Amended Counterclaims.

40. Hansen admits the allegations in Paragraph 40 of CytoSport's First Amended Counterclaims.

41. Hansen admits that CytoSport claims it is preparing to launch a ready-to-drink product under the MONSTER MILK mark for release in June or July 2009. Hansen lacks sufficient information to admit or deny the remaining allegations in Paragraph 41 of CytoSport's First Amended Counterclaims, and on that basis denies them.

42. Hansen admits that CytoSport claims it has announced to the trade that its ready-to-drink product under the MONSTER MILK mark will be available to consumers in the summer of 2009. Hansen lacks sufficient information to admit or deny the remaining allegations in Paragraph 42 of CytoSport's First Amended Counterclaims, and on that basis denies them.

43. Hansen admits that CytoSport claims of plans to launch a ready-to drink product under the MONSTER MILK mark in June or July 2009. Hansen lacks sufficient information to admit or deny the remaining allegations in Paragraph 43 of CytoSport's First Amended Counterclaims, and on that basis denies them.

44. Hansen admits the allegations in Paragraph 44 of CytoSport's First Amended Counterclaims.

45. Hansen admits the allegations of Paragraph 45 of CytoSport's First Amended Counterclaims.

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46. Hansen lacks sufficient information to form a belief as to the truth or falsity of the allegations in Paragraph 46 of CytoSport's First Amended Counterclaims, and on that basis denies them.

47. Hansen admits the allegations in Paragraph 47 of CytoSport's First Amended Counterclaims.

48. Hansen admits that it has alleged CytoSport's MONSTER MASS mark so resembles Hansen's MONSTER ENERGY Marks as to be likely, when used on or in connection with the goods as they are identified in U.S. Trademark Application No. 78/643,905, as to cause confusion, or to cause mistake or to deceive within the meaning of 15 U.S.C. § 1052(d). Hansen denies the remaining allegations in Paragraph 48 of CytoSport's First Amended Counterclaims.

49. Hansen admits the allegations in Paragraph 49 of CytoSport's First Amended Counterclaims.

50. Hansen admits that it seeks declaratory judgment that its use of the MONSTER ENERGY Marks does not infringe the MONSTER FOOD mark. Hansen denies the remaining allegations in Paragraph 50 of CytoSport's First Amended Counterclaims.

**COUNT I**

51. Hansen incorporates by reference its responses to the allegations contained in Paragraphs 1-50 of CytoSport's First Amended Counterclaims as if fully set forth herein.

52. Hansen admits the allegations in Paragraph 52 of CytoSport's First Amended Counterclaims, but denies that CytoSport is entitled to the requested relief.

53. Hansen admits the allegations in Paragraph 53 of CytoSport's First Amended Counterclaims.

54. Hansen denies the allegations in Paragraph 54 of CytoSport's First Amended Counterclaims.

55. Hansen denies the allegations in Paragraph 55 of CytoSport's First Amended Counterclaims.

**COUNT II**

56. Hansen incorporates by reference its responses to the allegations contained in Paragraphs 1-55 of CytoSport's First Amended Counterclaims as if fully set forth herein.

57. Hansen admits the allegations in Paragraph 57 of CytoSport's First Amended Counterclaims, but denies that CytoSport is entitled to the requested relief.

58. Hansen admits the allegations in Paragraph 58 of CytoSport's First Amended Counterclaims.

59. Hansen denies the allegations in Paragraph 59 of CytoSport's First Amended Counterclaims.

60. Hansen denies the allegations in Paragraph 60 of CytoSport's First Amended Counterclaims.

**COUNT III**

61. Hansen incorporates by reference its responses to the allegations contained in Paragraphs 1-60 of CytoSport's First Amended Counterclaims as if fully set forth herein.

62. Hansen admits the allegations in Paragraph 62 of CytoSport's First Amended Counterclaims, but denies that CytoSport is entitled to the requested relief.

63. Hansen admits the allegations in Paragraph 63 of CytoSport's First Amended Counterclaims.

64. Hansen denies the allegations in Paragraph 64 of CytoSport's First Amended Counterclaims.

65. Hansen denies the allegations in Paragraph 65 of CytoSport's First Amended Counterclaims.

66. Hansen denies the allegations in Paragraph 66 of CytoSport's First Amended Counterclaims.

67. Hansen denies the allegations in Paragraph 67 of CytoSport's First Amended Counterclaims.

**COUNT IV**

68. Hansen incorporates by reference its responses to the allegations contained in Paragraphs 1-67 of CytoSport's First Amended Counterclaims as if fully set forth herein.

69. Hansen admits the allegations in Paragraph 69 of CytoSport's First Amended Counterclaims.

70. Hansen admits the allegations in Paragraph 70 of CytoSport's First Amended Counterclaims.

71. Hansen admits the allegations in Paragraph 71 of CytoSport's First Amended Counterclaims.

72. Hansen admits the allegations in Paragraph 72 of CytoSport's First Amended Counterclaims.

73. Hansen denies the allegations in Paragraph 73 of CytoSport's First Amended Counterclaims.

74. Hansen denies the allegations in Paragraph 74 of CytoSport's First Amended Counterclaims.

75. Hansen denies the allegations in Paragraph 75 of CytoSport's First Amended Counterclaims.

**PRAYER FOR RELIEF**

Hansen denies that CytoSport is entitled to any of the relief sought in its prayer for relief. Hansen requests that CytoSport's Counterclaims be dismissed, that CytoSport take nothing thereby, that Hansen recover its costs of Court and attorneys' fees incurred herein, and such other and further relief as the Court deems just and equitable.

## HANSEN'S AFFIRMATIVE DEFENSES

### First Affirmative Defense

Each count of CytoSport's First Amended Counterclaims fails to state a claim upon which relief can be granted.

### Second Affirmative Defense

CytoSport's First Amended Counterclaims are barred, in whole or in part, by laches, estoppel, waiver, and/or unclean hands.

## HANSEN'S COUNTERCLAIMS

### JURISDICTION AND VENUE

1. This is an action for (a) trademark infringement arising under 15 U.S.C. § 1114; (b) federal dilution arising under 15 U.S.C. § 1125(c); (c) false designation of origin arising under 15 U.S.C. § 1125(a); (d) false advertising arising under 15 U.S.C. § 1125(a); (e) dilution arising under California Business & Professions Code § 14247; (f) unfair competition arising under California Business & Professions Code § 17200 et seq.; (g) trademark and trade dress infringement arising under the common law of the State of California; and (h) unfair competition arising under the common law of the State of California.

2. This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338(a) and (b), and 1367(a).

3. Venue is proper in this Judicial District pursuant to 28 U.S.C. §§ 1391(b) and (c).

### THE PARTIES

4. HANSEN BEVERAGE COMPANY ("Hansen") is a Delaware corporation having its principal place of business at 550 Monica Circle, Suite 201, Corona, California 92880. MONSTER BEVERAGE COMPANY ("Monster") is a fictitious business name of Hansen.

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5. Hansen is informed and believes, and on that basis alleges, that Defendant CYTOSPORT, INC. ("CytoSport") is a California corporation with its principal place of business at 4795 Industrial Way, Benicia, California 94510. CytoSport is subject to the general and specific jurisdiction of this Court by virtue of its substantial contacts with California, including its participation in the acts and events occurring in this Judicial District described herein.

## ALLEGATIONS FOR ALL CLAIMS FOR RELIEF

### A. Hansen's MONSTER Products And Goodwill

6. Hansen is a leader in the business of designing, creating, developing, producing, marketing and selling beverages, including energy drinks.

7. In 2002, prior to the acts of CytoSport described herein, Hansen launched its MONSTER energy drink. Hansen's successful line of MONSTER energy drinks has grown to include a variety of products, including Lo-Carb MONSTER, MONSTER Khaos, MONSTER Assault, MONSTER M-80, MONSTER Mixxd, and various Java MONSTER products, which include protein.

8. Since Hansen's launch of the original MONSTER energy drink in 2002, and prior to CytoSport's acts described herein, Hansen has continuously used the MONSTER, MONSTER ENERGY®, and M MONSTER ENERGY® Marks (collectively the "MONSTER Marks") in connection with its MONSTER energy products.

9. Hansen is the owner of numerous trademark registrations for marks incorporating the terms MONSTER, MONSTER ENERGY and M MONSTER ENERGY, including California Registration No. 108,124, and U.S. Trademark Registrations Nos. 3,057,061, 3,044,315, 3,044,314, 3,134,841 and 3,134,842 (collectively the "MONSTER Registered Marks"). True and correct copies of Hansen's MONSTER Registered Marks are attached hereto as Exhibit A.

10. The containers of Hansen's MONSTER energy drinks are prominently marked with Hansen's MONSTER Marks, and have the trade dress associated with its MONSTER line of energy drinks ("MONSTER Trade Dress"), which includes, for example, the following products shown below.

11. Since at least 2002, Hansen has spent hundreds of millions of dollars in promoting its MONSTER energy drinks, its MONSTER Marks, and the MONSTER Trade Dress. Hansen's promotional efforts include, for example, its internet website, point of sale materials, sponsorship of athletes, sponsorship of live events, contests, and attendance at trade shows. Hansen's MONSTER Marks and MONSTER Trade Dress are prominently featured in its promotional efforts for the MONSTER energy drinks.

12. Hansen's line of MONSTER energy drinks has been tremendously successful, with retail sales totaling over one billion dollars per year.

13. By virtue of Hansen's substantial use and promotion of the MONSTER Marks and MONSTER Trade Dress, the MONSTER Marks and MONSTER Trade Dress have become famous. The MONSTER Marks and MONSTER Trade Dress have acquired great value as identifiers of Hansen's products and serve to distinguish Hansen's MONSTER products from those of others. Customers in this Judicial District and elsewhere readily recognize Hansen's MONSTER Marks and MONSTER Trade Dress as distinctive designations of the origin of Hansen's MONSTER products. The MONSTER Marks and MONSTER Trade Dress are assets of enormous value as symbols of Hansen and its quality products and goodwill.

**B. CytoSport And Its MONSTER Product Line**

14. Hansen is informed and believes, and on that basis alleges, that CytoSport is engaged in the business of producing, selling and/or distributing nutritional supplements, including beverages, and has announced the imminent launch of a ready-to-drink beverage known as MONSTER MILK in this Judicial District and elsewhere.

15. Hansen is informed and believes, and on that basis alleges, that without permission or authority from Hansen, CytoSport has infringed Hansen's MONSTER Marks and MONSTER Trade Dress in interstate commerce in connection with CytoSport's making, using, promoting, advertising, selling, and/or offering to sell products in connection with a "monster" line of goods, including its MONSTER MILK ready-to-drink product.

16. Hansen is informed and believes, and on that basis alleges, that CytoSport's unauthorized use of Hansen's MONSTER Marks and MONSTER Trade Dress is intended to trade upon the goodwill and substantial recognition associated with Hansen's MONSTER products.

17. Hansen is informed and believes, and on that basis alleges, that CytoSport is using Hansen's MONSTER Marks and MONSTER Trade Dress in an attempt to associate itself with Hansen or otherwise trade upon Hansen's reputation and goodwill.

18. Hansen is informed and believes, and on that basis alleges, that CytoSport's use of the MONSTER Marks and MONSTER Trade Dress is designed to cause confusion, mistake or deception.

19. In addition to its federal trademark application for MONSTER MILK for dietary and nutritional supplements, which includes beverages, CytoSport has also recently filed numerous other trademark applications for marks that include the word MONSTER for use in connection with "dietary and nutritional supplements and dietary supplement drink mixes," categories that

include beverages. Those trademark applications include MONSTER PUMP, MONSTER PROTEIN, MONSTER STACK, MONSTER CREATINE, MONSTER AMINO, MONSTER MASS and MONSTER MAIZE. These applications indicate CytoSport's intent to develop a confusingly similar MONSTER product line, to continue to profit from Hansen's valuable MONSTER Trademark rights and to cause further damage, injury and irreparable harm to Hansen and its valuable MONSTER Trademark rights.

20. Hansen is informed and believes, and on that basis alleges, that it is CytoSport's purpose in using Hansen's MONSTER Marks and MONSTER Trade Dress to cause customers and potential customers to believe that CytoSport's MONSTER MILK ready-to-drink product and MONSTER product line is associated with Hansen or Hansen's products, when, in fact, they are not.

21. Hansen is informed and believes, and on that basis alleges, that CytoSport is using Hansen's MONSTER Marks and MONSTER Trade Dress in an attempt to pass-off its MONSTER MILK ready-to-drink product and MONSTER product line as originating from or affiliated with Hansen in order to profit from the success of Hansen's MONSTER Marks and MONSTER Trade Dress.

22. Hansen is informed and believes that CytoSport currently sells and markets a product known as "Muscle Milk" in this Judicial District and elsewhere, and that the National Advertising Division (NAD) of Better Business Bureaus has asked the Federal Trade Commission and Federal Drug Administration to investigate CytoSport's alleged false and misleading advertising in connection with its "Muscle Milk" drink. The complaint before the NAD asserts that the term "Muscle Milk" is false and misleading because it claims that the product contains actual milk, when it does not, and consumers are likely to be misled into thinking that they are buying a flavored or supplemented milk product, when in fact, the product is a water-based dietary

supplement.

23. Hansen is informed and believes, and on that basis alleges, that CytoSport's MONSTER MILK mark for its ready-to-drink product is similarly false, misleading and deceptively misdescriptive to consumers as, upon information and belief, the product does not contain actual milk. Upon information and belief, the product will be sold in many stores extensively throughout the United States, including in tens of thousands of grocery and convenience stores close to and, in many cases, immediately adjacent to, other consumer beverages, including Hansen's MONSTER ENERGY® beverages, using Hansen's MONSTER Trade Dress. The likelihood of confusion as to an affiliation or association between CytoSport's MONSTER MILK drinks and Hansen's MONSTER ENERGY® drinks will thus cause further damage and irreparable harm to Hansen's goodwill and business reputation.

24. By virtue of the acts complained of herein, CytoSport has created a likelihood of injury to Hansen's business reputation, caused a strong likelihood of consumer confusion as to the source of origin or relationship of Hansen's and CytoSport's goods, made false and misleading representations of fact in commercial advertising or promotion regarding the characteristics of its MONSTER MILK drinks, damaged and diluted Hansen's famous MONSTER Marks and MONSTER Trade Dress, and otherwise competed unfairly with Hansen.

25. Hansen is informed and believes, and on that basis alleges, that CytoSport's acts complained of herein are willful and deliberate.

26. CytoSport's acts complained of herein have caused damage to Hansen in an amount to be determined at trial, and such damage will continue to increase unless CytoSport is enjoined from its wrongful actions.

27. CytoSport's acts complained of herein have caused Hansen to suffer irreparable injury to its business. Hansen will suffer substantial loss of

goodwill and reputation unless and until CytoSport is enjoined from the wrongful acts complained of herein.

**COUNT I**

**(Infringement of Registered Trademark Under 15 U.S.C. § 1114)**

28. Hansen incorporates by reference the allegations set forth in Paragraphs 1-27 of these Counterclaims as though fully set forth herein.

29. This is an action for trademark infringement arising under 15 U.S.C. § 1114.

30. Jurisdiction is founded on 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338(a). Venue is proper in the Judicial District pursuant to 28 U.S.C. § 1391.

31. Hansen owns the MONSTER Registered Marks.

32. CytoSport has used in commerce, without permission of Hansen, marks that are confusing similar to Hansen's MONSTER Registered Marks. CytoSport has infringed Hansen's MONSTER Registered Marks and has created a false designation of origin by using confusingly similar marks in connection with the manufacturing, distribution, selling, and/or promoting CytoSport's products with the intent to unfairly compete against Hansen, to trade upon Hansen's reputation and goodwill by causing confusion and mistake among customers and the public, and to deceive the public into believing that CytoSport's MONSTER MILK product is associated with, sponsored by or approved by Hansen, when it is not.

33. Hansen is informed and believes, and on that basis alleges, that CytoSport had actual knowledge of Hansen's ownership and prior use of Hansen's MONSTER Marks, and without the consent of Hansen, has willfully violated 15 U.S.C. § 1114.

34. CytoSport's aforementioned acts have injured Hansen and damaged Hansen in an amount to be determined at trial. By its actions,

CytoSport has irreparably injured Hansen. Such irreparable injury will continue unless CytoSport is enjoined by this Court from further violation of Hansen's rights, for which Hansen has no adequate remedy at law.

**COUNT II**

**(Federal Dilution)**

35. Hansen incorporates by reference the allegations set forth in Paragraphs 1-34 of these Counterclaims as though fully set forth herein.

36. This is an action for federal dilution arising under 15 U.S.C. § 1125(c).

37. Jurisdiction is founded upon 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338(a). Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391.

38. Hansen's MONSTER Marks are famous and became famous prior to CytoSport's acts complained of herein.

39. CytoSport's unauthorized commercial use of the MONSTER Marks in connection with the advertisement, offering for sale, and/or sale of CytoSport's MONSTER MILK product, in interstate commerce, has caused and is likely to continue to cause dilution of the distinctive quality of Hansen's famous MONSTER Marks.

40. CytoSport's aforementioned acts are likely to tarnish, injure, or trade upon Hansen's business reputation or goodwill, and to deprive Hansen of the ability to control its MONSTER Marks.

41. CytoSport's aforementioned acts have injured Hansen and damaged Hansen in an amount to be determined at trial.

42. By its actions, CytoSport has irreparably injured Hansen. Such irreparable injury will continue unless CytoSport is enjoined by this Court from further violation of Hansen's rights, for which Hansen has no adequate remedy at law.

## COUNT III

**(Trade Dress Infringement and False Designation of Origin)**

43. Hansen incorporates by reference the allegations set forth in Paragraphs 1-42 of these Counterclaims as though fully set forth herein.

44. This is an action for trade dress infringement and false designation of origin arising under 15 U.S.C. § 1125(a).

45. Jurisdiction is founded on 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338(a). Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391.

46. Hansen's MONSTER Marks and MONSTER Trade Dress are used in commerce, are non-functional, inherently distinctive and have acquired substantial secondary meaning in the marketplace.

47. CytoSport is using packaging designs and advertising that are confusingly similar to Hansen's MONSTER Trade Dress and Hansen's MONSTER Marks as used on Hansen's products and promotional materials. CytoSport has infringed Hansen's MONSTER Trade Dress and MONSTER Marks and created a false designation of origin by manufacturing, distributing, selling and/or advertising or promoting in commerce, without Hansen's permission, a line of "monster" products with the intent to unfairly compete against Hansen, to trade upon Hansen's reputation and goodwill by causing confusion and mistake among customers and the public and to deceive the public into believing that CytoSport's "monster" product line, including the MONSTER MILK ready-to-drink product, is associated with, sponsored by or approved by Hansen, when it is not.

48. Hansen is informed and believes, and on that basis alleges, that CytoSport had actual knowledge of Hansen's ownership and prior use of its MONSTER Trade Dress and MONSTER Marks, and without the consent of Hansen, has willfully violated 15 U.S.C. § 1125(a).

49. CytoSport's aforementioned acts have injured Hansen and damaged Hansen in an amount to be determined at trial.

50. By its actions, CytoSport has irreparably injured Hansen. Such irreparable injury will continue unless CytoSport is enjoined by this Court from further violation of Hansen's rights, for which Hansen has no adequate remedy at law.

**COUNT IV**

**(False Advertising)**

51. Hansen repeats, realleges and incorporates by reference the allegations set forth in Paragraphs 1-50 of these Counterclaims as though fully set forth herein.

52. This is an action for false and misleading advertising arising under 15 U.S.C. § 1125(a).

53. Jurisdiction is founded on 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338(a). Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391.

54. Hansen is informed and believes that CytoSport currently sells and markets a product known as "Muscle Milk" in this Judicial District and elsewhere, and that the National Advertising Division (NAD) of Better Business Bureaus has asked the Federal Trade Commission and Federal Drug Administration to investigate CytoSport's alleged false and misleading advertising in connection with its "Muscle Milk" drink. The complaint before the NAD asserted that the term "Muscle Milk" is false and misleading because it claims that the product contains actual milk, when it does not, and consumers are likely to be misled into thinking that they are buying a flavored or supplemented milk product, when in fact, the product is a water-based dietary supplement.

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55. Hansen is informed and believes, and on that basis alleges, that CytoSport's MONSTER MILK mark for its ready-to-drink product is similarly false, misleading and deceptively misdescriptive to consumers as, upon information and belief, the product does not contain actual milk. Upon information and belief, the product will be sold in many stores, including grocery and convenience stores close to and, in many cases, immediately adjacent to, other consumer beverages, including Hansen's MONSTER ENERGY® beverages, using Hansen's MONSTER Trade Dress.

56. CytoSport alleges that it has advertised its MONSTER MILK ready-to-drink product for release in June or July 2009. CytoSport's aforementioned acts of false and/or misleading advertising or promotion in interstate commerce relating to the nature, characteristics or qualities of CytoSport's MONSTER MILK drink have injured Hansen and damaged Hansen in an amount to be determined at trial.

57. By its actions, CytoSport has irreparably injured Hansen. Such irreparable injury will continue unless CytoSport is enjoined by this Court from further false and misleading advertising, for which Hansen has no adequate remedy at law.

**COUNT V**

**(False and Misleading Advertising Under California Law)**

58. Hansen incorporates by reference the allegations set forth in Paragraphs 1-57 of these Counterclaims as though fully set forth herein.

59. This is an action for false and misleading advertising arising under California Business & Professions Code § 17500 *et seq.* Jurisdiction is founded upon 28 U.S.C. §§ 1338(b) and 1367(a). Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391.

60. By reason of the foregoing acts, CytoSport has intentionally disseminated false and misleading advertising in this Judicial District and

elsewhere, in violation of California Business & Professions Code § 17500 *et seq*.

61. Further, by these actions, CytoSport has damaged Hansen in an amount to be determined at trial, and has irreparably injured Hansen. Such irreparable injury will continue unless CytoSport is enjoined by this Court from further violation of Hansen's rights, for which Hansen has no adequate remedy at law.

**COUNT VI**

**(California Statutory Dilution)**

62. Hansen repeats, realleges and incorporates by reference the allegations set forth in Paragraphs 1-61 of these Counterclaims as though fully set forth herein.

63. This is an action for dilution arising under California Business & Professions Code § 14247.

64. Jurisdiction is founded upon 15 U.S.C. § 1367(a). Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391.

65. Hansen's MONSTER Marks are famous, and became famous prior to CytoSport's acts complained of herein.

66. CytoSport's unauthorized commercial use of the MONSTER Marks in connection with the advertisement, offering for sale, and/or sale of CytoSport's products, in interstate commerce, has caused and is likely to continue to cause dilution of the distinctive quality of the famous MONSTER Marks.

67. CytoSport's aforementioned acts are likely to tarnish, injure, or trade upon Hansen's business, reputation, or goodwill, and to deprive Hansen of the ability to control its MONSTER Marks.

68. CytoSport's aforementioned acts have injured Hansen and damaged Hansen in an amount to be determined at trial.

69. By its actions, CytoSport has irreparably injured Hansen. Such irreparable injury will continue unless CytoSport is enjoined by this Court from further violation of Hansen's rights, for which Hansen has no adequate remedy at law.

**COUNT VII**

**(California Statutory Unfair Competition)**

70. Hansen incorporates by reference the allegations set forth in Paragraphs 1-69 of these Counterclaims as though fully set forth herein.

71. This is an action for unfair competition arising under California Business & Professions Code § 17200 *et seq*.

72. Jurisdiction is founded upon 28 U.S.C. §§ 1338(b) and 1367(a). Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391.

73. By reason of the foregoing acts, CytoSport has intentionally caused a likelihood of confusion among the purchasing public in this Judicial District and elsewhere, thereby unfairly competing with Hansen in violation of California Business & Professions Code § 17200 *et seq*.

74. Further, by these actions, CytoSport has irreparably injured Hansen. Such irreparable injury will continue unless CytoSport is enjoined by this Court from further violation of Hansen's rights, for which Hansen has no adequate remedy at law.

**COUNT VIII**

**(Common Law Trademark Infringement)**

75. Hansen incorporates by reference Paragraphs 1-74 of these Counterclaims as though fully set forth herein.

76. This is an action for trademark infringement arising under the common law of the State of California.

77. Jurisdiction is founded upon 28 U.S.C. §§ 1338(b) and 1367(a). Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391.

78. By virtue of the acts complained of herein, CytoSport has intentionally infringed Hansen's MONSTER Marks and caused a likelihood of confusion among the consuming public, thereby committing common law trademark infringement.

79. CytoSport's aforementioned acts have been fraudulent, oppressive and malicious, and have injured Hansen and damaged Hansen in an amount to be determined at trial.

80. By its actions, CytoSport has irreparably injured Hansen. Such irreparable injury will continue unless CytoSport is enjoined by this Court from further violation of Hansen's rights, for which Hansen has no adequate remedy at law.

**COUNT IX**

**(Common Law Trade Dress Infringement)**

81. Hansen repeats, realleges, and incorporates by reference the allegations set forth in Paragraphs 1-80 of these Counterclaims as though fully set forth herein.

82. This is an action for common law trade dress infringement arising under the common law of the State of California.

83. Jurisdiction is founded upon 28 U.S.C. §§ 1338(b) and 1367(a). Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391.

84. By virtue of the acts complained of herein, CytoSport has intentionally infringed Hansen's MONSTER Trade Dress and caused a likelihood of confusion among the consuming public, thereby committing common law trade dress infringement.

85. CytoSport's aforementioned acts have injured Hansen and damaged Hansen in an amount to be determined at trial.

86. By its actions, CytoSport has irreparably injured Hansen. Such irreparable injury will continue unless CytoSport is preliminarily and

permanently enjoined by this Court from further violation of Hansen's rights, for which Hansen has no adequate remedy at law.

**COUNT X**

**(Common Law Unfair Competition)**

87. Hansen repeats, realleges, and incorporates by reference the allegations set forth in Paragraphs 1-86 of these Counterclaims as though fully set forth herein.

88. This is an action for unfair competition arising under the common law of the State of California.

89. Jurisdiction is founded upon 28 U.S.C. §§ 1338(b) and 1367(a). Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391.

90. By reason of the foregoing acts, CytoSport has caused a likelihood of confusion among the purchasing public in this Judicial District and elsewhere, thereby unfairly competing with Hansen in violation of the common law of the State of California.

91. By its actions, CytoSport has irreparably injured Hansen. Such irreparable injury will continue unless CytoSport is enjoined by this Court from further violation of Hansen's rights, for which Hansen has no adequate remedy at law.

92. CytoSport's willful acts of unfair competition under the common law of the State of California constitute fraud, oppression, and malice. Accordingly, Hansen is entitled to exemplary damages pursuant to California Civil Code § 3294(a).

**PRAYER FOR RELIEF**

WHEREFORE, Hansen prays for judgment against CytoSport as follows:

A. That the Court enter judgment in favor of Hansen and against CytoSport on all claims for relief alleged herein;

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B. That the Court enter judgment that CytoSport has willfully violated the provisions of 15 U.S.C. § 1114 by infringing Hansen's trademark rights in its MONSTER Registered Marks;

C. That the Court enter judgment that CytoSport has willfully diluted the distinctive quality of Hansen's MONSTER Marks in violation of 15 U.S.C. § 1125(c);

D. That the Court enter judgment that CytoSport has willfully violated the provisions of 15 U.S.C. §§ 1114 and 1125(a) by infringing Hansen's MONSTER Trade Dress and MONSTER Marks, and making a false designation of origin, false description or false representation in connection with their products;

E. That the Court enter judgment that CytoSport has willfully violated the provisions of 15 U.S.C. § 1125(a) by infringing the MONSTER Marks;

F. That the Court enter judgment that CytoSport has committed false and misleading advertising in violation of 15 U.S.C. § 1125(a), and that such violation was committed willfully.

G. That the Court enter judgment that CytoSport willfully diluted the distinctive quality of Hansen's MONSTER Marks in violation of California Business & Professions Code § 14247;

H. That the Court enter judgment that CytoSport willfully and unfairly competed with Hansen in violation of California Business & Professions Code § 17200 *et seq.*;

I. That the Court enter judgment that CytoSport willfully committed false and misleading advertising in violation of California Business & Professions Code § 17500 *et seq.* and California common law;

J. That the Court enter judgment that CytoSport willfully infringed Hansen's MONSTER Marks and MONSTER Trade Dress in violation of the common law of the State of California;

K. That the Court enter judgment that CytoSport unfairly competed with Hansen in violation of the common law of the State of California;

L. That CytoSport, its agents, servants, employees, attorneys, successors, and assigns, and all other persons in active concert or participation with any of them who receive actual notice of the injunction by personal service or otherwise, be forthwith enjoined from:

a. using Hansen's MONSTER Marks and MONSTER Trade Dress, or any marks or trade dress confusingly similar thereto, in connection with CytoSport's goods, in advertising or promoting CytoSport's goods, and/or in any manner that is likely to create the impression that CytoSport's goods originate from Hansen, are endorsed by Hansen, or are connected in any way with Hansen, and in any manner that is false and misleading to consumers;

b. using the term MONSTER or any variation thereof, including but not limited to MONSTER MILK, in connection with any of CytoSport's goods, in advertising or promoting CytoSport's goods, and/or in any manner that is likely to create the impression that CytoSport's goods originate from Hansen, are endorsed by Hansen, or are connected in any way with Hansen, and in any manner that is false and misleading to consumers;

c. otherwise infringing Hansen's MONSTER Marks and MONSTER Trade Dress, and/or committing false or misleading advertising;

d. diluting the distinctive quality of Hansen's MONSTER Marks;

e. falsely designating the origin, nature, characteristics or qualities of CytoSport's goods;

///

f. unfairly competing with Hansen in any manner whatsoever; and

g. causing a likelihood of confusion or injury to Hansen's business reputation;

M. That CytoSport be directed to file with this Court and serve on Hansen within thirty (30) days after the service of the injunction, a report, in writing, under oath, setting forth in detail the manner and form in which CytoSport has complied with the injunction;

N. That CytoSport be required to recall from its customers any and all infringing products and promotional materials;

O. That CytoSport be required to account to Hansen for any and all profits derived by it and all damages sustained by Hansen by virtue of CytoSport's acts complained of herein;

P. That CytoSport be ordered to pay over to Hansen all damages that Hansen has sustained as a consequence of the acts complained of herein, subject to proof at trial;

Q. That Hansen be awarded treble damages pursuant to 15 U.S.C. § 1117;

R. That Hansen be awarded exemplary damages from CytoSport pursuant to California Civil Code § 3294;

S. That CytoSport be required to deliver and destroy all devices, literature, advertising, goods, and other materials bearing the infringing marks pursuant to 15 U.S.C. § 1118;

T. For costs of suit incurred, including, but not limited to reasonable attorneys' fees and reasonable experts' fees;

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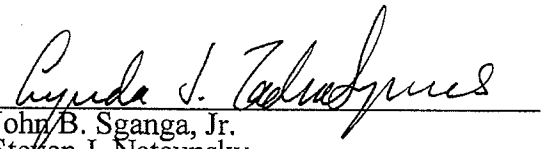
U. For such other and further relief as this Court may deem just and proper.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: June 11, 2009

By: 

John B. Sganga, Jr.
Steven J. Nataupsky
Lynda J. Zadra-Symes
Joseph S. Cianfrani

Attorneys for Plaintiff,
HANSEN BEVERAGE COMPANY

7270658

# EXHIBIT A

# State of California

## SECRETARY OF STATE

**Trademark Reg. No.** 108124 **Class No.** Int. 32

## CERTIFICATE OF REGISTRATION OF TRADEMARK

*I, BILL JONES,* **Secretary of State of the State of California, hereby certify:**

**That in accordance with the application filed in this office the TRADEMARK described below has been duly registered in this office on behalf of:**

**Name of Applicant:** Hansen Beverage Company
**Business Address:** 1010 Railroad Street, Corona, CA 92882
**Date first used in California:** March 27, 2002
**Date first used anywhere:** March 27, 2002
**Description of Trademark:** MONSTER
**Description of Goods on which the Trademark is used:** Fruit Juice drinks, soft drinks, carbonated soft drinks and soft drinks enhanced with vitamins, minerals, nutrients, amino acids and/or herbs, aerated water, soda water and seltzer water.
**A copy, specimen, facsimile, counterpart or a reproduction of the mark is attached**
**Date of Registration:** April 24, 2002
**Term of Registration Extends to and Includes:** April 24, 2012

**IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this** 26th **day of** April, 2002

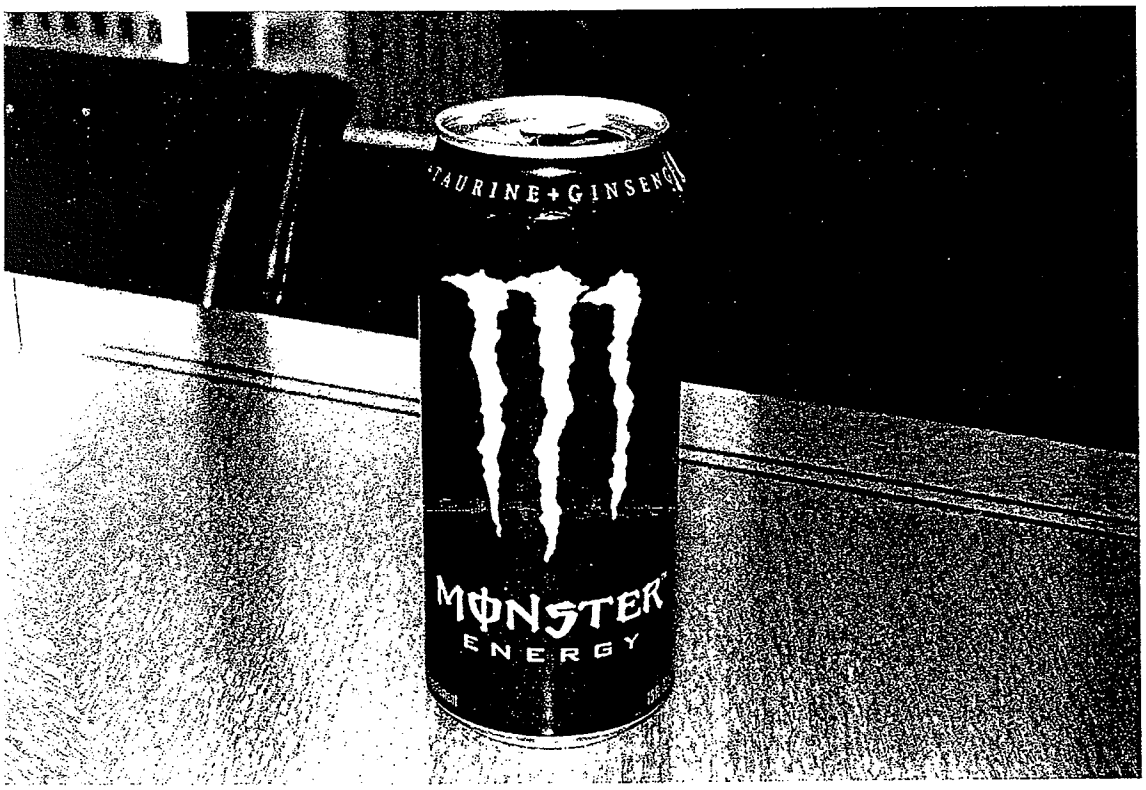
BILL JONES
Secretary of State

NP-24 A (Rev. 1-96)

OSP 99 21639

A COPY, SPECIMEN, FACSIMILE, COUNTERPART OR

REPRODUCTION OF TRADEMARK REG. NO. 108124



# The United States of America

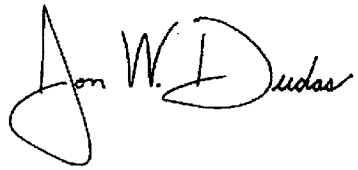
## CERTIFICATE OF REGISTRATION
### PRINCIPAL REGISTER

*The Mark shown in this certificate has been registered in the United States Patent and Trademark Office to the named registrant.*

*The records of the United States Patent and Trademark Office show that an application for registration of the Mark shown in this Certificate was filed in the Office; that the application was examined and determined to be in compliance with the requirements of the law and with the regulations prescribed by the Director of the United States Patent and Trademark Office; and that the Applicant is entitled to registration of the Mark under the Trademark Act of 1946, as Amended.*

*A copy of the Mark and pertinent data from the application are part of this certificate.*

***To avoid CANCELLATION of the registration, the owner of the registration must submit a declaration of continued use or excusable non-use between the fifth and sixth years after the registration date.*** *(See next page for more information.) Assuming such a declaration is properly filed, the registration will remain in force for ten (10) years, unless terminated by an order of the Commissioner for Trademarks or a federal court. (See next page for information on maintenance requirements for successive ten-year periods.)*



*Director of the United States Patent and Trademark Office*

Int. Cl.: 32

Prior U.S. Cls.: 45, 46 and 48

**United States Patent and Trademark Office**

**Reg. No. 3,057,061**
**Registered Feb. 7, 2006**

**TRADEMARK**
**PRINCIPAL REGISTER**

# MONSTER ENERGY

HANSEN BEVERAGE COMPANY (DELAWARE CORPORATION)
1010 RAILROAD STREET
CORONA, CA 92882

FOR: 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, IN CLASS 32 (U.S. CLS. 45, 46 AND 48).

FIRST USE 3-27-2002; IN COMMERCE 4-18-2002.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "ENERGY", APART FROM THE MARK AS SHOWN.

SER. NO. 78-122,679, FILED 4-18-2002.

ANN E. SAPPENFIELD, EXAMINING ATTORNEY

# The United States of America

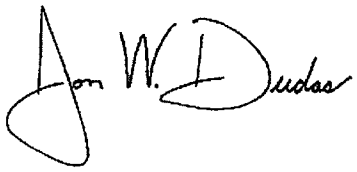
## CERTIFICATE OF REGISTRATION
### PRINCIPAL REGISTER

*The Mark shown in this certificate has been registered in the United States Patent and Trademark Office to the named registrant.*

*The records of the United States Patent and Trademark Office show that an application for registration of the Mark shown in this Certificate was filed in the Office; that the application was examined and determined to be in compliance with the requirements of the law and with the regulations prescribed by the Director of the United States Patent and Trademark Office; and that the Applicant is entitled to registration of the Mark under the Trademark Act of 1946, as Amended.*

*A copy of the Mark and pertinent data from the application are part of this certificate.*

***To avoid CANCELLATION of the registration, the owner of the registration must submit a declaration of continued use or excusable non-use between the fifth and sixth years after the registration date.*** *(See next page for more information.) Assuming such a declaration is properly filed, the registration will remain in force for ten (10) years, unless terminated by an order of the Commissioner for Trademarks or a federal court. (See next page for information on maintenance requirements for successive ten-year periods.)*



*Director of the United States Patent and Trademark Office*

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Int. Cl.: 5

Prior U.S. Cls.: 6, 18, 44, 46, 51 and 52

**United States Patent and Trademark Office**

**Reg. No. 3,044,315**
Registered Jan. 17, 2006

**TRADEMARK**
**PRINCIPAL REGISTER**

**MONSTER ENERGY**

HANSEN BEVERAGE COMPANY (DELAWARE CORPORATION)
1010 RAILROAD STREET
CORONA, CA 92882

FOR: 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, IN CLASS 5 (U.S. CLS. 6, 18, 44, 46, 51 AND 52).

FIRST USE 3-27-2002; IN COMMERCE 4-18-2002.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "ENERGY", APART FROM THE MARK AS SHOWN.

SER. NO. 78-253,933, FILED 5-23-2003.

SUSAN HAYASH, EXAMINING ATTORNEY

# The United States of America

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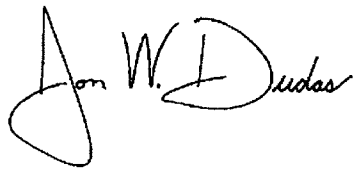

*Director of the United States Patent and Trademark Office*

Int. Cl.: 5

Prior U.S. Cls.: 6, 18, 44, 46, 51 and 52

United States Patent and Trademark Office

Reg. No. 3,044,314

Registered Jan. 17, 2006

# TRADEMARK
## PRINCIPAL REGISTER

## M MONSTER ENERGY

HANSEN BEVERAGE COMPANY (DELAWARE CORPORATION)
1010 RAILROAD STREET
CORONA, CA 92882

FOR: 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, IN CLASS 5 (U.S. CLS. 6, 18, 44, 46, 51 AND 52).

FIRST USE 3-27-2002; IN COMMERCE 4-18-2002.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "ENERGY", APART FROM THE MARK AS SHOWN.

SER. NO. 78-253,930, FILED 5-23-2003.

SUSAN HAYASH, EXAMINING ATTORNEY

# The United States of America

## CERTIFICATE OF REGISTRATION
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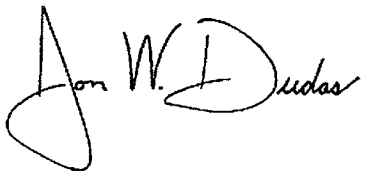


*Director of the United States Patent and Trademark Office*

Int. Cl.: 32

Prior U.S. Cls.: 45, 46 and 48

Reg. No. 3,134,841

United States Patent and Trademark Office

Registered Aug. 29, 2006

# TRADEMARK
## PRINCIPAL REGISTER

HANSEN BEVERAGE COMPANY (DELAWARE CORPORATION)
1010 RAILROAD STREET
CORONA, CA 92882

FOR: 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, IN CLASS 32 (U.S. CLS. 45, 46 AND 48).

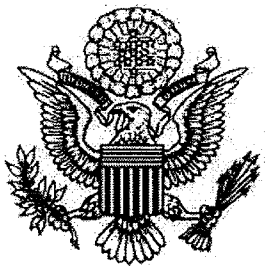
FIRST USE 3-27-2002; IN COMMERCE 4-18-2002.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "ENERGY", APART FROM THE MARK AS SHOWN.

SER. NO. 78-246,567, FILED 5-7-2003.

AMY HELLA, EXAMINING ATTORNEY

# The United States of America



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*Director of the United States Patent and Trademark Office*

Int. Cl.: 32

Prior U.S. Cls.: 45, 46 and 48

Reg. No. 3,134,842

**United States Patent and Trademark Office** Registered Aug. 29, 2006

## TRADEMARK
## PRINCIPAL REGISTER

## M MONSTER ENERGY

HANSEN BEVERAGE COMPANY (DELAWARE CORPORATION)
1010 RAILROAD STREET
CORONA, CA 92882

FOR: 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, IN CLASS 32 (U.S. CLS. 45, 46 AND 48).

FIRST USE 3-27-2002; IN COMMERCE 4-18-2002.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "ENERGY", APART FROM THE MARK AS SHOWN.

SER. NO. 78-246,573, FILED 5-7-2003.

AMY HELLA, EXAMINING ATTORNEY

## PROOF OF SERVICE

I am a citizen of the United States of America and I am employed in Irvine, California. I am over the age of 18 and not a party to the within action. My business address is 2040 Main Street, Fourteenth Floor, Irvine, California.

On June 11, 2009, I served the within **HANSEN BEVERAGE COMPANY'S REPLY AND COUNTERCLAIMS TO THE FIRST AMENDED COUNTERCLAIMS OF CYTOSPORT, INC.** on the parties or their counsel shown below as follows:

**VIA EMAIL:**

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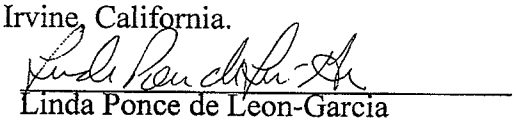
I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on June 11, 2009, at Irvine, California.



Linda Ponce de Leon-Garcia