

THIS DECISION IS NOT A  
PRECEDENT OF THE  
TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451  
General Contact Number: 571-272-8500

Mailed: January 30, 2015

Opposition No. 91199986

(**Parent Case**)

Opposition No. 91202947

Opposition No. 91205388

Opposition No. 91209540

*USA Nutraceuticals Group, Inc. and  
Ultra-Lab Nutrition, Inc., d/b/a Beast  
Sports*

v.

*Monster Energy Company*

**Before Quinn, Mermelstein and Adlin,  
Administrative Trademark Judges.**

**By the Board:**

Monster Energy Company (“Applicant”) seeks to register the following marks:

1. **UNLEASH THE NITRO BEAST!**, in standard characters, for “nutritional supplements” in International Class 5;<sup>1</sup>
2. **REHAB THE BEAST!**, in standard characters, for “nutritional supplements in liquid form” in International Class 5;<sup>2</sup>

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<sup>1</sup> Application Serial No. 85197756, the subject of Opposition No. 91199986, filed on December 14, 2010, based upon an allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

<sup>2</sup> Application Serial No. 85168304, the subject of Opposition No. 91202947, filed on November 3, 2010, based upon an allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

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3. **REHAB THE BEAST! WWW.MONSTERENERGY.COM**, in standard characters, for “nutritional supplements in liquid form” in International Class 5;<sup>3</sup> and
4. **UNLEASH THE ULTRA BEAST!**, for “nutritional supplements in liquid form” in International Class 5.<sup>4</sup>

USA Nutraceuticals Group, Inc. and Ultra-Lab Nutrition, Inc., d/b/a Beast Sports (“Opposers”) oppose registration of each of Applicant’s involved marks on the ground of likelihood of confusion. Additionally, Opposers oppose the registration of Applicant’s involved UNLEASH THE ULTRA BEAST! mark on the ground of lack of a *bona fide* intention to use the mark as of the filing date of that application. In support of their claims, Opposers have pleaded ownership of the registered marks THE BEAST and BEAST MODE used in association with nutritional supplements and vitamins.<sup>5</sup> Additionally, Opposers pleaded prior common law rights in the marks UNLEASH THE BEAST, BEAST, and BEAST SPORTS.

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<sup>3</sup> Application Serial No. 85543622, the subject of Opposition No. 91205388, filed on February 15, 2012, based upon an allegation of use in commerce under Section 1(a) of the Trademark Act, claiming March 2, 2011 as both the date of first use and the date of first use in commerce.

<sup>4</sup> Application Serial No. 85783034, the subject of Opposition No. 91205940, filed on November 19, 2012, based upon an allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

<sup>5</sup> The Board notes that Opposers have pleaded ownership of two applications, one for the mark THE BEAST CYCLE (Application Serial No. 77663693) and the other for the mark THE BEAST SHACK (Application Serial No. 77663433), both for dietary and nutritional supplements. The Board further notes, however, that these applications are abandoned. Therefore, Opposers may not rely upon these applications in support of their asserted claims.

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Applicant has filed answers to each notice of opposition denying the salient allegations asserted therein.

These consolidated proceedings now come before the Board for consideration of Applicant's motion (filed September 17, 2014) for summary judgment on Opposers' claims of likelihood of confusion and lack of a *bona fide* intent to use the mark in commerce. Opposers filed a timely response to Applicant's motion on October 17, 2014.

**Applicant's Motion for Summary Judgment**

In support of its motion, Applicant argues, *inter alia*, that: (1) Opposers lack any prior rights in the mark UNLEASH THE BEAST; (2) the parties' respective marks are visually and phonetically dissimilar, and convey different commercial impressions; (3) the existence of numerous third-party uses of the mark BEAST in connection with goods that are directly related to those offered by Opposers demonstrates that Opposers' pleaded BEAST marks are weak; (4) Applicant's goods are liquid, ready-to-eat products while Opposers' products are sold in non-liquid (powder or capsule) form and, therefore, the goods at issue differ; (5) the respective trade channels for the parties' goods are unrelated inasmuch as the majority of Applicant's goods are sold through convenience stores and gas stations while Opposers have not shown any sales of their products through these trade channels; (6) there is no evidence of actual confusion between the parties' respective marks; and (7) Opposers have failed to establish that Applicant lacked a *bona fide* intention

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to use its UNLEASH THE ULTRA BEAST! mark as of the filing date of the application for said mark.

In response, Opposers argue that: (1) Opposers have used their pleaded UNLEASH THE BEAST mark since long prior to Applicant's first use of each of Applicant's involved marks; (2) the third-party BEAST marks identified by Applicant are not currently in use in the United States, and some of them never were; (3) the marks at issue are highly similar; (4) Opposers' enforcement efforts against third-party uses of BEAST-formative marks demonstrate both the strength of Opposers' marks and recognition by third parties of Opposers' rights in its pleaded BEAST, THE BEAST, and UNLEASH THE BEAST marks; (5) the parties' respective goods are legally identical; (6) there are no trade channel restrictions in Opposers' pleaded registrations that would restrict Opposers from offering nutritional supplements in the same trade channels as Applicant's goods; and (7) lack of actual confusion is not compelling given the limited manner in which Applicant has used its subject BEAST marks. Opposers do not contest Applicant's motion with respect to the claim of no *bona fide* intent to use.

**Decision**

A party is entitled to summary judgment when it has demonstrated that there are no genuine disputes as to any material facts, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The evidence must be viewed in a light favorable to the nonmoving party, and all justifiable

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inferences are to be drawn in the nonmovant's favor. *Opryland USA Inc. v. The Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

Upon careful consideration of the arguments and evidence presented by the parties, and drawing all inferences with respect to Applicant's motion in favor of Opposers as the nonmoving parties, we find that there are genuine disputes of material fact with regard to Opposers' claims of likelihood of confusion which preclude disposition of these cases by way of summary judgment.

At a minimum, we find that genuine disputes of material fact exist as to the similarities between the parties' respective marks. Also, we find that genuine disputes of material fact exist as to the strength of Opposers' pleaded BEAST marks.

In view thereof, Applicant's motion for summary judgment on Opposers' likelihood of confusion claims is **DENIED**.<sup>6</sup>

With regard to Opposers' claim of lack of a *bona fide* intent to use the mark in commerce asserted only in Opposition No. 91209540, Opposers, in

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<sup>6</sup> The parties should note that the evidence submitted in connection with Applicant's motion for summary judgment and response thereto is of record only for consideration of the motion. *See infra*. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. *See Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB (1983)). Furthermore, the fact that we have identified certain genuine disputes as to material facts sufficient to deny Applicant's motion should not be construed as a finding that these are necessarily the only disputes which remain for trial.

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response to Applicant's motion for summary judgment, stipulated<sup>7</sup> to dismissal of this claim. Accordingly, the claim of lack of a *bona fide* intention to use the mark in commerce asserted in Opposition No. 91209540 is hereby dismissed **with prejudice**. Trademark Rule 2.106(c).

**Trial Schedule**

These consolidated proceedings are hereby RESUMED. Discovery is closed. Trial dates for this consolidated case are reset as follows:<sup>8</sup>

Plaintiff's 30-day Trial Period Ends	<b>3/13/2015</b>
Defendant's Pretrial Disclosures Due	<b>3/28/2015</b>
Defendant's 30-day Trial Period Ends	<b>5/12/2015</b>
Plaintiff's Rebuttal Disclosures Due	<b>5/27/2015</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>6/26/2015</b>

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony.

Briefs shall be filed in accordance with Trademarks Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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<sup>7</sup> A stipulation is an agreement, although Opposers have not submitted the written consent of the applicant, or even alleged such an agreement.

<sup>8</sup> Applicant filed its motion for summary judgment subsequent to Opposers' deadline for serving their pretrial disclosures. To the extent Opposers have yet to serve their pretrial disclosures, Opposers should do so no later than **five (5) business days** from the mailing date of this order.