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KGC

August 25, 2023

Opposition No. 91282624

*Monster Energy Company*

*v.*

*Glowstick Entertainment, Inc.*

**Before Lykos, Adlin, and English,  
Administrative Trademark Judges.**

**By the Board:**

This proceeding is before us for consideration of Applicant's May 4, 2023 motion for summary judgment, filed under Fed. R. Civ. P. 56(a). 6 TTABVUE.<sup>1</sup> The motion is fully briefed.

## **I. Background**

Applicant has applied to register on the Principal Register the standard character mark DARK DECEPTION: MONSTERS & MORTALS for "downloadable electronic

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<sup>1</sup> In this order, citations to the record are to TTABVUE, the Board's online docketing system. See *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014); see also TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 106.03 (2023). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any number(s) following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

game software for use on mobile phones, personal computers, handheld computers, portable media players and video game consoles” in International Class 9.<sup>2</sup>

Opposer opposes registration of this mark on the sole ground of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), pleading prior common-law rights in an alleged “family” of MONSTER-formative marks for various goods and services, as well as ownership of a number of registrations for MONSTER-formative marks, including the following that are the only pleaded marks for video, electronic, computer, and interactive games:<sup>3</sup>

1. MONSTER ENERGY in standard characters for “entertainment services, namely, providing online video games and providing temporary use of non-downloadable video games, computer games, electronic games, and interactive games; arranging contests featuring online gaming; providing a web-based system and on-line portal for customers to participate in online gaming operation, and coordination of game tournaments, leagues, and tours for recreational computer game playing purposes; entertainment services, namely, providing a website for online gaming; providing a website featuring information about online gaming and online gaming professionals; entertainment in the nature of live online gaming” in International Class 41;<sup>4</sup>
2. MONSTER ENERGY in standard characters for, among other things, “downloadable software for mobile devices for playing games; downloadable electronic game software for use on mobile devices; downloadable game

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<sup>2</sup> Application Serial No. 97089030 was filed on October 22, 2021 under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), with May 5, 2020 as a claimed date of first use and November 3, 2020 as a claimed date of first use in commerce.

<sup>3</sup> Copies of printouts showing the current status of and title to the pleaded registrations obtained from a USPTO electronic database were submitted with the notice of opposition. 1 TTABVUE 52-196. Thus, the registrations are properly of record for both purposes of summary judgment and trial pursuant to Trademark Rule 2.122(d)(1).

<sup>4</sup> Registration No. 5481864, issued May 29, 2018 on the Principal Register, with June 6, 2016 as a claimed date of first use and first use in commerce.

software; downloadable interactive game programs; downloadable video game software and programs” in International Class 9;<sup>5</sup> and



3. **MONSTER ENERGY** for, among other things, “entertainment services, namely, providing online video games and providing temporary use of non-downloadable video games, computer games, electronic games, and interactive games; sponsoring tournaments and arranging contests featuring online gaming; providing a web-based system and on-line portal for customers to participate in online gaming operation, and coordination of game tournaments, leagues, and tours for recreational computer game playing purposes; entertainment services, namely, providing a website for online gaming; providing a website featuring information about online gaming and online gaming professionals; entertainment services in the nature of sporting events, performances and competitions, electronic sporting events and competitions, and music performances and events; providing a web site featuring entertainment information and news on athletes” in International Class 41.<sup>6</sup>

1 TTABVUE.

Applicant filed an answer, denying the salient allegations in the notice of opposition. 5 TTABVUE.

## II. Standard

Summary judgment is an appropriate method of disposing of cases in which there are no genuine disputes as to any material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In reviewing a motion for summary judgment, the evidentiary record must be viewed in the light most favorable to the

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<sup>5</sup> Registration No. 5820689, issued July 30, 2019 on the Principal Register, with June 30, 2002 as a claimed date of first use and first use in commerce in International Class 9.

<sup>6</sup> Registration No. 5820870, issued July 30, 2019 on the Principal Register, with August 19, 2003 as a claimed date of first use and first use in commerce in International Class 41. The mark is described as “consist[ing] of the letter ‘M’ in the form of a claw above the words ‘MONSTER ENERGY.’”

non-moving party, and all justifiable inferences to be drawn from the undisputed facts must be drawn in favor of the non-moving party. *See Mayer/Berkshire Corp. v. Berkshire Fashions, Inc.*, 424 F.3d 1229, 76 USPQ2d 1310, 1314 (Fed. Cir. 2005); *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). We may not resolve disputes of material fact; we may only ascertain whether a material fact is genuinely disputed. *See Lloyd's Food Prods.*, 25 USPQ2d at 2029; *Olde Tyme Foods*, 22 USPQ2d at 1544.

The party moving for summary judgment has the burden of demonstrating that the material facts are not genuinely in dispute by:

1. citing to the record, including affidavits or declarations, admissions, or interrogatory answers, and showing the cited materials do not establish a genuine dispute; or,
2. showing that the non-moving party cannot produce admissible evidence sufficient to create a genuine dispute.

*See* Fed. R. Civ. P. 56(c)(1). The moving party also has the burden of showing that it is entitled to judgment as a matter of law based on the established, undisputed facts. *See generally Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

### **III. Analysis**


Inasmuch as Applicant stipulates for summary judgment purposes only that “Opposer has established an entitlement to bring a statutory cause of action” (6 TTABVUE 4, ¶ 2), and that “Opposer has priority” (*id.* at 4, ¶ 4), we need only

determine whether Applicant has demonstrated the absence of a genuine dispute of material fact as to Opposer's likelihood of confusion claim. *See Leb. Seaboard Corp. v. R & R Turf Supply, Inc.*, 101 USPQ2d 1826, 1830 (TTAB 2012) (“[T]he parties have stipulated that opposer has standing, and that priority of use is not at issue. The issue, then, that we must resolve is that of likelihood of confusion.”) (citations omitted).

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We focus our likelihood of confusion analysis on Opposer's three pleaded



MONSTER ENERGY and  marks used for video, electronic, computer, and interactive games. These marks, goods, and services are more similar to Applicant's mark and goods than Opposer's other pleaded marks. Thus, if we find the absence of a genuine dispute of material fact that confusion is unlikely between these marks and Applicant's involved mark, we would not find the existence of a genuine dispute of material fact that confusion is unlikely between Applicant's mark and Opposer's other pleaded marks, and we will grant Applicant's motion on summary judgment.

*See Sock It To Me, Inc. v. Fan*, 2020 USPQ2d 10611, at \*6 (TTAB 2020); *cf. In re Max Capital Grp.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

We need only consider whether a genuine dispute exists as to the dissimilarity of the marks, the first *DuPont* factor, in part because Applicant stipulates to the following in Opposer's favor:

1. Applicant's goods could be sold and downloaded by individuals throughout the United States.
2. Opposer's MONSTER and MONSTER ENERGY marks are "famous," but only in connection with beverages and supplements for providing energy.
3. As it pertains to Opposer's pleaded Registration Nos. 5481864, 5820689, and 5820870:
  - a. The parties' goods and services are identical, similar, and/or strongly related;
  - b. The trade channels of the parties' goods and services could be identical;
  - c. The parties' goods and services could be advertised via the same means and methods and in the same physical and online outlets;
  - d. The parties' goods and services could be sold to the same consumer types and classes;
  - e. The parties' goods and services could be used by the same consumer types and classes;
  - f. Consumers of the parties' goods and services are of ordinary sophistication and intellect;
  - g. The parties' goods and services could be sold at the same price points; and
  - h. Consumers would exercise only ordinary care in selecting and purchasing the parties' goods and services.

4. As it pertains to Opposer's other pleaded marks:
  - a. The parties' goods and services could be sold to the same consumer types and classes;
  - b. The parties' goods and services could be used by the same consumer types and classes;
  - c. Consumers of the parties' goods and services are of ordinary sophistication and intellect;
  - d. Consumers would exercise only ordinary care in selecting and purchasing the parties' goods and services;
  - e. The parties' goods and services are relatively inexpensive; and
  - f. The parties' goods and services could be used or consumed at the same time.

6 TTABVUE 4-6, ¶¶ 5-20.

While Applicant does not also stipulate that Opposer has established a family of MONSTER-formative marks; that Opposer's marks, including the wording "MONSTER" therein, are conceptually and commercially strong;<sup>7</sup> or that Opposer's marks are famous for goods and services other than beverages and supplements for providing energy, for purposes of Applicant's summary judgment motion only, we assume that no genuine dispute of material fact exists that Opposer owns a family of MONSTER-formative marks; that Opposer's marks, including the wording

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<sup>7</sup> Applicant, however, submits evidence pertaining to the purported conceptual and commercial weakness of this wording. See 6 TTABVUE 14-442.

“MONSTER” therein, are conceptually and commercially strong; and that Opposer’s marks are famous, including for video, electronic, computer, and interactive games.<sup>8</sup>

Regarding “[t]he similarity or dissimilarity of the marks,” we analyze “the marks in their entireties as to appearance, sound, connotation and commercial impression.” *DuPont*, 177 USPQ at 567.

“The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of marks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014) (citations omitted).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, “[o]ur analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on a comparison of the entire marks, not just part of the marks.” *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at \*4 (TTAB 2020) (citing *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014), and *In re Nat’l*

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<sup>8</sup> Notwithstanding, Opposer, in responding to the summary judgment motion, has not made of record any evidence that would support these findings. *See Marion Labs. Inc. v. Biochem./Diagnostics Inc.*, 6 USPQ2d 1215, 1218-19 (TTAB 1988) (setting forth requirements for establishing a family of marks); *see also TPI Holdings, Inc. v. Trailertrader.com, LLC*, 126 USPQ2d 1409, 1420 (TTAB 2018).



*Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)) (other citation omitted).

Though the parties' marks share one word—the plural “MONSTERS” in Applicant’s mark, and the singular “MONSTER” in Opposer’s marks and family of marks—the similarities end there.

In Applicant’s mark, “MONSTERS” is the third word of four, and is interposed between three other apparently distinctive terms—“DARK,” “DECEPTION,” and “MORTALS”—which do not appear in any of Opposer’s marks or its family of marks. Opposer’s most pertinent marks also include the second word “ENERGY,” which we presume for purposes of summary judgment to be distinctive for all of Opposer’s goods and services; Opposer’s pleaded Registration No. 5820870 also includes a stylized


letter “M” or claw design: , which, too, is distinctive.

In addition, “DARK” and “DECEPTION” begin Applicant’s mark, and, for this reason, these elements, rather than “MONSTERS,” are “most likely to be impressed upon the mind of a purchaser and remembered,” such that they are the most dominant elements of the mark. *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988).

Further, the letters MO- that begin “MONSTERS & MORTALS” have an alliterative lilting cadence. *Cf. In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983) (analyzing LIGHT N’ LIVELY in the context of a disclaimer requirement). Accordingly, consumers are likely to view “MONSTERS & MORTALS” as a whole,

and take from Applicant's mark a different meaning and commercial impression than Opposer's MONSTER ENERGY marks and its family of MONSTER-formative marks. Specifically, Applicant's mark conveys a duality between "creature[s] having ... strange or frightening appearance[s]" and "human[s]," i.e., "MONSTERS & MORTALS," and, separately, "[a] ruse" or "trick" that is "[e]vil in nature or effect" or "sinister," i.e., "DARK DECEPTION."<sup>9</sup> These connotations are completely absent from Opposer's family of MONSTER-formative marks, which at a minimum convey only "[a] creature having a strange or frightening appearance" (to the extent "MONSTER" is perceived as a noun).<sup>10</sup> The difference in meaning is even starker when we consider Opposer's three most pertinent marks, which all include the



distinctive element "ENERGY," and in the case of the third mark, , is dominated by a distinctive design element. The wording "MONSTER ENERGY" in

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<sup>9</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011) (<https://www.ahdictionary.com/word/search.html?q=monster>; <https://www.ahdictionary.com/word/search.html?q=mortals>; <https://www.ahdictionary.com/word/search.html?q=deception>; <https://www.ahdictionary.com/word/search.html?q=dark>), accessed August 21, 2023. We "may take judicial notice of online reference works which exist in printed format or have regular fixed editions." *Boston Red Sox Baseball Club L.P. v. Sherman*, 88 USPQ2d 1581, 1590 n.8 (TTAB 2008) (citation omitted); see also *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014) (citations omitted), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

<sup>10</sup> As an adjective, "MONSTER" means "[e]xtremely large" or "monstrous." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011) (<https://www.ahdictionary.com/word/search.html?q=monster>), accessed August 21, 2023.

these marks connotes a large amount of energy or a creature with a strange or frightening appearance and a high level of energy.

In response, Opposer references a depiction of Applicant's use of its mark to support the argument that the "mark is dominated by the term 'MONSTERS.'" 8 TTABVUE 9-10. However, although "the question of likelihood of confusion must be decided on the basis of the mark as shown in the [application], regardless of how the mark is actually used," *In re Thomas*, 79 USPQ2d 1021, 1029 n.14 (TTAB 2006) (citation omitted), "illustrations of the mark as actually used may assist ... [us] in visualizing other forms in which the mark might appear," *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011). Inasmuch as Applicant seeks to register its mark in standard characters, no claim is being made to any particular font style, size, or color, and we must presume that any of the words in Applicant's mark could be displayed in any size, etc.. See Trademark Rule 2.52(a). In any event, even when Applicant's mark is presented in the same manner as Opposer asserts, where "MONSTERS" is emphasized "as much [as] or more than all other terms in the mark" (8 TTABVUE 9), "DARK" and "DECEPTION" still precede "MONSTERS," and "MORTALS" still follows "MONSTERS," and the marks in their entirety remain different in how they look and sound, in the meaning they convey, and the commercial impression they create. See *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018).


When we consider Opposer's other marks that do not include "ENERGY," the result is the same. These marks do not include any elements from Applicant's mark

besides the singular version of “MONSTERS.” Further, these marks either do not include additional matter—the word mark MONSTER and <sup>11</sup>—or they include additional (in most cases distinctive) matter that precedes<sup>12</sup> or follows<sup>13</sup> “MONSTER” and that does not appear in Applicant’s mark. This additional matter as well as the apparently distinctive terms “DARK,” “DECEPTION,” and “MORTALS” in Applicant’s mark are sufficient to distinguish the parties’ marks, and contribute to a different appearance, sound, connotation, and commercial impression.


In view thereof, we find that Applicant has satisfied its burden of establishing the absence of any genuine dispute with regard to the dissimilarity of the parties’ marks.

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<sup>11</sup> These marks appear, respectively, in Registration No. 6760278 for “energy drinks; fruit drinks; soft drinks; sports drinks” in International Class 32, and in Registration No. 6451182 for “non-alcoholic beverages, namely, soft drinks, energy drinks, sports drinks, and fruit juice drinks” in International Class 32. However, in its notice of opposition, Opposer alleges that all of its pleaded MONSTER marks have been used “in connection with video games,” which

presumably would include the word mark MONSTER and . 1 TTABVUE 24, ¶ 8. Though Opposer provides no evidence to substantiate this assertion, even if it did, there would be no genuine dispute of material fact that these marks are too dissimilar to Applicant’s mark for confusion to be likely.

<sup>12</sup> They are JAVA MONSTER (Registration Nos. 3959457, “JAVA” disclaimed, and 5826919, “JAVA” disclaimed in International Class 21), MUSCLE MONSTER (Registration No. 4376796), JUICE MONSTER (Registration No. 4716750, “JUICE” disclaimed), LOCA MOCA

JAVA MONSTER (Registration No. 4058407, “JAVA” disclaimed), and  (Registration No. 4954483, “JUICE” disclaimed).

<sup>13</sup> They are MONSTER ARMY (Registration No. 5551192), MONSTER ASSAULT (Registration No. 4634053), MONSTER REHAB (Registration No. 4111964), MONSTER

HYDRO (Registration No. 5476437), and  (Registration No. 5551230).

#### IV. Balancing the *DuPont* Factors

Based upon the factual circumstances presented in this case, we find *Kellogg Co. v. Pack'em Enters., Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991), to be controlling. In *Kellogg*, the Court of Appeals for the Federal Circuit affirmed the Board's determination that even considering all other relevant *DuPont* factors in the opposer's favor, the single *DuPont* factor of the dissimilarity of the marks at issue in that case outweighed the other relevant *DuPont* factors, and was therefore dispositive on the issue of likelihood of confusion.

Similarly here, even considering all other relevant *DuPont* factors in Opposer's favor,<sup>14</sup> we find that Applicant's mark is so dissimilar to Opposer's pleaded marks that no likelihood of confusion can exist as a matter of law. *See also Odom's Tenn. Pride Sausage, Inc. v. FF Acquisition, LLC*, 600 F.3d 1343, 93 USPQ2d 2030, 2032 (Fed. Cir. 2010) (“[A] single *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks.”) (citation and internal quotation marks omitted).

Thus, we find that Applicant is entitled to judgment as a matter of law dismissing the likelihood of confusion claim under Section 2(d).

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<sup>14</sup> Including, as discussed, for purposes of this motion that there is no genuine dispute of material fact that Opposer owns a family of MONSTER-formative marks; that Opposer's marks, including the wording “MONSTER” therein, are conceptually and commercially strong; and that Opposer's marks are famous, including for video, electronic, computer, and interactive games.

**V. Decision**

Accordingly, Applicant's motion for summary judgment is **granted**, the opposition is **dismissed with prejudice**, and application Serial No. 97089030 will proceed to registration.