

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

In the Matter of Application Serial No. 76/356,535,
Published in the *Official Gazette* of December 3, 2002

Atty. Ref.: **BOOST** (BMS) U.S.



01-22-2003

U.S. Patent & TMO/TM Mail Rcpt #70

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MEAD JOHNSON & COMPANY,

Opposer,

Opposition No.:

v.

BOOST ENERGY BAR, L.L.C.,

Applicant.

EE6356061540

"Express Mail" mailing label No. _____
Date of Deposit: January 22, 2003

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the date indicated above and is addressed to the Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3513

Oswaldo F. Lecuona
(Printed name of person mailing paper of fee)

Oswaldo F. Lecuona
(Signature)

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Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3513

Attn: **BOX TTAB FEE**

NOTICE OF OPPOSITION

MEAD JOHNSON & COMPANY, a Delaware corporation, with a business address of 2400 West Lloyd Expressway, Evansville, Indiana 47721 (hereinafter "Opposer"), believes that it will be damaged by registration of the mark shown in U.S. Trademark Application Serial No. 76/356,535, filed January 7, 2002 by **BOOST ENERGY BAR, L.L.C.** (hereinafter "Applicant"), and hereby opposes same.

As grounds for opposition, Opposer alleges that:

1. Opposer, a subsidiary of Bristol-Myers Squibb Company, and its predecessors-in-interest have registered **BOOST**, and substantially similar variants, on the Principal Register as a trademark for goods in Class 5, since prior to the filing date of the aforementioned application and Opposer had a *bona fide* intent

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to commence use of the mark in the United States and continues to use the mark in interstate commerce in the United States.

2. Opposer is the owner of the following U.S. trademark registrations:

BOOST & Design, Reg. No. 1,333,938, registered May 7, 1985, for:

Vitamin supplements in Class 5;

BOOST, Reg. No. 1,882,769, registered March 7, 1995, for:

Adult nutritional supplement in Class 5;

BOOST PLUS, Reg. No. 2,264,789, registered July 27, 1999, for:

Nutritional supplements in Class 5; and

BOOST BREEZE, Reg. No. 2,596,022, registered July 16, 2002, for:

Nutritional supplement in Class 5.

3. Opposer is also the owner of the following pending U.S. intent-to-use application for

BOOST, filed August 3, 2000 and allowed on September 4, 2001, for:

Laxatives and nutritional fiber supplements in Class 5.

4. The aforementioned registrations are valid and subsisting, and Opposer hereby gives notice, in accordance with Trademark Rule 2.122(d)(2), that it will rely thereon as evidence on its behalf in this proceeding, and status copies thereof showing present title will be introduced into evidence during its testimony period. Further, Opposer's Registration Nos. 1,333,938 and 1,882,769 are incontestable and thereby constitute conclusive evidence of Opposer's exclusive right to use the mark for the goods identified in those certificates of registration.

5. On January 7, 2002, Applicant filed an application in the United States Patent and Trademark Office, Serial No. 76/356,535, for registration on the Principal Register of the trademark **BOOST ENERGY BAR** for "retail store services in the field of non-alcoholic beverages and snacks" in International Class 35.
6. There is no issue of priority since the filing date of Applicant's aforementioned trademark application is subsequent to the date of registration of Opposer's aforementioned trademark and the date of first use of Opposer's pleaded mark(s).
7. Applicant's alleged trademark is so similar to Opposer's registered trademark(s) in sound, appearance and/or commercial impression so as to be likely to cause confusion.
8. The respective goods of the Opposer in Class 5 and the Applicant's services in International Class 35 are closely related and would likely target the same class of purchasers. Indeed, Applicant's appropriation of Opposer's mark for retail store services featuring the very products for which Opposer owns registrations would undoubtedly cause confusion.
9. Applicant's alleged trademark is likely to cause confusion, mistake or deception of purchasers as to the respective marks, and also as to the source of origin or sponsorship of the goods and/or services for which such marks are used.
10. Applicant's alleged trademark is calculated or likely to cause irreparable loss, injury and damage to Opposer's business and to the goodwill appertaining thereto as evidenced by the fact that Opposer's mark **BOOST ENERGY BAR** completely contains within it Opposer's mark **BOOST**.
11. Applicant's alleged trademark is a colorable imitation or misappropriation of Opposer's pleaded trademark and the concurrent use of both marks would be likely to cause confusion, mistake or deception.

12. Opposer's **BOOST** mark is distinctive and famous and had become famous prior to the filing of Applicant's intent-to-use application to register **BOOST ENERGY BAR**.
 13. Use of the mark **BOOST ENERGY BAR** by Applicant in connection with products similar to those offered by Opposer under the **BOOST** mark is likely to dilute the distinctive quality of Opposer's famous **BOOST** mark by lessening the capacity of the **BOOST** mark to identify and distinguish Opposer exclusively as the source of goods and services provided under the **BOOST** mark.
 14. Applicant's registration and use of the **BOOST ENERGY BAR** mark for its services is likely to create a mental association with Opposer and Opposer's products, thereby diluting Opposer's **BOOST** mark.
 15. Pursuant to 15 U.S.C. § 1052, as amended, where a mark when used would cause dilution, registration may be refused in an opposition proceeding.
 16. In this case, the registration sought by Applicant would dilute the distinctiveness and source identifying function of Opposer's **BOOST** mark.
 17. Accordingly, any registration of the mark **BOOST ENERGY BAR** would cause harm to Opposer.
- WHEREFORE**, Opposer prays that its opposition to Application Serial No. 76/356,535 be sustained for the services in International Class 35 and that the Trademark Trial and Appeal Board grant any and all further relief to Opposer that the Board finds to be necessary and just in the circumstances.

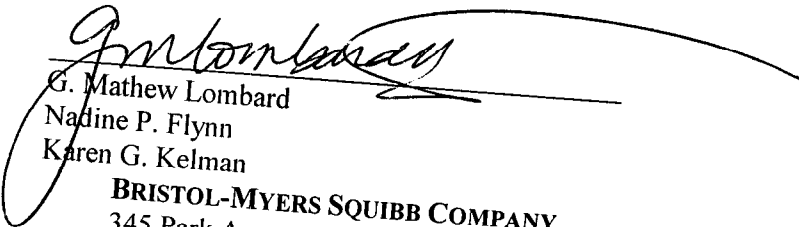
Two copies of this *Notice of Opposition* are enclosed, as required. The Commissioner of Trademarks is authorized to charge all required fees to our Deposit Account No. 13-2505.

Respectfully submitted,

MEAD JOHNSON & COMPANY

Dated: January 22, 2003

By:


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