

ESTTA Tracking number: **ESTTA302508**

Filing date: **08/24/2009**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	XELR8, Inc.
Granted to Date of previous extension	08/23/2009
Address	480 S. Holly St. Denver, CO 80246 UNITED STATES

Attorney information	Christopher M. Parent Brownstein Hyatt Farber Schreck, LLP 410 17th Street Suite 2200 Denver, CO 80202 UNITED STATES cparent@bhfs.com Phone:303.223.1148
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Applicant Information

Application No	76691379	Publication date	02/24/2009
Opposition Filing Date	08/24/2009	Opposition Period Ends	08/23/2009
Applicant	Robyn Sales, Inc. 115 East 57th Street, 11th floor New York, NY 10022 UNITED STATES		

Goods/Services Affected by Opposition

Class 032. First Use: 2008/04/15 First Use In Commerce: 2008/04/15 All goods and services in the class are opposed, namely: Non-alcoholic beverages, namely, sports drinks, energy drinks and soft drinks
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Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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Mark Cited by Opposer as Basis for Opposition

U.S. Application No.	77736173	Application Date	05/13/2009
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	FEEL THE POWER		

Design Mark	FEEL THE POWER
Description of Mark	NONE
Goods/Services	Class 032. First use: First Use: 2007/01/00 First Use In Commerce: 2007/01/00 Fruit drinks; fruit beverages

Attachments	77736173#TMSN.jpeg (1 page)(bytes) XELR8Opposition.PDF (5 pages)(55340 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/christopherparent/
Name	Christopher M. Parent
Date	08/24/2009

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

In the Matter of the Trademark Application Serial No. 76/691,379
For the Trademark: NOMIS in International Class 32
Published in the Official Gazette on February 24, 2009

XELR8, Inc.,
Opposer

v.

Robyn Sales, Inc.,
Applicant

OPPOSITION NO. _____

NOTICE OF OPPOSITION

XELR8 , Inc. ("XELR8"), a Colorado corporation having its principal place of business at 480 S. Holly St., Denver, Colorado 80246, believes it will be damaged by the registration of U.S. Trademark Application Serial No. 76/691,379 for the mark, FEEL THE POWER (the "Mark"), owned by Robyn Sales, Inc. ("Sales"), in International Classes 32, for use with "Non-alcoholic beverages, namely, sports drinks, energy drinks and soft drinks."

As grounds for the opposition, XELR8 alleges the following:

A. XELR8 and its Trademarks

1. XELR8 is a leading manufacturer and distributor of beverages and nutritional supplements.
2. One of XELR8's most successful brands is "BAZI", under which XELR8 sells primarily fruit drinks and liquid nutritional supplements.

3. In conjunction with its BAZI product line, XELR8 employs the tag line and trademark, "FEEL THE POWER." The Mark is included in the middle of each bottle sold under the BAZI brand and other packaging materials for the BAZI product line.

4. Since at least as early as January 2007, and prior to Sales' application for the Mark and first use of the Mark anywhere in commerce, XELR8 has continuously and extensively used the Mark in interstate commerce to advertise, promote, and market its line of beverages and nutritional supplements nationwide.

5. On May 13, 2009, XELR8 filed an application for the Mark, for use with "Fruit drinks; fruit beverages" in International Class 32, under U.S. Serial Number 77/736,173.

6. Because of XELR8's significant investment in the Mark, as well as the widespread success of the FEEL THE POWER brand throughout the country, XELR8's FEEL THE POWER Mark has acquired distinctiveness and goodwill throughout the United States.

7. XELR8 owns all rights in the Mark for use in conjunction with fruit drinks, fruit beverages, and liquid nutritional supplements.

B. Sales' Trademark

8. Upon information and belief, Sales, a New York corporation having an address of 115 East 57th Street, 11th floor, New York, New York 10022, seeks to register the Mark (U.S. Serial No. 76/691,379) for use with "Non-alcoholic beverages, namely, sports drinks, energy drinks and soft drinks," in International Class 32.

9. The opposed application for the Mark was filed under Section 1(a) of the Lanham Act on a use basis on July 18, 2008 – well after XELR8's rights in the Mark first arose.

10. In its application for the Mark, Sales declared a first use date of April 15, 2008 – also well after XELR8's rights in the Mark first arose.

11. Sales' application for the Mark published for opposition on February 24, 2009.

C. XELR8's Claim for Trademark Infringement

12. The Mark, as used by Sales, is exactly the same in sound, appearance, and meaning as the Mark used by XELR8. Sales' use of the Mark therefore offers the same commercial impression to potential consumers as XELR8's long-time use of the Mark.

13. Sales is using the Mark in connection with the same or similar goods XELR8 has sold under the Mark since January, 2007. Accordingly, the goods for which Sales seeks registration under the Mark are competitive, complementary, and/or related to the goods already offered by XELR8 under its use of the Mark.

14. Because XELR8 is the senior user of the Mark for drinks, beverages and supplements; the Mark, as employed by both XELR8 and Sales, is exactly the same in sight and sound; the products in connection with which Sales seeks to register the Mark are competitive, complementary and/or related to those goods sold by XELR8 under the same exact Mark; and the channels of trade and customer base for Sales' and XELR8's goods are the same or overlapping, Sales' Mark is squarely in conflict with XELR8's Mark, and is, therefore, likely to cause confusion, or mistake among consumers pursuant to 15 U.S.C. §§ 1052(d) and 1125.

15. Sales' registration of the Mark is likely to cause confusion or mistake in the minds of the public and lead the public and prospective purchasers into believing that Sales' drinks are those of XELR8's, or are endorsed or sponsored by, or otherwise affiliated or connected with XELR8, or that XELR8's goods are associated with Sales', all to the damage and injury of the purchasing public and to the damage and injury of XELR8.

D. Conclusion

16. Because XELR8's trademark rights in the Mark are prior and senior to Sales' rights in the Mark, and a likelihood of confusion exists between these marks, Sales should be denied registration of the Mark.

WHEREFORE, XELR8 prays that Sales' USPTO application for the Mark be rejected, that no registration be issued thereon to Sales, and that this opposition be sustained in Sales' favor.

Respectfully submitted,

Dated: August 24, 2009

By: Christopher M. Parent
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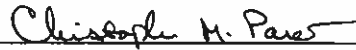
PROOF OF SERVICE

Christopher M. Parent, an attorney at Brownstein Hyatt Farber Schreck, LLP, says that on August 24, 2009, he served a copy of this NOTICE OF OPPOSITION upon:

Robyn Sales, Inc.
115 East 57th Street, 11th floor
New York, NY 10022

by enclosing the same in a First Class postage paid envelope and depositing it in the U.S. mail.

I declare that the statement above is true to the best of my information, knowledge and belief.



Christopher M. Parent