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Filing date: **03/24/2017**

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

Proceeding	91229583
Party	Plaintiff Monster Energy Company
Correspondence Address	JULIANNA M SIMON KNOBBE MARTENS OLSON & BEAR LLP 2040 MAIN STREET 14TH FLOOR IRVINE, CA 92614 UNITED STATES efiling@knobbe.com, francie.leonguerrero@knobbe.com, doreen.buluran@knobbe.com
Submission	Motion to Compel Discovery
Filer's Name	Julianna M. Simon
Filer's e-mail	efiling@knobbe.com, MEC.TTAB@knobbe.com
Signature	/Julianna M. Simon/
Date	03/24/2017
Attachments	2017-03-24 Opposer_s Motion to Compel-HANBEV.4527M.pdf(83371 bytes) 2017-03-24 JMS Declaration in Support of Opposer_s Motion to Compel-HAN- BEV.4527M.pdf(69958 bytes) JMS EXHIBIT 1 - RFP- HANBEV.4527M.PDF(633972 bytes) JMS EXHIBIT 2 -ROGS - HANBEV.4527M.PDF(618163 bytes) JMS EXHIBIT 3 - March 3 email.pdf(1165404 bytes) JMS EXHIBIT 4 - March 10 and 16 emails.pdf(627868 bytes)

MEMORANDUM OF LAW

I. STATEMENT OF FACTS

A. Background of Proceeding

Since 2002 and continuing thereafter, Opposer has used and promoted its UNLEASH THE BEAST!® mark in connection with its MONSTER™ line of beverages. In addition to its continued use of the UNLEASH THE BEAST!® mark, Opposer has also used its UNLEASH THE NITRO BEAST!®, UNLEASH THE ULTRA BEAST!®, and UNLEASH THE CAFFEINE FREE BEAST!® marks on nutritional supplements and energy drinks (collectively, the “UNLEASH Marks”). Opposer owns a number of registrations for its marks, including the registrations asserted in this Opposition.

Applicant seeks to register the mark UNLEASH THE FURY in connection with various supplements and beverages in Classes 5 and 32. Opposer filed the present opposition because it will be damaged by registration of the application because the UNLEASH THE FURY mark so resembles Opposer’s UNLEASH Marks as to be likely as to cause confusion, or to cause mistake or to deceive within the meaning of Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

B. Opposer’s Discovery Requests

Opposer timely served its First Set of Requests for Production of Documents and Things (Nos. 1-39) (“Requests for Production”) and First Set of Interrogatories (Nos. 1-32) (“Interrogatories”) on January 25, 2017 (collectively, the “Discovery Requests”). Simon Decl. ¶¶ 2; Exs. 1-2.¹ Applicant’s responses to the Discovery Requests were due by February 24, 2017.

¹ All exhibits are attached to the Simon Declaration filed concurrently herewith.

Simon Decl. ¶ 2. Applicant has not provided any responses to Opposer's Interrogatories or produced any documents in response to Opposer's Requests for Production. *Id.* at ¶ 7.

C. Opposer's Attempts to Resolve These Discovery Disputes

Opposer has made repeated, good-faith efforts to resolve these discovery issues with Applicant, as described in more detail in the Simon Declaration filed herewith. Applicant, however, has not responded to the Discovery Requests or provided any indication of when, if ever, it might provide responses. Applicant also did not respond to Opposer's requests for a meet and confer to discuss Applicant's failure to provide discovery responses.

On March 3, 2017, Opposer emailed Applicant's counsel notifying Applicant that its responses to the Discovery Requests were due February 24, and requesting that Applicant provide responses by March 6, 2017. *Id.* at ¶ 3; Ex. 3. Opposer did not receive a response to that email. *Id.* On March 10, 2017, Opposer emailed Applicant's counsel requesting a meet and confer because Applicant still had not responded to the Discovery Requests. *Id.* at ¶ 4; Ex. 4. Opposer did not receive a response to that email. *Id.* On March 16, 2017, Opposer emailed Applicant's counsel again requesting a meet and confer as Applicant had not responded to Opposer's Discovery Requests or provided his availability to meet and confer regarding Applicant's responses. *Id.* at ¶ 5; Ex. 4. The email informed Applicant that if it did not provide dates it was available to meet and confer, then Opposer would need to proceed with a motion to compel. *Id.* Opposer did not receive a response to that email. *Id.*

To date, Applicant has not provided responses to the Discovery Requests. *Id.* at ¶ 7. Applicant's counsel also has not responded to Opposer's counsel's requests to meet and confer. *Id.*

II. THE REQUESTS AND RESPONSES AT ISSUE

The Discovery Requests that are at issue in this Motion are Opposer's Requests for Production of Documents Nos. 1-39 and Opposer's Interrogatories Nos. 1-32. Exs. 1-2.

III. LEGAL STANDARD FOR A MOTION TO COMPEL

A motion to compel discovery should be granted where, as here, (1) Opposer made a good faith attempt to resolve the matter, and (2) Applicant failed to provide responses to properly served discovery requests, or produce documents or information responsive to Opposer's discovery requests. *See* 37 C.F.R. § 2.120(e); T.B.M.P. §§ 523.01-02.

IV. ARGUMENT

Applicant has failed to provide written responses to Opposer's Interrogatories or Requests for Production, and has failed to produce any documents in response to Opposer's Requests for Production. Simon Decl. ¶ 7. The Discovery Requests sought documents and information that are highly relevant to this opposition, including to the DuPont factors, such as the following:

- Documents and information relating to the development, creation, selection, and actual or anticipated use of Applicant's mark, including the marketing, promotion, or sale of goods offered under Applicant's mark (or variations thereof), and the commercial impression of Applicant's mark. Ex. 1 at Request for Production Nos. 1-2, 4-14, 16-17, 23, 26, 34; Ex. 2 at Interrogatory Nos. 1-11, 17-18, 28-29, 32.
- Documents and information relating to the channels of trade through which the goods under Applicant's mark travel or will travel. Ex. 1 at Request for Production Nos. 18-20, 22, 33; Ex. 2 at Interrogatory Nos. 12-16.
- Documents and information relating to the purchasers or anticipated purchasers of goods sold under Applicant's mark, or the target market for those goods. Ex. 1 at Request for Production Nos. 15, 21, 24-25; Ex. 2 at Interrogatory Nos. 26-27.
- Documents and information regarding Applicant's awareness of Opposer or Opposer's UNLEASH Marks. Ex. 1 at Request for Production Nos. 3; Ex. 2 at Interrogatory Nos. 19-23, 27-29, 31.

- Documents and information regarding actual or possible confusion between Applicant's mark and Opposer's UNLEASH Marks. Ex. 1 at Request for Production Nos. 30; Ex. 2 at Interrogatory Nos. 24.

Applicant has not disputed the relevancy of the information and documents requested by Opposer. Indeed, Applicant has not provided any responses at all to the Discovery Requests.

Applicant has had more than sufficient time to respond. Opposer served its Discovery Requests on January 25, 2017, making Applicant's responses due on February 24, 2017. Simon Decl. ¶ 2. Despite having had nearly two months to respond to the Discovery requests, Applicant has failed to provide its responses. *Id.* at ¶ 7. Further, Applicant's counsel has not responded to Opposer's repeated requests to meet and confer to resolve the issues raised in this motion. *Id.* at ¶¶ 4-7. Accordingly, the Board should find that Applicant has waived its right to object to Opposer's Interrogatories and Requests for Production, and order Applicant to respond to Opposer's Interrogatories without objection and produce, without objection, all documents responsive to Opposer's Requests for Production. *See* T.B.M.P. 406.04(a) ("[A] party which fails to respond to requests for production during the time allowed therefor, and which is unable to show that its failure was the result of excusable neglect, may be found, on motion to compel filed by the propounding party, to have forfeited its right to object to the requests on their merits."), citing *No Fear Inc. v. Rule*, 54 U.S.P.Q.2d 1551, 1555 (T.T.A.B. 2000).

Under the current schedule, fact discovery is set to close on April 24, 2017. However, Opposer needs the information and documents that it has requested in its Discovery Requests to assist in proving its case in this opposition. Accordingly, Opposer requests that the Board suspend this proceeding pending resolution of this motion so that Opposer will have an opportunity to obtain the discovery it has requested from Applicant prior to the close of discovery and potentially conduct depositions once that information has been received.

V. CONCLUSION

For the reasons set forth above, Opposer respectfully requests that the Board order Applicant to: (1) respond to Opposer's Interrogatories without objection, and (2) produce, without objection, all documents responsive to Opposer's Requests for Production. Opposer further requests that the Board suspend this proceeding pending its ruling on this motion.

Respectfully Submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: March 24, 2017

By: /Julianna M. Simon/

Steven J. Nataupsky
Lynda J. Zadra-Symes
Julianna M. Simon
2040 Main Street, Fourteenth Floor
Irvine, CA 92614
(949) 760-0404
efiling@knobbe.com
Attorneys for Opposer,
MONSTER ENERGY COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the OPPOSER'S MOTION TO COMPEL has been served on the Applicant's counsel of record on March 24, 2017, via electronic mail to:

Mark Harrison
VENABLE LLP
mbharrison@venable.com
trademarkdocket@venable.com
lmfuller@venable.com

Signature: 

Name: Anokhi Destiche

Date: March 24, 2017

3. Attached hereto as Exhibit 3 is a true and correct copy of an email chain containing an email I sent to Applicant's counsel on March 3, 2017 indicating that Applicant's responses to the Discovery Requests were due February 24, and requesting Applicant to provide responses by March 6, 2017. I did not receive a response to that email.

4. On March 10, 2017, I emailed Applicant's counsel requesting a meet and confer as Applicant had not responded to the Discovery Requests. I did not receive a response to that email.

5. On March 16, 2017, I emailed Applicant's counsel again requesting a meet and confer as Applicant had not responded to Opposer's Discovery Requests or provided his availability to meet and confer regarding Applicant's responses. I provided dates in the email that I was available to meet and confer. I also explained that if Applicant's counsel did not provide available dates to meet and confer by March 17, then Opposer would have no alternative but to proceed with a motion to compel. I did not receive a response to that email.

6. Attached hereto as Exhibit 4 are true and correct copies of the correspondence identified in Paragraphs 4-5 of this declaration.

7. As of the date this motion was filed, Applicant has not served responses to Opposer's Discovery Requests, has not produced documents in response to Opposer's document requests, and has not otherwise indicated when, if ever, responses may be forthcoming. Applicant's counsel also has not responded to any of Opposer's requests to meet and confer.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: March 24, 2017

By: /Julianna M. Simon/
Julianna M. Simon

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **DECLARATION OF JULIANNA M. SIMON IN SUPPORT OF OPPOSER'S MOTION TO COMPEL** has been served on the Applicant's counsel of record on March 24, 2017, via electronic mail to:

Mark Harrison
VENABLE LLP
mbharrison@venable.com
trademarkdocket@venable.com
lmfuller@venable.com

Signature: 

Name: Anokhi Destiche

Date: March 24, 2017

EXHIBIT 1

HANBEV.4527M

TRADEMARK

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

MONSTER ENERGY COMPANY, a Delaware corporation,)	
)	Opposition No.: 91229583
)	
Opposer,)	Serial No.: 86/798987
)	
v.)	Mark: UNLEASH THE FURY
)	
NUTRACLICK, LLC,)	
)	
Applicant.)	
)	

OPPOSER MONSTER ENERGY COMPANY’S FIRST SET OF REQUESTS FOR THE PRODUCTION OF DOCUMENTS AND THINGS (NOS. 1–39)

Pursuant to Rule 2.120(d) of the U.S. Patent and Trademark Office’s Trademark Rules of Practice, 37 C.F.R. § 2.120(d), and Rule 34 of the Federal Rules of Civil Procedure (“FRCP”), Opposer Monster Energy Company (“Opposer”), hereby requests that Applicant NutraClick, LLC (“Applicant”), produce the following documents and things for inspection and copying at the offices of Knobbe, Martens, Olson & Bear, 2040 Main Street, Fourteenth Floor, Irvine, California 92614, or such other place as may be agreed between the parties, within thirty (30) days of service hereof in accordance with FRCP 34 and Rule 2.120(a) of the PTO’s Trademark Rules of Practice.

DEFINITIONS

The following definitions shall apply to each of the Document Requests herein:

1. The term “Opposer” shall refer to Monster Energy Company, and any present or former owner, officer, director, employee, servant, agent, attorney or other representative acting

on its behalf, and shall include any related entity, parent corporation, or wholly-owned or partially-owned subsidiary, predecessor, successor, or affiliate.

2. The term “Applicant” shall refer to NutraClick, LLC and any present or former owner, officer, director, employee, servant, agent, attorney or other representative acting on behalf of it, and shall include any related entity, parent corporation, or wholly-owned or partially-owned subsidiary, predecessor, successor, or affiliate.

3. The term “you” or “your” shall mean Applicant.

4. As used herein, the term “document” shall mean all writings, recordings, photographs, or other documents within the scope of Rule 1001 of the Federal Rules of Evidence or Rule 34 of the Federal Rules of Civil Procedure, including without limitation written, printed, typed, electronically stored, magnetically stored, optically stored, and visually or aurally reproduced material of any kind, whether or not privileged. The term “document” shall include both the original of a document and all distinct copies thereof, including, without limitation, copies that are distinct due to the presence of notes made on or attached to the document.

5. A document or thing “relating” or which “relates” to any given subject means any document or thing that comprises, constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any way pertinent to that subject, including, without limitation, documents concerning the preparation of other documents.

6. The term “person” shall include both natural persons and corporate or other business entities, whether or not in the employ of Applicant, and the acts and knowledge of a person are defined to include the acts and knowledge of that person’s directors, officers, members, employees, representatives, agents and attorneys.

7. The terms “trademark” or “mark” shall include trademarks, service marks, collective marks, certification marks and trade names as defined in 15 U.S.C. § 1127.

8. The phrases “use in commerce,” “use in United States commerce,” “used in commerce” and “used in United States commerce,” and similar phrases, shall mean and refer to the definition provided under 15 U.S.C. § 1127.

9. The terms “all” and “each” shall be construed to include all and each.

10. The term “and” shall be construed to include “or” and *vice versa*, and shall be the logical equivalent of “and/or,” as necessary in order to bring within the scope of the Document Request all responses which might otherwise be construed as outside its scope.

11. The term “Applicant’s Mark” shall mean mark UNLEASH THE FURY as shown in U.S. Trademark Application Serial Number 86/798987.

12. The term “Applicant’s Application” shall mean U.S. Trademark Application Serial Number 86/798987.

13. The term “Notice of Opposition” shall refer to the Notice of Opposition filed in connection with Opposition No. 91229583.

14. The term “Applicant’s Goods” shall mean and refer to the goods Applicant offers or sells, has offered or sold, or intends to offer or sell in connection with Applicant’s Mark, including, but not limited to, the goods identified in Applicant’s Application for Applicant’s Mark, namely, dietary supplements; nutritional supplements; vitamin supplements; dietary and nutritional supplements; mineral supplements; vitamin and mineral supplements; herbal supplements; nutritionally fortified beverages; food supplements; pre-workout energy powder drink mixes; pre-workout nutritional supplements; dietary supplement beverages for pre-workout stimulation of muscle energy; nutritional supplements for pre-workout stimulation of muscle

energy; nutritional supplements for nitric oxide boosting in International Class 5 and pre-workout energy powder drink mixes used in the preparation of energy drinks in International Class 32.

15. The term “Opposer’s Marks” shall collectively refer to all of Opposer’s trademarks alleged in Opposer’s Notice of Opposition No. 91229583.

16. The term “Opposer’s Goods” shall mean and refer to all of the goods covered under Opposer’s Marks or as alleged in Opposer’s Notice of Opposition No. 91229583.

GENERAL INSTRUCTIONS

1. If you claim that any document requested is privileged, please provide all information falling within the scope of the Document Request which is not privileged, and identify with sufficient particularity for purposes of a Motion to Compel each item, document or thing, separately, with respect to which you claim a privilege, and state:

- (a) the basis on which the privilege is claimed;
- (b) the author of the document, if applicable;
- (c) each individual or other person to whom the document or copy thereof was sent or otherwise disclosed;
- (d) the date of the document;
- (e) the type of the document (e.g., letter, memorandum, etc.); and
- (f) the general subject matter of the document.

You are not requested to provide privileged information or information for which you claim privilege, but only to identify such information, document, or thing.

2. The documents produced pursuant to these Document Requests shall be separately produced for each paragraph of the same or, in the alternative, shall be identified as

complying with the particular paragraphs of the Document Requests to which they are responsive.

3. Applicant's responses to the following Document Requests are to be promptly supplemented to include subsequently acquired information in accordance with the requirements of Rule 26(e) of the FRCP.

REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

REQUEST FOR PRODUCTION NO. 1:

All documents referring or relating to the development or adoption of Applicant's Mark, including, but not limited to, surveys or studies.

REQUEST FOR PRODUCTION NO. 2:

All documents and things referring or relating to any searches (including trademark searches) or investigations relating to Applicant's Mark.

REQUEST FOR PRODUCTION NO. 3:

All documents and things referring or relating to any searches (including trademark searches) or investigations relating to Opposer's Marks.

REQUEST FOR PRODUCTION NO. 4:

All documents referring or relating to the first use of Applicant's Mark, including, but not limited to, all invoices, advertisements, brochures and promotional materials.

REQUEST FOR PRODUCTION NO. 5:

Documents and things sufficient to identify all goods and/or services that have been sold or will be sold in connection with Applicant's Mark, including samples of each good.

REQUEST FOR PRODUCTION NO. 6:

Documents sufficient to show the sales of Applicant's Goods, in both units and dollars, by year from the date of first use of Applicant's Mark to the present.

REQUEST FOR PRODUCTION NO. 7:

All documents referring or relating to how Applicant's Mark has been or will be used or promoted in the United States, including, but not limited to, representative samples of all promotional materials used or considered by Applicant for potential use in connection with Applicant's Mark.

REQUEST FOR PRODUCTION NO. 8:

All documents referring or relating to Applicant's use or planned use of marks that include the term "UNLEASH."

REQUEST FOR PRODUCTION NO. 9:

All documents referring or relating to plans, including, but not limited to, marketing plans or advertising plans, by Applicant to adopt or use additional marks that include the term "UNLEASH."

REQUEST FOR PRODUCTION NO. 10:

Documents sufficient to show Applicant's expenditures or anticipated expenditures in connection with marketing and/or promoting Applicant's Goods.

REQUEST FOR PRODUCTION NO. 11:

All documents referring or relating to business plans for Applicant's Goods.

REQUEST FOR PRODUCTION NO. 12:

All documents referring or relating to any advertising agencies or other person(s) which Applicant has used, or intends to use in promoting Applicant's Mark.

REQUEST FOR PRODUCTION NO. 13:

All documents referring or relating to the use or anticipated use of the colors black and green in connection with any mark used by Applicant that includes the term “UNLEASH.”

REQUEST FOR PRODUCTION NO. 14:

All documents and things referring or relating to the past use or plans for future use of any colors in connection with Applicant’s Mark.

REQUEST FOR PRODUCTION NO. 15:

All documents referring or relating to market research in connection with Applicant’s Goods, including, but not limited to, surveys or statistics showing Applicant’s target audience of consumers.

REQUEST FOR PRODUCTION NO. 16:

Documents sufficient to show each of Applicant’s Goods.

REQUEST FOR PRODUCTION NO. 17:

All documents referring or relating to plans or steps toward expansion by Applicant of the types of products and/or services with which Applicant’s Mark is used or will be used.

REQUEST FOR PRODUCTION NO. 18:

All documents referring or relating to plans to alter the present channels of trade/distribution for Applicant’s Goods.

REQUEST FOR PRODUCTION NO. 19:

Documents sufficient to show the geographic areas (by state) where Applicant’s Goods have been sold or where you intend to sell Applicant’s Goods.

REQUEST FOR PRODUCTION NO. 20:

All documents referring or relating to plans to alter the geographic areas where Applicant's Goods are offered or sold.

REQUEST FOR PRODUCTION NO. 21:

All documents referring or relating to plans to alter the customer base for Applicant's Goods or to sell Applicant's Goods to persons other than the present purchasers of Applicant's Goods.

REQUEST FOR PRODUCTION NO. 22:

All documents referring or relating to the types of stores or channels of trade/distribution through which Applicant's Goods have been sold or will be sold.

REQUEST FOR PRODUCTION NO. 23:

All documents referring or relating to the commercial impression or intended commercial impression for Applicant's Mark.

REQUEST FOR PRODUCTION NO. 24:

All documents referring or relating to the demographics or classes of persons who purchase or obtain Applicant's Goods or to whom Applicant's Goods will be sold.

REQUEST FOR PRODUCTION NO. 25:

All documents referring or relating to the target market or anticipated target market for Applicant's Goods.

REQUEST FOR PRODUCTION NO. 26:

Documents sufficient to show the actual or anticipated wholesale or retail prices for Applicant's Goods.

REQUEST FOR PRODUCTION NO. 27:

All documents referring or relating to any analysis or investigation conducted by Applicant or on its behalf regarding Applicant's Mark or Opposer's Marks.

REQUEST FOR PRODUCTION NO. 28:

All documents referring or relating to Applicant's first knowledge of Opposer or Opposer's Marks.

REQUEST FOR PRODUCTION NO. 29:

All documents referring or relating to Opposer or Opposer's Marks.

REQUEST FOR PRODUCTION NO. 30:

All documents referring or relating to any possible or actual confusion between Applicant and Opposer.

REQUEST FOR PRODUCTION NO. 31:

All communications between Applicant and any third-party referring or relating to Opposer or Opposer's Marks.

REQUEST FOR PRODUCTION NO. 32:

All documents referring or relating to Applicant's efforts to enforce its rights in Applicant's Mark against any third party.

REQUEST FOR PRODUCTION NO. 33:

Documents and things sufficient to show each state where Applicant has shipped or sold Applicant's Goods.

REQUEST FOR PRODUCTION NO. 34:

All documents referring or relating to any mention in the press of Applicant's Mark, including any press releases, Internet web pages, magazines, newspapers or other printed publications.

REQUEST FOR PRODUCTION NO. 35:

All documents and things referring or relating to any transfer of rights to or from Applicant.

REQUEST FOR PRODUCTION NO. 36:

All documents and things identified in Applicant's responses to Opposer's Interrogatories or that were reviewed or relied upon in the preparation of Applicant's responses to Opposer's Interrogatories.

REQUEST FOR PRODUCTION NO. 37:

All documents and things identified in your Initial Disclosures.

REQUEST FOR PRODUCTION NO. 38:

All documents and things relied upon in preparing your responses to Opposer's Requests for Admission.

REQUEST FOR PRODUCTION NO. 39:

All documents referring or relating to Applicant's policies regarding retention, storage, filing and destruction of documents.

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: January 25, 2017

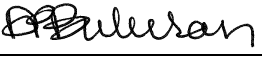
By: /Julianna M. Simon/

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(949) 760-0404
efiling@knobbe.com
Attorneys for Opposer,
MONSTER ENERGY COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the **OPPOSER MONSTER ENERGY COMPANY'S FIRST SET OF REQUESTS FOR THE PRODUCTION OF DOCUMENTS AND THINGS (NOS. 1-39)** has been served on the Applicant's counsel of record on January 25, 2017, via electronic mail to:

Mark Harrison
VENABLE LLP
mbharrison@venable.com
trademarkdocket@venable.com
lmfuller@venable.com

Signature: 

Name: Doreen P. Buluran

Date: January 25, 2017

24505969/dpb/102516

TTAB Opposition No. 91229583
Monster Energy Company v. NutraClick, LLC

EXHIBIT 2

HANBEV.4527M

TRADEMARK

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

MONSTER ENERGY COMPANY, a Delaware corporation,)	
)	Opposition No.: 91229583
)	
Opposer,)	Serial No.: 86/798987
)	
v.)	Mark: UNLEASH THE FURY
)	
NUTRACLICK, LLC,)	
)	
Applicant.)	
)	

OPPOSER MONSTER ENERGY COMPANY’S FIRST SET OF INTERROGATORIES (NOS. 1–32)

Pursuant to Rule 2.120(d) of the U.S. Patent and Trademark Office’s Trademark Rules of Practice, 37 C.F.R. § 2.120(d), and Rule 33 of the Federal Rules of Civil Procedure (“FRCP”), Opposer Monster Energy Company (“Opposer”), hereby requests that Applicant NutraClick, LLC (“Applicant”), answer separately and fully, in writing and under oath, each of the following Interrogatories, within thirty (30) days of service hereof in accordance with FRCP 33 and Rule 2.120(a) of the PTO’s Trademark Rules of Practice.

DEFINITIONS

1. The term “Opposer” shall refer to Monster Energy Company, and any present or former owner, officer, director, employee, servant, agent, attorney or other representative acting on its behalf, and shall include any parent corporation, or wholly-owned or partially-owned subsidiary, predecessor, successor, or affiliate.

2. The term “Applicant” shall refer to NutraClick, LLC and any present or former owner, officer, director, employee, servant, agent, attorney or other representative acting on behalf of it, and shall include any related entity, parent corporation, or wholly-owned or partially-owned subsidiary, predecessor, successor, or affiliate.

3. The term “you” or “your” shall mean Applicant.

4. As used herein, the term “document” shall mean all writings, recordings, photographs, or other documents within the scope of Rule 1001 of the Federal Rules of Evidence or Rule 34 of the Federal Rules of Civil Procedure, including without limitation written, printed, typed, electronically stored, magnetically stored, optically stored, and visually or aurally reproduced material of any kind, whether or not privileged. The term “document” shall include both the original of a document and all distinct copies thereof, including, without limitation, copies that are distinct due to the presence of notes made on or attached to the document.

5. The terms “all” and “each” shall be construed to include all and each.

6. The term “and” shall be construed to include “or” and *vice versa*, and shall be the logical equivalent of “and/or,” as necessary in order to bring within the scope of the Interrogatory all responses which might otherwise be construed as outside its scope.

7. The use of the singular form of any word also includes the plural and *vice versa*.

8. The phrases “use in commerce,” “use in United States commerce,” “used in commerce” and “used in United States commerce,” and similar phrases, shall mean and refer to the definition provided under 15 U.S.C. § 1127.

9. The term “person” shall include both natural persons and corporate or other business entities, whether or not in the employ of Applicant, and the acts and knowledge of a

person are defined to include the acts and knowledge of that person's directors, officers, members, employees, representatives, agents and attorneys.

10. The term "date" means the exact day, month, and year, if ascertainable and, if not, the best approximation thereof.

11. The terms "trademark" or "mark" shall include trademarks, service marks, collective marks, certification marks and trade names as defined in 15 U.S.C. § 1127.

12. The term "Applicant's Mark" shall mean mark UNLEASH THE FURY as shown in U.S. Trademark Application Serial Number 86/798987.

13. The term "Applicant's Application" shall mean U.S. Trademark Application Serial Number 86/798987.

14. The term "Notice of Opposition" shall refer to the Notice of Opposition filed in connection with Opposition No. 91229583.

15. The term "Applicant's Goods" shall mean and refer to the goods Applicant offers or sells, has offered or sold, or intends to offer or sell in connection with Applicant's Mark, including, but not limited to, the goods identified in Applicant's Application for Applicant's Mark, namely, dietary supplements; nutritional supplements; vitamin supplements; dietary and nutritional supplements; mineral supplements; vitamin and mineral supplements; herbal supplements; nutritionally fortified beverages; food supplements; pre-workout energy powder drink mixes; pre-workout nutritional supplements; dietary supplement beverages for pre-workout stimulation of muscle energy; nutritional supplements for pre-workout stimulation of muscle energy; nutritional supplements for nitric oxide boosting in International Class 5 and pre-workout energy powder drink mixes used in the preparation of energy drinks in International Class 32.

16. The term “Opposer’s Marks” shall collectively refer to all of Opposer’s trademarks alleged in Opposer’s Notice of Opposition No. 91229583.

17. The term “Opposer’s Goods” shall mean and refer to all of the goods covered under Opposer’s Marks or as alleged in Opposer’s Notice of Opposition No. 91229583.

GENERAL INSTRUCTIONS

1. All requests contained in the following Interrogatories to identify a person are to be answered by providing sufficient information to enable the undersigned to contact the person by telephone and mail and to serve legal documents on such person. If such a person is a natural person, please state his or her full name and current business (including employer name) and residence addresses and telephone numbers. If such person is other than a natural person, please state its full name and designation (i.e. corporation, LLC, etc.), principal business address, and telephone number.

2. All requests contained in the following Interrogatories to identify a document means to provide a description in terms sufficient that the document can be readily and unambiguously sought in a Request for Production of Documents under Federal Rules of Civil Procedure 34. In lieu of such identification, Opposer will accept a clear and legible copy of the document at the time Applicant answers this set of Interrogatories with a correlation of the produced document to the Interrogatory number.

3. Applicant’s obligation to respond to these Interrogatories is continuing, and the responses to the following Interrogatories are to be promptly supplemented to include subsequently acquired information in accordance with the requirements of Rule 26(e) of the Federal Rules of Civil Procedure.

INTERROGATORIES

INTERROGATORY NO. 1:

Identify each person involved with the creation of Applicant's Mark.

INTERROGATORY NO. 2:

For each person identified in response to Interrogatory No. 1, describe the person's involvement in the creation of Applicant's Mark.

INTERROGATORY NO. 3:

Identify each person involved with the selection and adoption of Applicant's Mark.

INTERROGATORY NO. 4:

For each person identified in response to Interrogatory No. 3, describe the person's involvement in the selection and adoption of Applicant's Mark.

INTERROGATORY NO. 5:

Identify all goods that have been promoted or sold under Applicant's Mark.

INTERROGATORY NO. 6:

Describe all goods that You plan or intend to offer or sell under Applicant's Mark.

INTERROGATORY NO. 7:

State the date that Applicant's Mark was first used in commerce.

INTERROGATORY NO. 8:

Identify the dates that Applicant's Goods were first promoted or sold.

INTERROGATORY NO. 9:

State the sales or anticipated sales in units and dollars, on an annual basis, of each good sold under Applicant's Mark in the United States.

INTERROGATORY NO. 10:

Describe the manner in which You advertise or plan to advertise Applicant's Mark or Applicant's Goods.

INTERROGATORY NO. 11:

Identify the amount You have spent on advertising Applicant's Mark or Applicant's Goods.

INTERROGATORY NO. 12:

Describe the channels of distribution for Applicant's Goods.

INTERROGATORY NO. 13:

Describe the intended channels of distribution for Applicant's Goods.

INTERROGATORY NO. 14:

Describe any plans by You to expand the channels of distribution for Applicant's Goods.

INTERROGATORY NO. 15:

Identify the geographic locations (by state) where Applicant's Goods have been sold.

INTERROGATORY NO. 16:

Identify the geographic locations where You intend to sell Applicant's Goods.

INTERROGATORY NO. 17:

State the average retail price for Applicant's Goods.

INTERROGATORY NO. 18:

State the anticipated average retail price for Applicant's Goods.

INTERROGATORY NO. 19:

Describe any research, including surveys and market research, conducted by You or on Your behalf involving Applicant's Mark.

INTERROGATORY NO. 20:

Describe any research or investigations conducted by You or on Your behalf involving Opposer's Marks.

INTERROGATORY NO. 21:

Describe the circumstances under which You first became aware of Opposer, including identifying when You first became aware of Opposer.

INTERROGATORY NO. 22:

Describe the circumstances under which You first became aware of any of Opposer's Marks, including identifying when You first became aware of Opposer's Marks.

INTERROGATORY NO. 23:

Describe in what way any of Opposer's Marks were considered during development or selection of Applicant's Mark.

INTERROGATORY NO. 24:

Describe any instances of actual or possible confusion of which You are aware involving Applicant's Mark and Opposer's Marks.

INTERROGATORY NO. 25:

Identify each person whom You intend to call as a witness or expect will give evidence in this proceeding.

INTERROGATORY NO. 26:

Describe the target market for Applicant's Goods.

INTERROGATORY NO. 27:

Describe the demographics (such as age and gender) of the purchasers or potential purchasers of Applicant's Goods.

INTERROGATORY NO. 28:

Identify all uses by You of any mark incorporating the term “UNLEASH.”

INTERROGATORY NO. 29:

Identify all websites (including social media) on which Applicant has promoted or intends to promote Applicant’s Mark or Applicant’s Goods.

INTERROGATORY NO. 30:

Identify every person or entity that Applicant has authorized to use Applicant’s Mark.

INTERROGATORY NO. 31:

Identify all persons who were consulted or participated in the preparation of answers to Opposer’s Interrogatories.

INTERROGATORY NO. 32:

Identify all past use, present use or plans for future use of any colors in connection with Applicant’s Mark or Applicant’s Goods.

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: January 25, 2017

By: /Julianna M. Simon/
Steven J. Nataupsky
Lynda J. Zadra-Symes
Julianna M. Simon
2040 Main Street, Fourteenth Floor
Irvine, CA 92614
(949) 760-0404
efiling@knobbe.com
Attorneys for Opposer,
MONSTER ENERGY COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the **OPPOSER MONSTER ENERGY COMPANY'S FIRST SET OF INTERROGATORIES (NOS. 1-32)** has been served on the Applicant's counsel of record on January 25, 2017, via electronic mail to:

Mark Harrison
VENABLE LLP
mbharrison@venable.com
trademarkdocket@venable.com
lmfuller@venable.com

Signature: 

Name: Doreen P. Buluran

Date: January 25, 2017

24505964/dpb/102516

EXHIBIT 3

From: Julianna.Simon
Sent: Friday, March 03, 2017 5:23 PM
To: Harrison, Mark B.
Cc: Lynda.Zadra-Symes; Jade.Nguyen; Doreen.Buluran; MEC.TTAB; Lesley.Kim
Subject: RE: Proposed Settlement- UNLEASH THE FURY Opposition No. 91229583 (Our Ref. hanbev.4527m)

Mark,

Given that your client is not interested in settlement and is not withdrawing the application, it is required to respond to Monster's discovery requests. Applicant's responses to Monster's discovery requests were due February 24. To date, we have not received Applicant's responses. Please send us Applicant's responses by Monday, **March 6**.

Best regards,

Julianna Simon
Associate
Julianna.Simon@knobbe.com
949-721-6344 Direct
Knobbe Martens
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2040 Main St., 14th Fl.
Irvine, CA 92614
www.knobbe.com/julianna-simon

From: Harrison, Mark B. [mailto:MBHarrison@Venable.com]
Sent: Thursday, March 02, 2017 12:24 PM
To: Julianna.Simon
Cc: Lynda.Zadra-Symes; Jade.Nguyen; Doreen.Buluran; MEC.TTAB; Lesley.Kim
Subject: RE: Proposed Settlement- UNLEASH THE FURY Opposition No. 91229583 (Our Ref. hanbev.4527m)

Julianna,

I have not been authorized to do so.

Mark

Please note our new street address effective February 27, 2017. All other information is the same.

Mark B. Harrison, Esq. | Venable LLP
t 202.344.4019 | f 202.344.8300
600 Massachusetts Avenue, NW, Washington, DC 20001

MBHarrison@Venable.com | www.Venable.com

From: Julianna.Simon [mailto:Julianna.Simon@knobbe.com]
Sent: Thursday, March 02, 2017 12:42 PM
To: Harrison, Mark B. <MBHarrison@Venable.com>

EXHIBIT 4

From: Julianna.Simon
Sent: Thursday, March 16, 2017 9:06 AM
To: Harrison, Mark B.
Cc: Lynda.Zadra-Symes; Jade.Nguyen; Doreen.Buluran; MEC.TTAB; Jonathan.Menkes
Subject: RE: Meet and Confer Requested- UNLEASH THE FURY Opposition No. 91229583 (Our Ref. hanbev.4527m)

Mark,

I am following up on my emails dated March 3 and March 10. We have not received Applicant's responses to Monster's discovery requests, which were due **February 24**, and you have not provided your availability to meet and confer regarding Applicant's responses. Please let us know your availability to meet and confer next Monday through Wednesday (3/20-3/22) between 10a-4p (PST) by **Friday, March 17**. If we do not hear from you by this date, we will be forced to file a motion to compel Applicant's responses to Monster's discovery requests.

Best regards,

Julianna Simon

Associate

Julianna.Simon@knobbe.com

949-721-6344 Direct

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Irvine, CA 92614

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From: Julianna.Simon
Sent: Friday, March 10, 2017 10:37 AM
To: 'Harrison, Mark B.'
Cc: Lynda.Zadra-Symes; Jade.Nguyen; Doreen.Buluran; MEC.TTAB; Jonathan.Menkes
Subject: Meet and Confer Requested- UNLEASH THE FURY Opposition No. 91229583 (Our Ref. hanbev.4527m)

Mark,

I am following up on my email dated March 3. Applicant's responses to Monster's discovery responses were due on **February 24**. To date, we have not received Applicant's responses. Please advise when you are available to meet and confer to discuss Applicant's responses. We are available at the following times: today: 1p-4p (PST), Monday (3/13): 10a-4p (PST), Tuesday (3/14): 10a- 4p (PST), and Wednesday (3/15): 10a-4p (PST).

Best regards,

Julianna Simon

Associate

Julianna.Simon@knobbe.com

949-721-6344 Direct

Knobbe Martens

TTAB Opposition No. 91229583
Monster Energy Company v. NutraClick, LLC

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