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

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| Proceeding | 91238273 |
| Party | Defendant<br>Vitalize Labs, LLC |
| Correspondence Address | ANTHONY A. LOPRESTI<br>LOPRESTI & O'REILLY, LLP<br>134 SPRING STREET, STE. 502<br>NEW YORK, NY 10012<br>Email: alopresti@lo-firm.com, coreilly@lo-firm.com |
| Submission | Answer |
| Filer's Name | Anthony A. LoPresti |
| Filer's email | alopresti@lo-firm.com, coreilly@lo-firm.com |
| Signature | /Anthony A. LoPresti/ |
| Date | 01/22/2018 |
| Attachments | EBOOST-Target-Answer-FINAL-01.22.2018.pdf(159734 bytes ) |

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

In the Matter of Trademark Application Serial Nos. 87/325,722, 87/325,782
Published in the Official Gazette June 13, 2017

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| TARGET BRANDS, INC.,<br><br>Opposer,<br><br>vs.<br><br>VITALIZE LABS, LLC,<br><br>Applicant. | Opposition No. 91238273 |

**ANSWER TO CONSOLIDATED NOTICE OF OPPOSITION**
**WITH AFFIRMATIVE DEFENSES**

Applicant, Vitalize Labs, LLC, d/b/a EBOOST ("Vitalize" or "Applicant"), for its answer to the Consolidated Notice of Opposition filed by Target Brands, Inc. ("Target" or "Opposer") against the application for registration of Vitalize's trademark , Serial No. 87/325,722 filed February 6, 2017, and published in the Official Gazette of June 13, 2017 (the "7 Mark"), and the application for registration of Vitalize's trademark EBOOST , Serial No. 87/325,782 filed February 6, 2017, and published in the Official Gazette of June 13, 2017 (the "7 Word Mark"), pleads and avers as follows. To the extent not explicitly admitted, all allegations in the opposition are denied.

1. Applicant is without knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph 1 of the Notice of Opposition with regard to Target's ownership or the incontestability of Target's asserted mark, , (the "Up & Up Mark"). Since Applicant can neither admit nor deny the paragraph as written, Applicant must deny.

2. Applicant is without knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph 2 of the Notice of Opposition. Since Applicant can neither admit nor deny the paragraph as written, Applicant must deny.

3. Applicant is without knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph 3 of the Notice of Opposition. Since Applicant can neither admit nor deny the paragraph as written, Applicant must deny.

4. Applicant admits that it is a New York limited liability company with an address at 134 Spring Street, Suite 502, New York, NY 10012, and that it is the owner of the applications at issue. Notwithstanding, the applications referenced in Paragraph 4 speak for themselves, and to the extent the allegations in Paragraph 4 vary therewith, Vitalize denies them.

5. Applicant is without knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph 5 of the Notice of Opposition. Since Applicant can neither admit nor deny the paragraph as written, Applicant must deny.

6. Applicant is without knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph 6 of the Notice of Opposition. Since Applicant can neither admit nor deny the paragraph as written, Applicant must deny.

7. Vitalize denies the allegations and/or legal conclusions contained in Paragraph 7.

## AFFIRMATIVE DEFENSES

Vitalize undertakes the burden of proof only as to those defenses deemed affirmative defenses by law, regardless of how such defenses are denominated below. Vitalize expressly reserves the right to plead additional affirmative and other defenses should any such defenses be revealed by discovery in this case. As and for its affirmative and other defenses, Vitalize states as follows:

8. The consolidated notice of opposition fails to state a claim upon which relief can be granted.

9. There is no likelihood of confusion, mistake, or deception between Opposer's mark and Applicant's marks.

10. Applicant alleges on information and belief that as a result of Opposer's own acts and/or omissions, the opposition is barred by the doctrine of laches.

11. Applicant alleges on information and belief that the opposition is barred by the doctrine of estoppel.

12. Applicant alleges on information and belief that as a result of its own acts and omissions, Opposer has waived any right to pursue its opposition.

13. Applicant alleges on information and belief that the opposition is barred by the doctrine of acquiescence.

14. Applicant alleges on information and belief that Opposer has never registered or sought registration of its "Up & Up" mark, or used its "Up & Up" mark in commerce, in connection with either (i) energy drinks enhanced with vitamins, minerals, herbs, and nutrients, or (ii) concentrates and powders used in the preparation of energy drinks and fruit-flavored beverages. Based on the same, Opposer's consolidated notice of opposition fails to state a claim upon which relief can be granted.

15. Applicant's marks are unique and distinctive.

16. Applicant's marks and Opposer's mark are different in appearance.

17. Applicant's marks are not contiguous in design, consisting of separate elements of the number 7 and a liquid drop, as opposed to Opposer's mark which is continguous in design, consists of rounded edges and contains the words "up&up".

18. The wording in Applicant's marks and Opposer's mark is different.

19. Applicants' marks and Opposer's mark are different in spelling.

20. Applicants' marks and Opposer's mark create different commercial impressions.

21. Opposer's mark contains the words "Up & Up" which is not present in Applicant's marks.

22. Applicant's mark contains the word "EBOOST" not present in Opposer's mark.

23. Opposer cannot claim ownership or exclusivity over "an arrow design pointing at a 45 degree diagonal, up and to the right".

24. Applicant's marks and Opposer's mark are not likely to disparage or falsely suggest a trade connection between Opposer and Applicant.

25. Any and all acts alleged to have been committed by Applicant were performed with lack of knowledge and lack of willful intent.

WHEREFORE, Vitalize requests that the Combined Notice of Opposition be dismissed with prejudice, together with whatever other relief the Board may deem appropriate.

Dated: January 22, 2018

Respectfully submitted,

/s/ *Anthony A. LoPresti*

Anthony A. LoPresti
Cornelius J. O'Reilly

LOPRESTI & O'REILLY, LLP
134 Spring Street, Ste. 502
New York, New York 10012
(212) 646-490-0065
alopresti@lo-firm.com
coreilly@lo-firm.com

*Attorneys for Applicant Vitalize Labs, LLC*

## CERTIFICATE OF SERVICE

I, Anthony A. LoPresti, hereby certify that on January 22, 2018, I served a true and correct copy of the foregoing ANSWER AND AFFIRMATIVE DEFENSES OF VITALIZE LABS, LLC by electronic mail upon:

James R. Steffen, Esq.
David R. Merritt, Esq.
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Tel: 612.766.7000
Fax: 612.766.1600
james.steffen@faegrebd.com
david.merritt@faegrebd.com

*Attorneys for Opposer Target Brands, Inc.*

/s/ *Anthony A. LoPresti*
Anthony A. LoPresti