

ESTTA Tracking number: **ESTTA904729**

Filing date: **06/21/2018**

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

Proceeding	91241012
Party	Defendant Tru, Inc.
Correspondence Address	WILLIAM FARAH WILLIAM FARAH, PLLC 301 E. LIBERTY ST., SUITE 200 ANN ARBOR, MI 48104 Email: wf@williamfarahlaw.com
Submission	Answer
Filer's Name	John David McNamara
Filer's email	jack@drinktru.com
Signature	/John David McNamara/
Date	06/21/2018
Attachments	DPSG Opposition - Tru Inc. Answer.pdf(105617 bytes)

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

<p>Dr/ Pepper/Seven Up, Inc. Opposer,</p> <p style="text-align: center;">v.</p> <p>Tru, Inc. Applicants.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Opposition No.: 91241012</p> <p>Serial No.: 87508942</p> <p>Mark: CRUSH YOUR DAY</p>

Regarding late Response

To Whom It May Concern,

Since we are a startup, our company doesn't have the necessary funds to hire a lawyer on retainer to fight the duration of this expensive case so the lawyer agreed that we could copy him on communications. Although he could potentially step in as the case progresses, our company is handling the response. Our President, John David McNamara, happened to be looking into the trademark in question by chance yesterday, June 20, 2018, and saw that some sort of opposition may have been filed; however, our company never received any notice.

Our company immediately reached out to the lawyer who filed our application to check the same day to see if anything happened and we found out that Dr. Pepper did file an opposition and that we needed to respond.

Our company had discussed potentially selling the mark to Dr. Pepper for several months and had agreed to extending the mark in good faith, on more than one occasion, so our company was caught off guard when we did not receive an email with the actual opposition. Neither us nor the filing lawyer received the opposition.

Our company rejected the oppositions offer as it was significantly lower than our ask as we do not believe there is any trademark infringement and we have invested significant time and capital into the mark.

I, John David McNamara, President of Tru Inc. am responding now on behalf of the company without the attorney as we refuse to be bullied.

RESPONSE TO NOTICE OF OPPOSITION

Priority and Likelihood of Confusion

1. Applicant denies the opposition because the opposition sells a drink in a standard aluminum can that hundreds if not thousands of competitors use or plastic bottles at no less than 8 oz; whereas, our company sells a 50 ml supplement in a custom design well thought out by a former designer at Chobani. Our company was founded with a mission to differentiate with premium ingredients and premium packaging, not copy cat old brands. (ie. The packaging is extremely distinct).

2. Applicant denies the opposition because our company has also invested significant time, money and effort to establish customer recognition of the distinct slogan, “CRUSH YOUR DAY” by partnering with influencers and athletes to gain recognition for our high quality supplement across multiple social media channels including but not limited to; Youtube, Facebook, Instagram, Twitter, as well as merchandise in the form of custom hats and t-shirts. Our supplement, “TRUENERGY” has also been sold to customers in multiple countries including, but not limited to, United States, Canada, Saudia Arabia, Sweden etc. Furthermore, our supplement, “TRUENERGY” has been featured on the show, Entrepreneur’s Elevator Pitch, which has already added well over 670,000 views across multiple mediums and one of our videos had received over 230,000 views. Our brand also a significant audience.

3. Applicant denies the opposition because our company utilizes the mark as a slogan “CRUSH YOUR DAY” defined as an action synonymously with “Carpe Diem / Seize the Day” first originated in approximately 65 BC – 8 BC ie. Although you can’t afford a lawyer, “CRUSH YOUR DAY” and win the case”. The definition and usage are unique and distinct with a definition predating the opposed origination.

4. Applicant denies the opposition because the opposition utilizes the mark “CRUSH” as a noun (ie. I drink “ORANGE CRUSH”) or as an adjective (ie. I drink “CRUSH” soda) in their merchandise whereas our company utilizes the word “CRUSH” in the three word slogan “CRUSH YOUR DAY” completely differentiating from the opposition’s usage leading to no confusion.

5. Applicant denies the opposition because our company does not lessen the capacity of their mark to identify and distinguish their unique goods or services because the opposition primarily utilizes the mark, “CRUSH” to market a carbonated beverage, namely a soda or

soft drink; whereas, our company uses the brand name “TRUENERGY” as the primary means to market a supplement, namely an energy shot.

6. Furthermore, the nutrition panel on our packaging must legally state “SUPPLEMENT FACTS” in the eyes of the FDA as we are not a thirst quenching beverage due to the amount of liquid delivered and because it is used to supplement the diet; whereas, “CRUSH” must state “NUTRITION FACTS” in the perspective of the FDA as it is a thirst quencher.
7. Applicant denies the opposition because the opposition primarily utilizes the mark, “CRUSH” to market a soda against an arsenal of competitors; whereas, our company uses the slogan “CRUSH YOUR DAY” to market an energy shot in a space that is monopolized by one player who owns over 90% of the market. The opposition does not compete with our company in the category of supplements, or the subcategory of liquid supplements, nor does the opposition compete with our company in energy drinks or the subcategory of energy shots. ie. The category is distinct.
8. Applicant denies the opposition again on the same reasoning because the opposition primarily utilizes the mark, “CRUSH” to market a soda against an arsenal of competitors; whereas, our company uses the slogan “CRUSH YOUR DAY” to market an energy shot in a space that is monopolized by one player who owns over 90% of the market. The opposition does not compete with our company in the category of supplements, or the subcategory of liquid supplements, nor does the opposition compete with our company in energy drinks or the subcategory of energy shots. ie. The category is distinct.
9. Applicant denies the opposition because our company is protecting the mark, “CRUSH YOUR DAY”, in classes that are completely distinct. Classes 005 and 032 have no conflict in this scenario as “cosmetic products, namely, lip balm and lip gloss” bare no resemblance to “supplements”. Furthermore, the opposition is attempting to drown us in poor claims with the hopes that give up on the defense. The opposition also claims in the first opposition that they sell “soft drinks” not “cosmetic products” lending us to believe that this mark would be weak and diluted in the class regardless also lending itself to a dilution of their brand.
10. Applicant denies the opposition again on the previously stated opposition because our company is protecting the mark, “CRUSH YOUR DAY”, in classes that are completely distinct. Classes 005 and 032 have no conflict in this scenario as “frozen novelties, namely, frozen confection” bare no resemblance to “supplements” or in the scenario, Classes 005 and 032. The total “13 million households” that apparently still drink “CRUSH” soda would not have consumed “frozen novelties” bearing the “CRUSH” name.

11. Applicant denies the opposition again on the previously stated opposition because our company is protecting the mark, "CRUSH YOUR DAY", in classes that are completely distinct. Classes 005 and 032 have no conflict in this scenario as "cakes; topping syrup" bare no resemblance to "supplements" or in this scenario, Classes 005 and 032. The opposition's defense is not only weak in this category it has nothing to do with our product. Ie. Apple Computer lost a recent "IPHONE" trademark dispute with an accessory maker in China as accessories and devices are distinct.
12. Applicant denies the opposition again on the previously stated opposition because our company is protecting the mark, "CRUSH YOUR DAY", in classes that are completely distinct. Classes 005 and 032 have no conflict in this scenario as "bubble gum; chewing gum" bare no resemblance to "supplements" or in this scenario, Classes 005 and 032. "Bubble gum; chewing bubble gum" are not considered "supplements".
13. Applicant denies the opposition again on the previously stated opposition because our company is protecting the mark, "CRUSH YOUR DAY", in classes that are completely distinct. Classes 005 and 032 have no conflict in this scenario as "concentrates and syrups for making non-alcoholic beverages" bare no resemblance to "supplements" or in this scenario, Classes 005 and 032. "TRUENERGY" is a finished product not a component of another good. In addition, "CRUSH YOUR DAY" is a secondary mark to help sell that finished good.
14. Applicant denies the opposition again on the previously stated opposition because our company is protecting the mark, "CRUSH YOUR DAY", in classes that are completely distinct. Classes 005 and 032 have no conflict in this scenario as "concentrates and syrups for making non-alcoholic beverages" bare no resemblance to "supplements" or in this scenario, Classes 005 and 032. "TRUENERGY" is a finished product not a component of another good. In addition, "CRUSH YOUR DAY" is a secondary mark to help sell that finished good. Furthermore, having multiple adjectives of flavors associated with the mark does not strengthen their opposition if the usage of the terms are completely distinct.
15. Applicant denies the opposition again on the previously stated opposition because our company is protecting the mark, "CRUSH YOUR DAY", in classes that are completely distinct. Classes 005 and 032 have no conflict in this scenario as "concentrates and syrups for making non-alcoholic beverages" bare no resemblance to "supplements" or in this scenario, Classes 005 and 032. "TRUENERGY" is a finished product not a component of another good. In addition, "CRUSH YOUR DAY" is a secondary mark to help sell that finished good. In fact, this further states the "CRUSH" is used as an object and not an action. Ie "ORANGE CRUSH", "STRAWBERRY CRUSH", or "GRAPE CRUSH"

makes grammatical sense; whereas, “ORANGE CRUSH YOUR DAY”, “STRAWBERRY CRUSH YOUR DAY”, or “GRAPE CRUSH YOUR DAY” would make no sense whatsoever.

16. Applicant denies the opposition because our mark “CRUSH YOUR DAY” is utilized to help market our products as a singularly defined slogan that has zero conflict in definition to any of the above family of the opposition’s CRUSH marks. Furthermore, many of these marks are used to sell gimmicky products in industries that have no conflict with supplements.
17. Applicant denies the opposition because to the defense’s knowledge, the opposition has never trademarked “CRUSH” as an action, nor has it ever obtained a string of more than two words whereas “CRUSH YOUR DAY” is used as a three word phrase describing an action. Additionally, to the defense’s knowledge, the opposition have never used the phrase “CRUSH YOUR DAY” ever even dating back to 1915. For this to have never occurred in a 100 year plus history where CRUSH is often used in slang in American culture as an action, proves statistical evidence that consumers would not associate each distinct mark with one another.
18. Applicant denies the opposition because our companies defense against a beverage conflict as consistant with other industries and categories as our usage is distinct in both definition of the phrase and in our usage as a slogan and not a brand to support our brand, “TRUENERGY”. Furthermore, the opposition has stated an arbitrary number which could relate to \$2,000,000 to \$999,000,000. If there is a significance to the number, how come they don’t know a more exact account of their spend. Additionally, our company, a startup, has spent an equally or greater amount of time and capital relative to the size of our company. Big companies have the luxury of spending millions to market and defend marks; however, that luxury does not give them right to attack companies with distinct marks who have also spent considerable time and money on those grounds.
19. Applicant denies the opposition as our company does not market “TRUENERGY” singularly with the word “CRUSH” (.ie TRUENERGY CRUSH beach towel or TRUENERGY CRUSH laptop sleeve”) If our company were to brand a product like the aforementioned products, our company would use “TRUENERGY” with “CRUSH YOUR DAY” (ie Buy this TRUENERGY football and CRUSH YOUR DAY.) To our knowledge, the opposition has never sold a drink or a piece of merchandise like *earbuds*, with the slogan “CRUSH YOUR DAY”.
20. Applicant denies the opposition as the opposition to the best of our knowledge, has never made the term “CRUSH” famous as an action or a slogan, nor have they ever used the

phrase “CRUSH YOUR DAY” on any public merchandise or products. The mark is rightfully the property of Tru, Inc. as our company is the ONLY company in the TESS with the exact mark “CRUSH YOUR DAY” whereas, “CRUSH” from a dilution standpoint has 1232 related records in the TESS database. From a protection standpoint, “CRUSH” has far less differentiating properties and can be used in thousands of ways. (ie. I have a CRUSH on a girl. I just CRUSHed my workout.)

21. Applicant denies the opposition because the opposition is citing a case that between a mark “CRUSSH” filed by Krush Global Limited which bears little to no resemblance of this case. (ie. If Apple “IPHONE” were to oppose a company that sold an “IIPHONE”) In this scenario, the trademark is obviously being infringed. According the proceedings, both marks were similar in appearance as a logo. The are both used as brand names whereas our mark is used as a slogan. Both “CRUSSH” and “CRUSH” or one syllable with their sound and look very similar. “CRUSH YOUR DAY” is three syllables and is different in sound, and look.
22. Applicant denies the opposition because the opposition primarily utilizes the mark, “CRUSH” as the brand name for its product; whereas, our company uses the brand name “TRUENERGY” as the primary means to market the product. The mark “CRUSH YOUR DAY” is a secondary means to market the product as a slogan. (The mark usage is distinct.) To our knowledge, the opposition uses the slogan “WHERE FUN MEETS FLAVOR” which is completely distinct to “CRUSH YOUR DAY”.
23. Applicant denies the opposition because our company does not create a false designation of origin of our company (ie. Tru, Inc. not Crush Inc.). Our company does not dilute their mark because our company sells under the brand name “TRUENERGY” (ie. CRUSH vs CRUSSH). Our company uses “CRUSH YOUR DAY” as a three word slogan describing an action synonymous with a phrase that has been used for centuries (ie. CRUSH YOUR DAY / SEIZE THE DAY). Our company sells products that do not compete with the opposition so the likelihood for confusion is further erased. Our packaging is distinct as well as our branding and logo. With these facts, it is obvious that our company is not trying to ride on the coat tails of DPSG. Furthermore, it would certainly not be in our best interest to associate ourselves with a sugary soda brand like “CRUSH” as our company is marketing a healthy supplement. Additionally, it would not be beneficial to pick a fight with a billion dollar brand. Finally, this lends our company to claim that DPSG is actually trademark bullying and therefore not demonstrating good will towards the original reasoning for the Lanham Act (Trademark Act of 1946) as it was created to get rid of knock offs which we certainly do not portray.
24. Applicant denies the opposition because the opposition sells a drink that is typically

merchandised in the refrigerated section of the store or a refrigerated vending machine next to other sodas or soft drinks; whereas, we primarily merchandise our product at the counter against competitors like 5-Hour Energy or in the ambient/room temperature vending machines against snacks. (ie. The way it is merchandised is distinct.)

25. Applicant denies the opposition because our company does not lessen the capacity of their mark to identify and distinguish their unique goods or services because the opposition primarily utilizes the mark, “CRUSH” to market a carbonated beverage, namely a soda or soft drink; whereas, our company uses the brand name “TRUENERGY” as the primary means to market a dietary supplement, namely an energy shot. Furthermore, the nutrition panel on our packaging must legally state “SUPPLEMENT FACTS” in the eyes of the FDA, not SUPPLEMENT DRINK FACTS” as we are not a thirst quenching beverage due to the amount of liquid delivered and because it is used to supplement the diet; whereas, “CRUSH” must state “NUTRITION FACTS” in the perspective of the FDA as it is a thirst quenching beverage or drink.

26. Applicant denies the opposition because the opposition primarily utilizes the mark, “CRUSH” as the brand name for its product; whereas, our company uses the brand name “TRUENERGY” as the primary means to market the product. The mark “CRUSH YOUR DAY” is a secondary means to market the product as a slogan. (The mark usage is distinct.) In other words, athletes and influencers would be sponsored by “TRUENERGY” not “CRUSH YOUR DAY”. In addition, the look and feel of the phrase is original and distinct.

27. Applicant denies the opposition because opposition does not have exclusive use of the mark. One of many examples of anti-exclusivity, serial number: 87221464, has registered the mark, “CRUSH IT” IC 030. Additionally, serial number: 87221464 for “CRUSH IT” is also positioned as a short phrase and action like our mark, “CRUSH YOUR DAY”, which proves a further distinction and precedence of acceptability for our mark in usage as a slogan. Additionally, our company is selling a high quality healthy product at a higher price point in retail, a higher cost, more functional ingredients, and a unique costly bottle design. In addition, our company has the support in usage of multiple professional athletes as a means of preparing for top level matches ranging from the NHL to pro tennis; whereas the opposition, is selling an unquestionably unhealthy soda with 71g of sugar in a stagnant industry with an ingredient list that includes; high fructose corn syrup, yellow 6, and red 40. Opposition is assisting the American obesity epidemic; whereas, our company is fighting it.

28. Applicant denies the opposition because our company had absolutely no intention to create an association with the oppositions mark and our company gains nothing by trying to pick

a legal battle with a billion dollar brand. We can't afford to hire a lawyer to execute documents on our behalf, so if anything, this opposition is costing us valuable time. Furthermore, we are a bootstrapped startup with a mission to differentiate in every aspect of our business from marketing to formulation, not copy others. The opposition sells a drink in a standard aluminum can that hundreds if not thousands of competitors use or plastic bottles at no less than 8 oz; whereas, our company sells a 50 ml supplement in a custom design well thought out by a former designer at Chobani. Our company was founded with a mission to differentiate with premium ingredients and premium packaging, not copy cat old brands. (ie. The packaging is extremely distinct). If anything, our company is always looking to partner with major brands to help with distribution, not fight them. Furthermore, the DPSG participated in one of the biggest acquisition of a CPG brand in the past 5 years. It would not be in our interest to upset them, unless our company felt it was just.

Respectfully submitted,

/s/ John David McNamara

John David McNamara

President, Tru Inc.

jack@drinktru.com

617.833.9750

Dated: June 21, 2018