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

Proceeding no.	91254243
Party	Plaintiff Guess? IP Holder L.P., Guess?, Inc.
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TRADEMARK
Docket No. 405063-04080

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

In the matter of trademark application **Serial No. 88/657,335**
For the mark GUESS
Published in the Trademark *Official Gazette* on January 21, 2020

Guess? IP Holder L.P. and Guess?, Inc. Opposer, v. JHO Intellectual Property Holdings, LLC Applicant.	Opposition No. 91254243

OPPOSERS' REPLY BRIEF

Opposers Guess? IP Holder L.P. and Guess?, Inc. (collectively "Opposer" or "Guess") hereby respectfully submits this brief in support of its opposition to the pending application for the word mark GUESS as filed by JHO Intellectual Property Holdings, LLC ("JHO" or "Applicant") in U.S. application No. 88657335.

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I. INTRODUCTION

The matter before the Board is a straightforward one: Applicant seeks to obtain a registration for the word mark GUESS in connection with beverage and beverage-related products, despite Opposer's pre-existing, incontestable federal registrations and decades of common law use in the mark GUESS (collectively, the "GUESS Mark"), including for beverage and beverage-related products.

To make this case even more straightforward, Applicant has failed to file a brief in its defense. Applicant has not submitted any substantive arguments or case law in its defense. In contrast, Guess has submitted a full brief that clearly articulates the basis of its opposition for likelihood of confusion. Guess submits this reply in support of its opposition and to highlight for the Board why application No. 88657335 should be denied registration.[1]

II. THE BOARD SHOULD STRIKE APPLICANT'S NOTICE OF RELIANCE

As an initial matter, Guess reiterates its request that the Board strike the entirety of Applicant's Notice of Reliance. As set forth in Guess's opening brief, Applicant's Notice of Reliance should be stricken on the basis that it is inadmissible heresay under TBMP § 704.11 and that the evidence lacks relevance under FRE 401 and 402. *See* 16 TTABVUE, pages 6 – 7. Applicant has not provided any response or arguments to counter or object to Guess's objections set forth in its opening brief, so accordingly the Board should strike the entirety of Applicant's Notice of Reliance.

[1] Although the Board has the discretion to review a reply brief when no defense brief has been filed, *See* TBMP § 801.02(c), Guess believes this brief reply will help highlight the key points raised in Guess's brief.

III. OPPOSER'S STANDING AND PRIORITY IS NOT DISPUTED

Guess's standing and priority in this case is undisputed. As set forth in its opening brief, Guess has common law rights for its GUESS mark dating back to at least as early as 1981 for a wide variety of goods and services, including beverage and beverage-related products, and will be harmed by Applicant's mark if it registers for similar goods. *See* 16 TTABVUE, pages 10 – 11. Moreover, Guess has active and subsisting federal registrations for its GUESS mark that predate the filing date of the subject application. *Id.* Guess's common law rights and registrations have been entered into the record for this proceeding, and Guess's standing and priority are not disputed.

IV. THE *DU PONT* FACTORS WEIGH IN FAVOR OF CONFUSION

The majority of the *Du Pont* factors are not in dispute and weigh strongly in Opposer's favor.

A. The First *Du Pont* Factor – The Marks Are Identical

The parties' marks are indisputably identical in terms of sight, sound, or connotation. The subject application is for the word mark GUESS in standard characters without claim to any particular font style, size, or color. Opposer likewise has both common law and registered rights in the GUESS mark, in both standard character word form as well as in various stylizations, dating back to at least as early as 1981. Applicant does not – and cannot – dispute that the marks are identical.

B. The Second *Du Pont* Factor – The Goods Are Similar

Applicant provides no arguments, case law, or evidence to suggest that the parties' goods are not similar. In contrast, Guess has submitted ample evidence showing a connection to beverage products, including bottled water, which guess distributes under

its GUSS mark, and the dietary and nutritional supplements in Class 5 and the energy drinks and sports drinks in Class 32 that are the subject of the opposed application. *See* 15 TTABVUE, pages 18 – 20. Guess has also cited ample case law in which the Board had previously found that bottled water is similar to dietary and nutritional supplements as well as energy drinks and sports drinks, thereby supporting a finding of likelihood of confusion. *Id.* Guess's evidence and case law is not disputed or contradicted in any way by Applicant, and the Board should find the second *Du Pont* factor weighs strongly in Opposer's favor.

C. The Third *Du Pont* Factor – The Channels Of Trade Overlap

Opposer's common law rights and federal registrations for its GUESS mark do not impose any limitations or restrictions on channels of trade. The subject application likewise does not impose any limitations or restrictions on the channels of trade for Applicant's mark. Accordingly, it must be presumed that Applicant's products will travel in the same channels of trade as Opposer's products. Applicant does not dispute that the parties' products are likely to travel in the same channels of trade, so the third *Du Point* factor weighs in Opposer's favor.

D. The Fourth *Du Pont* Factor – The Parties' Consumers Overlap

There is nothing in the nature of the products at issue in this case – dietary and nutritional supplements, energy drinks and sports drinks, and beverages in general – to suggest the relevant purchasers are particularly sophisticated or careful, and Applicant has not limited its goods to any particular class of consumers. Accordingly, it must be presumed that Applicant's products will target the same consumers as Opposer's products. Moreover, the Board has previously found that, at a minimum, bottled water

and sports drinks have overlapping markets. *See* 16 TTABVUE 22. Applicant does not dispute that the parties' products are likely to target and be purchased by the same types of consumers, so the fourth *Du Point* factor weighs in Opposer's favor.

E. The Fifth *Du Pont* Factor – Opposer's Mark Is Strong

Opposer's GUESS mark is strong by virtue of its 40 years of continuous and exclusive use throughout the United States and worldwide. Opposer has submitted ample evidence that its GUESS mark is strong and well-known among consumers. *See* 16 TTABVUE, pages 23 – 24. The strength of Opposer's mark supports a wide breadth of rights in the GUESS mark and makes the likelihood of confusion and damage to Opposer's rights all the more palpable. Applicant does not dispute the strength of Opposer's GUESS mark, so the fifth *Du Point* factor weighs in Opposer's favor.

F. All Other *Du Pont* Factors Are Neutral Or Irrelevant

As set forth in Opposer's opening brief, the additional *Du Pont* factors, which are either neutral, weigh in Opposer's favor, or are irrelevant, cannot overcome the conclusion that confusion will occur if Applicant's registration is granted. *See* 16 TTABVUE, pages 24 – 25.

V. APPLICANT HAS NOT SUPPORTED ITS AFFIRMATIVE DEFENSES

The three affirmative defenses set forth in Applicant's answer are mere boilerplate defenses devoid of any factual or legal support, and Applicant has failed to provide any arguments, case law, or evidence to support its affirmative defenses in any way. Opposer has already argued, based on the scant boilerplate language in Applicant's answer, why these affirmative defenses lack merit. *See* 16 TTABVUE, pages 25 – 26. The Board should now strike Applicant's affirmative defenses in their entirety due to Applicant's

failure to file a defense brief and provide any support whatsoever for its affirmative defenses.

VI. CONCLUSION

When the evidence in this case is examined, and the *Du Pont* factors are weighed, it is abundantly clear that consumers will be confused if application is permitted a federal registration for its mark. Moreover, although Applicant's failure to submit a defense brief does not constitute a concession of the case, the Board should take into consideration the lack of arguments, case law, evidence, and interest in this case as demonstrated by Applicant's failure to file a defense brief. Opposer, in contrast, has submitted ample arguments, case law, and evidence to prove a likelihood of confusion exists between the parties' marks and Opposer will be damaged if the subject application is allowed to register.

For all the reasons articulated in Opposer's opening brief and this reply, Opposer respectfully requests that the Board sustain its opposition.

DATED this 20th day of April, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Opposers' Reply Brief was served by email upon the following:

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