

**IN THE HEARINGS AND MEDIATION DEPARTMENT OF
THE INTELLECTUAL PROPERTY OFFICE OF SINGAPORE
REPUBLIC OF SINGAPORE**

Trade Mark No. 40201515702X
7 February 2018

IN THE MATTER OF A TRADE MARK APPLICATION BY

GLAMCO CO., LTD.

AND

OPPOSITION THERETO BY

MONSTER ENERGY COMPANY

Hearing Officer: Ms Sandy Widjaja
Principal Assistant Registrar of Trade Marks

Representation:

Mr Just Wang and Ms Penelope Ng (Bird & Bird ATMD LLP) for the Opponents

Ms Gillian Tan and Mr Lim Tianjun (Infinitus Law Corporation) (Instructed by Henry Goh (S) Pte Ltd) for the Applicant

GROUND OF DECISION

1 Monster Energy Company (the “Opponent”) is no stranger to contentious proceedings before this Tribunal. Within a short span of three months, two decisions were

issued following opposition actions brought by the Opponent.¹ This is the third case in line and a fourth one has been heard². Of course, there is nothing wrong in seeking to safeguard one's rights. But there is a fine line between defending one's borders and making forays into another's domain.

2 In the instant dispute, the subject mark, 40201515702X "SWEET MONSTER" ("Application Mark") was sought to be registered by Glamco Co., Ltd (the "Applicant") for the following goods in Classes 30:

Class 30

Popcorn; food products containing (principally) cereals; confectionery; gum sweets; biscuits; bread; sweetmeats (candy); iced cakes; ice cream; non-medicated confectionery in jelly form; chocolate; cookies; rice cakes; chemical seasonings (cooking); sauces; tea; coffee; cocoa products; non-medicated tea based beverages; chocolate based products.

3 The Application Mark was accepted and published on 18 December 2015 for opposition purposes. The Opponent filed its Notice of Opposition to oppose the registration of the Application Mark on 17 February 2016³. The Applicant filed its Counter-Statement on 16 June 2016. The Opponent filed evidence in support of the opposition on 3 November 2016. The Applicant filed evidence in support of the application on 15 February 2017. The Opponent filed its evidence in reply on 11 May 2017. A Pre-Hearing Review was conducted on 2 June 2017 whereupon the Registrar was informed that there was a concurrent infringement action based on the Application Mark at the High Court⁴. Upon consideration of the parties' submissions, on 28 September 2017, the Registrar nonetheless directed that the matter proceed to hearing⁵. On 3 October 2017, the Opponent requested for leave to file further evidence. However, having regard to parties' submissions on the same, it was refused by the Registrar on 16 October 2017.⁶ The matter ultimately was set down for hearing on 7 February 2018.

¹ *Monster Energy Company v Mixi, Inc.*, [2017] SGIPOS 12 was issued on 12 September 2017 and *Monster Energy Company v Chun-Hua Lo* [2017] SGIPOS 17 was issued on 2 November 2017. An appeal against the latter decision was dismissed by the High Court on 31 January 2018; no grounds of decision was issued by the High Court.

² The case was heard on 13 February 2018. Based on the Tribunal's records, there are a total of 9 other cases where the applicants abandoned their trade mark applications following oppositions filed by the Opponent.

³ The Opponent filed an amended Notice of Opposition on 18 August 2016 where it dropped the objection based on Section 7(6) of the Trade Marks Act (Cap 332, 2005 Rev Ed).

⁴ HC/S/501/2017. The matter is pending before the High Court.

⁵ One of the considerations is that the matter before the Tribunal may be unduly delayed (Applicant's letter of 17 July 2018).

⁶ The evidence pertained to images which were taken after the relevant date of 10 September 2015, i.e, the date of application of the Application Mark (more below).

Grounds of Opposition

4 The Opponent relies on Sections 8(2)(b), 8(4) and 8(7)(a) of the Trade Marks Act (Cap 332, 2005 Rev Ed) (the “Act”) in this opposition⁷.

Opponent’s Evidence

5 The Opponent’s evidence comprises the following:

- a) statutory declaration of Rodney Cyril Sacks, Chairman and Chief Executive Officer of Monster Beverage Corporation and its subsidiaries, including the Opponent, dated 27 October 2016 (“Opponent’s 1st SD”); and
- b) statutory declaration of Rodney Cyril Sacks dated 20 April 2017 (“Opponent’s 2nd SD”).

Applicant’s Evidence

6 The Applicant’s evidence comprises the statutory declaration of Park Dae Chul, the Chief Executive Officer of the Applicant, dated 7 February 2017 (“the Applicant’s SD”).

Applicable Law and Burden of Proof

7 As the applicable law is the Act, there is no overall onus on the Applicant either before the Registrar or in opposition proceedings. The undisputed burden of proof in the present case falls on the Opponent.

Background

8 The Opponent deposed that it is in the business of designing, creating, developing, producing, marketing and selling energy drinks ([3] of the Opponent’s 1st SD). The Opponent also deposed that it has been acknowledged as a leader in the beverage industry, and has received recognition and awards ([4] of Opponent’s 1st SD). The Opponent’s MONSTER marks have also been filed / registered worldwide in more than 150 countries ([7] of the Opponent’s 1st SD). By both unit volume and dollar value, MONSTER energy drinks are the best-selling energy drinks in the United States of America (USA) and the second best-selling worldwide ([24] of Opponent’s 1st SD).




9 In Singapore, MONSTER energy drinks are distributed by Pacific Beverages Pte Ltd and are sold via retail stores, gas stations as well as drug stores ([31] of Opponent’s 1st SD).

10 The Opponent relies on the following earlier marks (collectively, *Opponent’s Earlier Marks*) ([13] of the Opponent’s written submissions (“OWS”)):

S/N	<i>Opponent’s Earlier Marks</i>	Class
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⁷ As mentioned above, the Opponent withdrew the ground of objection based on Section 7(6) on 18 August 2017.

<i>Opponent's Earlier Monster Marks</i>		
1	MONSTER T0605638Z	<u>Class 5</u> Nutritional supplements; vitamin drinks; drinks containing vitamins and minerals.
2	MONSTER T0605639H	<u>Class 32</u> Beverages; fruit juices [beverages]; aerated fruit juices; soda water; vitamin enriched non-alcoholic beverages [vitamins not predominating]; isotonic beverages and drinks; energy drinks.
3	MONSTER T1111969F	<u>Class 5</u> Nutritional supplements in liquid form in Class 5.
		<u>Class 32</u> Non-alcoholic beverages in Class 32.
<i>Opponent's Earlier Monster Prefix Marks</i>		
4	MONSTER REHABITUATE T1210719E	<u>Class 5</u> Nutritional supplements in liquid form.
		<u>Class 30</u> Ready to drink tea, iced tea and tea based beverages; ready to drink flavored tea, iced tea and tea based beverages; all included in Class 30.
		<u>Class 32</u> Non-alcoholic beverages, namely energy drinks, energy drinks flavored with tea, energy drinks flavored with juice, sports drinks, and fruit juice drinks; all of the foregoing enhanced with vitamins, minerals, nutrients, amino acids and/or herbs; all included in Class 32.
5	MONSTER REHAB T1107597D	<u>Class 5</u> Nutritional supplements in liquid form; vitamin drinks; beverages containing added vitamins and minerals (for medical purposes); all included in Class 5.
		<u>Class 30</u> Ready to drink tea, iced tea and tea based beverages; ready to drink flavored tea, iced tea and tea based beverages; all included in Class 30.
		<u>Class 32</u> Non-alcoholic beverages, namely energy drinks, energy drinks flavored with tea, energy drinks flavored with juice, sports drinks, and fruit juice drinks; all of the foregoing enhanced with vitamins, minerals, nutrients amino acids and/or herbs; all included in Class 32.
6	MONSTER DETOX	<u>Class 5</u> Nutritional supplements in liquid form in Class 5.

	T1206503D	<p><u>Class 30</u> Ready to drink tea, iced tea and tea based beverages; ready to drink flavored tea, iced tea and tea based beverages; all included in Class 30.</p> <p><u>Class 32</u> Non-alcoholic beverages, including energy drinks, energy drinks flavored with tea, energy drinks flavored with juice, sports drinks, and fruit flavoured non-alcoholic drinks; all of the foregoing enhanced with vitamins, minerals, nutrients, amino acids and/or herbs (other than for medicinal use); all included in Class 32.</p>
<i>Opponent's Earlier Monster and Claw Device Marks</i>		
7	 <p>T0609605E</p>	<p><u>Class 32</u> Beverages; preparations for making beverages.</p>
8	 <p>T0813672J</p>	<p><u>Class 9</u> Protective clothing; protective footwear; protective headwear; protective eyewear; all included in Class 9.</p> <p><u>Class 16</u> Printed matter and publications; posters; stickers; transfers; cards; stationary; signboards; all included in Class 16.</p> <p><u>Class 18</u> Bags; backpacks; wallets; cases; key cases; leather and imitations of leather, and goods made of these materials and not included in other classes; all included in Class 18.</p> <p><u>Class 25</u> Clothing; footwear and headgear; all included in Class 25.</p>
9	 <p>T1402721J</p>	<p><u>Class 16</u> Printed matter and publications; posters; stickers; sticker kits comprising stickers and decals; decals; transfers; cards; stationery; signboards of paper or cardboard.</p> <p><u>Class 25</u> Printed matter and publications; posters; stickers; sticker kits comprising stickers and decals; decals; transfers; cards; stationery; signboards of paper or cardboard.</p>
<i>Opponent's Earlier Monster Energy Marks</i>		
10	<p>MONSTER ENERGY</p> <p>T0603081Z</p>	<p><u>Class 32</u> Mineral and aerated waters and other non-alcoholic drinks; energy drinks; isotonic beverages (non-medicated); fruit drinks; fruit juices and syrups for preparing beverages.</p>

11	MONSTER ENERGY T0813668B	<u>Class 9</u> Protective clothing; protective footwear; protective headwear; protective eyewear; all included in Class 9.
		<u>Class 16</u> Printed matter and publications; posters; stickers; transfers; cards; stationary; signboards; all included in Class 16.
		<u>Class 18</u> Bags; backpacks; wallets; cases; key cases; leather and imitations of leather, and goods made of these materials and not included in other classes; all included in Class 18.
		<u>Class 25</u> Clothing; footwear and headgear; all included in Class 25.
12	MONSTER ENERGY 40201501193T	<u>Class 35</u> Promoting goods and services of others in the sports, motorsports, electronic sports, and music industries through the distribution of printed, audio and visual promotional materials; promoting sports and music events and competitions for others; retail and wholesale of food and beverage via a distributor; retail and wholesale services featuring foods and beverages; online retail store services in the field of beverages, clothing, headwear, calendars, posters, stickers, promotional items.
		<u>Class 41</u> Entertainment services; organizing, conducting and staging sports events, live musical performances, exhibitions and competitions; on-line publication and provision of multimedia content in the nature of multimedia files containing audio, video, text, still images, and graphics in the fields of sports, people, entertainment, and music; providing non-downloadable publications in the nature of multimedia content in the nature of multimedia files containing audio, video, text, still images, and graphics in the fields of sports, people, entertainment and music via a website.
13	MONSTER ENERGY 40201401724W	<u>Class 9</u> Protective clothing; protective footwear; protective headwear; protective eyewear, sports helmets; eye glasses; eye glass cases; sunglasses; sunglass cases; video recordings featuring sports, extreme sports, and motor sports; eyeglass cords.
		<u>Class 16</u> Printed matter and publications; posters; stickers; decals; transfers; cards; stationery; signboard of paper and cardboard; sticker kits comprising stickers and decals.
		<u>Class 18</u> Bags; backpacks; wallets; business card cases; attaché cases; card cases [notecases]; carrying cases for documents; cases

		for cosmetic articles; cases for keys; cases for sporting articles (not fitted or shaped); cases for travel kits (not fitted); cases of imitation leather; cases of leather, or leatherboard; credit card cases; document cases; driving license cases; portfolio cases (briefcases); tie cases; travel cases; vanity cases (not fitted); overnight cases; music cases, and make-up cases; key cases; duffle bags; book bags; handbags; all-purpose sports bags; all-purpose bags; leather and imitations of leather, and goods made of these material and not included in other classes.
		<u>Class 25</u> Clothing, footwear, and headgear.
<i>Opponent's Earlier Monster Suffix Marks</i>		
14	JAVA MONSTER T0611182H	<u>Class 32</u> Beverages, namely, soft drinks; carbonated soft drinks; carbonated and non-carbonated energy drinks; carbonated and non-carbonated sports drinks; carbonated and non-carbonated fruit juice drinks; soft drinks, carbonated soft drinks, carbonated and non-carbonated energy drinks, carbonated and non-carbonated sports drinks and carbonated and non-carbonated fruit juice drinks, all enhanced with vitamins, minerals, nutrients, amino acids, and/or herbs; flavored waters, fruit juices; concentrates, syrups or powders used in the preparation of soft drinks or energy drinks.
15	JAVA MONSTER T1402722I	<u>Class 32</u> Non-alcoholic beverages
16	X-PRESSO MONSTER T1009880F	<u>Class 5</u> Nutritional supplements in Class 5.
		<u>Class 32</u> Non-alcoholic beverages being energy drinks in Class 32 flavoured with coffee.

11 The Applicant deposed that it was incorporated in 2014 in the Republic of Korea ([4] of the Applicant's SD), that it is the creator of "popcorn soft-serve ice cream" and is known for its colourful creations featuring generous portions of soft-serve ice cream, made from the Applicant's ice cream milk powder and topped with the Applicant's air popped gourmet popcorn ([5] of the Applicant's SD).

12 The Applicant deposed that while it opened its first store in Korea, owing to its popularity and success, it expanded its operations overseas. To-date, in addition to the 23 outlets in Korea, there are 13 outlets overseas ([6] of the Applicant's SD).

MAIN DECISION

Ground of Opposition under Section 8(2)(b)

13 Section 8(2)(b) provides as follows:

8. —(2) A trade mark shall not be registered if because...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public.

Decision on Section 8(2)(b)

Step-by-step approach

14 In *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide, Inc* [2014] 1 SLR 911 (“*Staywell*”), the Court of Appeal re-affirmed the 3-step test approach in relation to an objection under Section 8(2)(b) (see [15] and [55]):

- a) The first two elements - namely similarity or identity of the marks and similarity or identity of the goods / services - are assessed individually before the final element which is assessed in the round.
- b) Once the two threshold requirements have been met, the issue of the likelihood of confusion arises and the tribunal / court is directed to look at (a) *how* similar the marks are, (b) *how* similar the goods / services are, and (c) given this, how likely the relevant segment of the public will be confused.

Similarity of Marks

15 The law in relation to this issue is as follows (*Staywell* at [15] to [30]):

- a) The similarity of marks is ultimately and inevitably a matter of impression rather than one that can be resolved as a quantitative or mechanistic exercise. The court must ultimately conclude whether the marks, when observed in their totality, are similar or dissimilar.
- b) The three aspects of similarity (i.e. visual, aural and conceptual similarities) are meant to guide the court’s inquiry. Trade-offs can occur among the three aspects of similarity.
- c) A productive and appropriate application of the step-by-step approach necessitates that the court reaches a meaningful conclusion at each stage of the inquiry.

- d) The assessment of marks similarity is mark-for-mark without consideration of any external matter.
- e) Technical distinctiveness is an integral factor in the marks-similarity inquiry. A mark which has greater technical distinctiveness enjoys a high threshold before a competing sign will be considered dissimilar to it.
- f) While the components of a mark may be inherently technically distinctive, ultimately the ability of the mark to function as a strong badge of origin must be assessed by looking at the mark as a whole. Conversely, the components of a mark may not be inherently distinctive, but the sum of its parts may have sufficient technical distinctiveness.
- g) When speaking of the assessment of a mark as a whole, the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components.

16 Further, the Court of Appeal provided in *Hai Tong Co (Pte) Ltd v Ventree Singapore Pte Ltd and another and another appeal* [2013] 2 SLR 941 at [40(c)] and [40(d)] ("*Hai Tong*"):

[40(c)] The relevant viewpoint is that of the average consumer who would exercise some care and a measure of good sense in making his or her purchases, not that of an unthinking person in a hurry.

[40(d)] It is assumed that the average consumer has "imperfect recollection" such that the two contesting marks are not to be compared or assessed side by side (and examined in detail). Instead, the court will consider the general impression that will likely be left by the essential or dominant features of the marks on the average consumer.

Family of Marks

17 Before I proceed to deal with Section 8(2)(b), I will deal with the issue of family of marks as it was raised upfront as a "significant" issue by the Opponent ([4] of the OWS) and the Opponent made substantial arguments in relation to the same (see [4] – [32] of the OWS). Curiously, in *Monster Energy Company v Mixi, Inc.* [2017] SGIPOS 12 ("*Monster Strike*"), the Opponent appeared to accept that this principle is to be applied at the likelihood of confusion stage ([15] and [98] of *Monster Strike*):

[15] During oral argument, it was common ground that the doctrine of a family or series of marks: (a) applies in Singapore; and (b) can be taken into account in the likelihood of confusion assessment, but not when comparing the marks for similarity...

[98] According to the Opponent, *the evidence shows that there is a "MONSTER" family or series of marks*, and this factors into the likelihood of confusion analysis in that it: (a) adds to the reputation of the Opponent's Earlier Trade Marks; and (b) increases and exacerbates the likelihood of confusion given the possibility of imperfect recollection by the consumer.

[Emphasis in italics mine]

It is not necessary for me to comment on whether the principle is applicable at the mark similarity stage or at the likelihood of confusion stage for it will become apparent that I am of the view that the Opponent has not established that it has a family of marks in the current case.

18 The Opponent relied on *Lacoste v Carolina Herrera, Ltd* [2014] SGIPOS 3 ("*Lacoste*") for this proposition ([5] OWS). The learned Assistant Registrar in *Monster Strike* applied *Lacoste* ([97]):

[97] In *Lacoste v Carolina Herrera, Ltd* [2014] SGIPOS 3 ("*Lacoste*"), an earlier decision of this tribunal, the learned Assistant Registrar had occasion to consider whether certain earlier marks could be considered to be a family or a series of marks. After examining a number of EU, UK and local authorities, she summarised the general principles as follows.

- a) *Prima facie*, registration of a number of marks each bearing the same element in common, *does not automatically* give rise to the presumption that the consumer would perceived them as being a family or series of marks, such that the registered proprietor of the marks is entitled to have protection of that common element. The registered proprietor who claims additional protection of that common element will have to adduce *sufficient evidence to show use* of a sufficient number of these marks as to be capable of constituting a family or series of trade marks, for the purposes of the *assessment of the likelihood of confusion*. (*Lacoste* at [38].)
- b) When deciding whether a family or series of marks is in existence in the market place, the relevant audience to consider is the *consumer or the public...*

[Emphasis in italics mine]

19 The Opponent submitted, at [15] OWS that:

[15] ...the evidence adduced by the Opponent does show that the various "MONSTER" trade marks forming the "MONSTER" family of trade marks have in fact been *used in Singapore*, resulting in a high degree of recognition of the "MONSTER" family of trade marks in Singapore.

[Emphasis in italics mine]

20 Some preliminary points before I wade into the Opponent’s expansive evidence:

- (i) Having regard to the date of application of the Application Mark which was *10 September 2015* (“Relevant Date”), any evidence dated after the Relevant Date will be disregarded. This excludes excerpts which were printed after the Relevant Date but pertain to events which occurred before the Relevant Date. Undated excerpts will also not be taken into account, unless they are simply enlarged versions of images pertaining to events which occurred before the Relevant Date.
- (ii) On the Registrar’s directions to specify the earlier marks which it is relying on for relative grounds, the Opponent indicated that only the *Opponent’s Earlier Monster Marks* and *Opponent’s Earlier Monster Suffix Marks* will be relied on for its Section 8(2)(b) objection⁸. The Applicant submitted at the oral hearing that out of all the *Opponent’s Earlier Marks*, it is the *Opponent’s Earlier Monster Marks* which are closest to the Application Mark. This means that if the *Opponent’s Earlier Monster Marks* are found not to be similar to the Application Mark, the same will hold true⁹ for the rest of the *Opponent’s Earlier Marks* (including the *Opponent’s Earlier Monster Suffix Marks*). Thus, the focus of the analysis below will be on the *Opponent’s Earlier Monster Marks*. The analysis for Section 8(4) will also be narrowed to *Opponent’s Earlier Monster Marks* (despite Opponent’s reliance on the *Opponent’s Earlier Marks*).
- (iii) Before I proceed further, it is useful to define the different types of marks reflected in the Opponent’s evidence¹⁰:



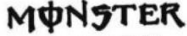
S/N	Opponent’s Marks	Depiction
1	Monster Energy Composite Mark ¹¹	
2	Claw Device Mark	
3	Monster Energy Stylised Mark	

⁸ Opponent’s letter of 3 October 2017.

⁹ Or all the more so.

¹⁰ For clarity, references to the *Opponent’s Earlier Marks* (above) will not be used; the *Opponent’s Earlier Marks* pertain to specific applications made at IPOS.

¹¹ As above. Thus, while this mark is identical to the *Opponent’s Earlier Monster and Claw Device Marks*, the reference used for the purposes of identifying it in the Opponent’s 1st SD will be the Monster Energy Composite Mark.

4	Monster Composite Mark	
5	Monster Energy Composite Mark 2	
6	Monster Stylised Mark	

Local Use

21 The Opponent summarised its use in *Singapore* at [22] – [30] OWS. A snapshot of the same is as follows:

S/N	Evidence	Comments
1	Sales ¹²	An average ¹³ of 1.34 million cans sold annually
		An average ¹⁴ of US\$1.2 million revenue annually.
2	Promotional expenditure ¹⁵	An average ¹⁶ of US\$550,000 promotional expenditure annually.
3	Attendance at the Singapore Grand Prix (“SGP”) ¹⁷	In 2013, 262,527 spectators attended the SGP ¹⁸ .
		In 2014 ¹⁹ , 253,362 spectators attended the SGP ²⁰ .
4	Team sponsorship in SGP ²¹	MERCEDES GP PETRONAS Formula 1 team (2010, and 2011).
		MERCEDES AMG PETRONAS F1 team (2012, 2013, 2014 ²²).
5	SGP Wins ²³	2014 ²⁴ - Lewis Hamilton won the SGP
6		Straits Times:

¹² See [24] OWS. More below.

¹³ 4.7 million cans divided by 3.5 years (October 2012 – March 2016). I am cognizant that the period extends beyond the Relevant Date. Thus this average figure merely provides an approximation.

¹⁴ US\$ 4.2 million divided by 3.5 years (October 2012 – March 2016). See also [25] of the Opponent’s 2nd SD which suggests that the average annual sales is \$1.4 million for the period 2013 – 2015. However, it is unclear whether the amount is in US dollars or Singapore dollars and thus the figures provided in [29] of the Opponent’s 1st SD is taken instead.

¹⁵ See [26] OWS. More below.

¹⁶ US\$ 2.2 million divided by 3.5 years (October 2012 – March 2016). As above, this average figure is only an approximate.

¹⁷ See [28(b)] OWS. More below.

¹⁸ Exhibit 77 of the Opponent’s 2nd SD at page 39.

¹⁹ The SGP in 2015 is not taken into account as it occurred on 18, 19 and 20 September 2015, *after* the Relevant Date (see page 42 of Exhibit 77 of the Opponent’s 2nd SD).

²⁰ Exhibit 77 of the Opponent’s 2nd SD at page 42.

²¹ See [28(b)] OWS. More below.

²² See above.

²³ See [28(b)] OWS. More below.

²⁴ See above.

	Coverage of SGP Win in 2014 ²⁵	<p>(i) <i>Formula One: Hamilton blazes ahead under Singapore lights; Alonso close behind</i> dated 19 September 2014</p> <p>(ii) <i>Formula One: Hamilton takes over driver's title lead after thrilling Singapore win</i> dated 21 September 2014</p> <p>(iii) <i>Formula One: Mercedes' Lewis Hamilton storms to victory as Nico Rosberg retires at Singapore Grand Prix</i> dated 21 September 2014</p> <p>An article on http://f1weekends.com entitled <i>Lewis Hamilton wins the 2014 Singapore Grand Prix</i> published on 21 September 2014.</p> <p>A Skysports article entitled <i>Singapore Grand Prix – Hamilton takes title lead with win</i> updated on 22 September 2014</p>
7	Visits at www.monsterenergy.com ²⁶	An average ²⁷ of 8,566 visitors annually.

22 With regard to the Opponent's products in Singapore, the can as depicted at Exhibit RCS-2 of the Opponent's 1st SD reflects the Monster Energy Composite Mark²⁸.

23 In relation to the sales revenue and promotional expenditure in Singapore, any figures after the Relevant Date cannot be taken into account. The Opponent deposed that:

- (i) since October 2012 through 31 March 2016, it has sold more than 4.7 million cans of MONSTER ENERGY drinks bearing one or more of the MONSTER Marks, amounting to sales of approximately US\$ 4.2 million ([29] of the Opponent's 1st SD)²⁹.
- (ii) since April 2012 through March 2016, it has spent more than US\$ 2.2 million in marketing and promotional activities to promote MONSTER ENERGY drinks ([42] of the Opponent's 1st SD).

However, there is no indication as to what is the extent of the volume and sales revenue for the period October 2012 - 10 September 2015³⁰. Similarly, the extent to which the

²⁵ See [28(b)] OWS. More below.

²⁶ See [30] OWS. More below.

²⁷ 51,395 divided by 6 years (1 September 2010 – 30 June 2016). The figure for the period 1 September 2010 – 1 September 2012 will not be taken into account since there is an overlap. As above, this average figure is only an approximate.

²⁸ The website also reflects the tagline "Unleash the Beast!" (see below). See also RCS-48 which are printouts (dated 13 January 2015) from the localized version of the "Monster Energy website" (see [157] of the Opponent's 1st SD). It is observed that the Monster Energy Stylised Mark and the tagline "Unleash the Beast!" are also seen on the webpage.

²⁹ See above in relation to alternative sales figures in [25] of the Opponent's 2nd SD.

³⁰ See above. Thus an average figure has been computed as an approximate gauge.

promotional expenses can be attributed to the period April 2012 - 10 September 2016 is unclear³¹. In any event, even if such sales revenue / advertising expenditure can be demarcated, the crux of the issue is the actual marks which were made manifest.

24 Invoices / goods receipt notes issued to / by the Opponent's Singapore distributor, Pacific Beverages Pte Ltd are included in Exhibit RCS-3 of the Opponent's 1st SD. The invoices reflect the Monster Energy Composite Mark 2. Further, it is observed that the products were described as "monster *energy*" rather than "monster" *per se* (see RCS-3 at pages 658, 670 and 671).

25 The Opponent submitted ([27] OWS) that their marketing strategy is unconventional and that the focus is on endorsements and sponsorships of athletes and events, ranging from sports and music festivals to video games. The Opponent explained that, through its marketing strategy, the MONSTER Marks receive substantial and extensive exposure on television, on the Internet, in magazines, and at live events ([36] of the Opponent's 1st SD).

26 The Opponent submitted that RCS-5 to 7 of the Opponent's 1st SD are examples of "[p]hotographs showing examples of use of the "MONSTER" family of trade marks at the Opponent's sponsored events and by the Opponent's sponsored athletes and teams" ([28(a)] of OWS):

- (i) RCS-5: It is noted that the print outs are dated after the Relevant Date on 18 November 2015, while some are undated. In any case, the marks which appear in this exhibit are mainly:
 - (a) Claw Device Mark; and
 - (b) Monster Energy Stylised Mark.
- (ii) RCS-6: the marks which appear in this exhibit are also mainly:
 - (a) Claw Device Mark; and
 - (b) Monster Energy Stylised Mark.
- (iii) RCS-7: the marks which appear in this exhibit are mainly:
 - (a) Monster Energy Composite Mark;
 - (b) Claw Device Mark; and
 - (c) Monster Energy Stylised Mark.

27 In relation to the SGP, the Opponent submitted that:

- (i) There was high attendance and viewership for the event. The average figure for the years 2013 – 2014³² is approximately 257, 945.

³¹ As above.

³² As above.

- (ii) The Opponent had sponsored teams since 2010 through to 2014³³:
 - (a) Mercedes GP Petronas Formula 1 team (2010 and 2011);
 - (b) Mercedes AMG Petronas F1 team (2012 – 2014).
- (iii) The teams sponsored by the Opponent had always performed well. In particular, in 2014³⁴, Lewis Hamilton (“Hamilton”) won the SGP. The wins received widespread media and attention before the Singapore audience. The Opponent highlighted that the driver’s attire and vehicle prominently displayed the MONSTER Marks ([28(b)] OWS).

28 The facts above are not in dispute. The heart of the issue, however, is the actual marks which received exposure during the SGP. The following observations are made in relation to the evidence tendered with regard to the SGP:

- (i) RCS-10: screen shots about Hamilton’s wins.³⁵ Page 834 is a screen shot of a Youtube video of Hamilton’s win in 2014. What can be made out (the shot is a little blurry) is that Hamilton’s helmet reflected the Claw Device Mark and the Monster Energy Stylised Mark.
- (ii) RCS-11: articles and photographs covering SGP over the years:
 - (a) Pages 837 - 845: Straits Times article entitled *Formula One: Hamilton blazes ahead under **Singapore** lights; Alonso close behind* dated 19 September 2014. Page 838 also shows a picture of both Hamilton and Nico Rosberg (“Rosberg”) posing ahead of the SGP 2014 with the Claw Device Mark on their collars. Page 844 shows a picture of Hamilton exiting his car after the SGP 2014. The marks on his helmet are Claw Device Mark and the Monster Energy Stylised Mark.
 - (b) Pages 846 - 851: Straits Times article entitled *Formula One: Hamilton takes over driver’s title lead after thrilling **Singapore** win* dated 21 September 2014. Page 847 shows a triumphant Hamilton on top of his car. His helmet reflected the Claw Device Mark and the Monster Energy Stylised Mark. Page 850 shows a picture of a Hamilton holding his trophy, with the Claw Device Mark on his collar.
 - (c) Pages 852 - 853: Straits Times article entitled *Formula One: Mercedes’ Lewis Hamilton storms to victory as Nico Rosberg retires at **Singapore Grand Prix*** published 21 September 2014. Page 853 shows a picture of Hamilton in his car, again with his helmet reflecting the Claw Device Mark and the Monster Energy Stylised Mark.

³³ As above, events which occurred after the Relevant Date are not taken into account.

³⁴ As above.

³⁵ Screen shots relating to the 2016 SGP are not taken into account.

- (d) Page 859: an article on <http://f1weekends.com> entitled *Lewis Hamilton wins the 2014 Singapore Grand Prix* published on 21 September 2014. Page 859 shows a picture of Hamilton's helmet reflecting the Claw Device Mark and the Monster Energy Stylised Mark.
- (e) Pages 868 – 878: A Skysports article entitled *Singapore Grand Prix – Hamilton takes title lead with win* updated on 22 September 2014. In particular, page 873 reflects a picture of Hamilton on the podium with an elated look on this face and with his collar reflecting the Claw Device Mark.
- (f) Pages 881 – 882: photos of Hamilton on *F1 Race day, Singapore 2014*. His helmet reflected the Claw Device Mark and the Monster Energy Stylised Mark.

29 Based on the above, it is apparent that the marks which were presented at the SGP did not include the plain word mark “Monster”³⁶.

30 In relation to the localised version of the Opponent's website, I refer to RCS-47 of the Opponent's 1st SD. The print outs are dated 18 July 2016 which is *after* the Relevant Date. Nonetheless, even if the marks can be taken into account they are:

- (i) Page 1535:
 - (a) The mark at the top of the website is the Claw Device Mark and the Monster Energy Stylised Mark.
 - (b) The words at the bottom are “Discover Monster *Energy*”.
- (ii) Page 1537:
 - (a) “Become a part of THE MONSTER FAMILY”
 - (b) “What is monster life for you?
Share your tweet and see what others think about your MONSTERENERGY, use the hashtag #MONSTERENERGY”

It is noted that there are relatively few references to “Monster” without “Energy” in the localised version of the Opponent's website. Taking the website as a whole, the overall focus is still on Monster *Energy*.

31 Finally, with regard to the claim that there are visits from Singapore at the Opponent's website ([30] OWS and [157] Opponent's 1st SD), it is observed that:

- (i) Any visit after the Relevant Date is to be disregarded. As such only the number of visits for the period 1 September 2010 – 1 September 2012, that is, 13,000

³⁶ There are other local articles which reported on Grand Prix conducted overseas, see below.

can be safely taken into account³⁷. This figure overlaps with the total figure of 51,395 visits for the period 1 September 2010 – 30 June 2016.

(ii) the domain name of the website is www.monsterenergy.com.

32 What can be garnered from the above is that the evidence tendered does *not* support the Opponent’s contention of a family of marks. This is because the actual marks which were exposed via the promotional materials are not the plain word mark “Monster” *simpliciter*.

33 Critically, at the oral hearing, the Opponent submitted that while the marks as used are not the plain word mark “Monster”, the stylisation of the mark is not extensive such that use of the Monster Stylised Mark can equate to use of the ***Opponent’s Earlier Monster Marks***. For ease of reference, the Monster Stylised Mark is as follows:

MΦNSTER

34 I have given the issue careful thought but I am unable to agree that the stylisation is slight. In addition, a closer look will reveal that the letter “O” is of a specific design (in addition to the general stylisation of the word). The Opponent argued that the issue is one of weight. I agree. But the weight, if any, would be miniscule to be of any significance.

35 Further, it is apparent that the word “Energy” almost always appears in conjunction with “Monster”. Pertinently, the domain name of the Opponent’s website and its hashtag both include “Energy” (above). It is to be recalled that the Opponent itself deposed (above) that “through its marketing strategy, the MONSTER Marks receive substantial and extensive exposure...on the Internet.³⁸” The significance of this phenomenon cannot be overlooked. Finally, the Claw Device Mark, which is clearly unique on its own, also appears frequently with the Monster Energy Stylised Mark.

36 Accordingly, the above evidence cannot be taken into account as use of the ***Opponent’s Earlier Monster Marks***, having regard to the actual marks used, namely:

- (i) Monster Energy Composite Mark 2;
- (ii) Monster Energy Composite Mark;
- (iii) Claw Device Mark; and
- (iv) Monster Energy Stylised Mark.

37 In coming to this conclusion, I have taken the following into consideration:

- (i) Use of **MΦNSTER** does not equate to use of the ***Opponent’s Earlier Monster Marks*** in light of the stylisation and specific design. Any weight to be accorded to the Monster Stylised Mark, if any, towards the use of the ***Opponent’s Earlier Monster Marks***, will be at the very low end.

³⁷ As a rough gauge, an average has been computed above.

³⁸ See [36] of the Opponent’s 1st SD.

- (ii) Where the word “Monster” appears in plain word form, the word “Energy” almost always appears in conjunction with it. The instances where “Monster” appears on its own without any embellishment are very few and far between to be of any significance.

38 The above is sufficient to put the issue of a family of marks to rest. However, having regard to the Opponent’s copious evidence as to its use overseas, I will look into the same to assess if any link can be drawn between such activities and Singapore.

Overseas Use

39 The Opponent has summarised its evidence at [16] – [21] OWS. There are two issues to be resolved as regards evidence of overseas use:

- (i) Whether the *Opponent’s Earlier Monster Marks* were reflected on the products and the promotional materials;
- (ii) Whether such overseas use can be linked to Singapore.

Unless the questions above are both answered in the affirmative, the evidence is irrelevant regardless of the extent of the sales and promotion.

40 I have already analysed RCS-5 to 7 of the Opponent’s 1st SD above and I will not repeat my analysis here. The nub of the issue is that these exhibits, which are examples of “[p]hotographs showing use of the “MONSTER” family of trade marks at the Opponent’s sponsored events and by the Opponent’s sponsored athletes and teams” ([19(a) OWS] mainly reflect the following marks:

- (a) Monster Energy Composite Mark;
- (b) Claw Device Mark; and
- (c) Monster Energy Stylised Mark.

41 Similarly, RCS-8 to 22 of the Opponent’s 1st SD pertain to “[p]hotographs showing how the “MONSTER” family of trade marks have been used at international sports sponsorships” ([19(a) OWS). I observe as follows:

- (i) RCS-8: Shows samples of the helmets³⁹. The marks which appear are mainly:
 - (a) Claw Device Mark; and
 - (b) Monster Energy Stylised Mark.
- (ii) RCS-9: Contains samples of marketing surveys. Some examples are:

³⁹ The print outs are mostly undated, although the Opponent deposed that they are “photographs...since March 2010” ([52] Opponent’s 1st SD).

- (a) Pages 770 – 780: *2011 FIA Formula 1 World Championship, R1-R19 Global TV Report*.
- (b) Pages 781 – 811: *2012 FIA Formula 1 World Championship, End of Season Global TV Report*.
- (c) Pages 812 – 832: *2013 FIA Formula 1 World Championship, REPUCOM End of Season Overview*.

No marks are reflected in any of these reports.

- (iii) RCS-10 contains screen shots of Hamilton’s wins at the SGP while RCS-11 contains articles and photographs of SGP over the years. Similarly, I have analysed them above and they will not be repeated here. The point is that the marks which were presented at the SGP are not the plain word mark “Monster”.
- (iv) RCS-11 also includes local articles which reported on the Grand Prix conducted overseas:
 - (a) Pages 854 – 858: Straits Times article titled *Motor racing: Hamilton wins maiden **Russian** race as Mercedes take F1 constructors’ title* published on 12 October 2014. Page 855 shows a picture of Hamilton wearing his helmet and the marks reflected are the Claw Device Mark and the Monster Energy Stylised Mark. Page 857 shows both Hamilton and Rosberg on the podium with Rosberg shaking the champagne bottle. The Claw Device Mark is imprinted on their collars.
 - (b) Pages 866 – 867: Today article titled: *Hamilton finally wins at the **Malaysian** Grand Prix* published on 30 March 2014⁴⁰. Page 866 contains a picture of Hamilton pumping his fists in victory. His helmet reflects the Claw Device Mark and the Monster Energy Stylised Mark.

The Opponent deposed at [29] of the Opponent’s 2nd SD that these were Singapore publications. However as they do not pertain to actual use in Singapore, any weight to be accorded to them will be low.

- (v) RCS-12: Photos of Yamaha Tech 3 teams and riders.
 - (a) Pages 884 - 885: An article titled *Friday at Silverstone with Scott Jones* published on 16 June 2012. At page 884, the Claw Device Mark is seen on the helmet and the motorbike while the Monster Energy Stylised Mark is seen on the motorbike.
 - (b) Pages 887 – 888: An article titled *Monster Yamaha Tech 3 to field Cal Crutchlow and Bradley Smith in 2013 Moto GP World Championship* published on 25 August 2012. Similarly, the Claw Device Mark is seen

⁴⁰ It is unclear if this article is dated as above or as at 30 October 2016. Regardless, it will become apparent that its significance is on the low side.

on the helmet and the motorbike while the Monster Energy Stylised Mark is seen on the motorbike.

- (c) Page 895: An article titled *MotoGP: Tech 3 will continue as a Yamaha Satellite Team* published on 9 December 2013. The Claw Device Mark is reflected on the t-shirt.
- (vi) RCS-13: Motor GP Audience Data. Some examples are:
 - (a) Pages 992 – 999: *Motor GP World Championship Audience Data 2010*. At page 999 the Claw Device Mark is seen in the background on the ring fence.
 - (b) Pages 1000 – 1004: *Motor GP World Championship Review 2010*. At page 1004, the Claw Device Mark and the Monster Energy Stylised Mark are seen in the background on the ring fence.
 - (c) Pages 1014 – 1049: *Audience Data 2012*. At page 1018, the Claw Device Mark and the Monster Energy Stylised Mark are seen in the background.
- (vii) RCS-14: Motor GP Grand Prix de France, 2010.
 - (a) Page 1182: The Monster Energy Composite Mark is seen as part of the background for the podium.
 - (b) Page 1183: The Claw Device Mark and the Monster Energy Stylised Mark are seen in the background on the ring fence.
- (viii) RCS-15: FIM Motocross World Championship.
 - (a) Pages 1186 - 1191: An article titled *2013 FIM World Motocross – Round 9 – Maggiore, Italy* published on 16 June 2013. At page 1190 the Claw Device Mark and the Monster Energy Stylised Mark are seen in the background.
 - (b) Page 1193: Screen shot of an article titled *2013 FIM World Motocross – Round 6 – Agueda, Portugal* published on 5 May 2013. The Claw Device Mark and the Monster Energy Stylised Mark are seen in the background.
- (ix) RCS-16: Screen shots of DC South East Asia Tour 2013 with Singapore stop. Pages 1196 and 1197 both reflect the Monster Energy Composite Mark.
- (x) RCS-17: Dakar Rally webpages. Some of the events captured on the printouts may have occurred after the Relevant Date (page 1208 simply states the figures pertaining to a 2015 competition without information as to the exact dates of the same). In any event, no images of any mark is seen.

- (xi) RCS-18: Dakar Rally.
- (a) Pages 1213 - 1214: Screen shots of Youtube titled *Monster Energy X-raid Team Teaser for the 2014 Dakar Rally* published on 2 Dec 2013⁴¹. The Claw Device Mark and the Monster Energy Stylised Mark are seen on the body of a mini.
 - (b) Page 1220: Article titled *Dakar Rally Monster Energy X-Raid Team* published in February 2011 (bottom left hand corner of the article) contains a picture of a mini with the Claw Device Mark embossed on the body of the car.
- (xii) RCS-19: Central European Rally photos.
- (a) Page 1227: The Claw Device Mark and the Monster Energy Stylised Mark are seen on suits.
 - (b) Page 1230: The Claw Device Mark and the Monster Energy Stylised Mark are seen on the body of the car.
- (xiii) RCS-20: X Games and Winter X Games.
- (a) Page 1234: Article titled *Hibbert Set for Snocross Gold Three-peat at ESPN's Winter X Games 13* published on 19 January 2009. The picture shows the Claw Device Mark, the Monster Energy Stylised Mark and the Monster Energy Composite Mark on the helmet, suit and the body of the snow mobile.
 - (b) Page 1245: Screenshot dated 26 January 2014. The Claw Device Mark can be seen in the background.
- (xiv) RCS-21: Screenshot from www.espneventwrapups.com. No images of any mark can be seen.
- (xv) RCS-22: Screenshot from XGames.com and X Games facebook page. The screen shots are undated and thus will not be taken into account.

42 With regard to the Opponent's claim of marketing via its website ([19(b)] OWS), Exhibit RCS-46 of the Opponent's 1st SD contains screen shots from www.MonsterEnergy.com printed on 11 October 2006. Pages 1524 and 1532 contain images of the Opponent's drinks. The Claw Device Mark and the Monster Energy Stylised Mark are on the website as well.

43 In relation to the Opponent's partnership with video game publishers, RCS-73 contains screen grabs of the game *Aliens - Colonial Marines*. At page 1810 ([19(c)] OWS),

⁴¹ It would appear that the Youtube screen shots capture the preparatory works for the 2014 event. It is also observed that in this Youtube snippet, the Opponent is identified with the Monster Energy Composite Mark and described as "Monster Energy" (see pages 1213 and 1214).

there is an excerpt “Latest News: Aliens Colonial Marines Monster Energy Free DLC” posted on 5 February 2013. It reads:

Monster *Energy* Drink is currently offering a free gear DLC for the upcoming videogame Aliens: Colonial Marines...

Below the excerpt is an image of the gear and the Claw Device Mark appears on the breastplate of the same.

44 The Opponent also promotes its energy drinks via computer events ([19(c)] OWS). RCS-74 contains screen shots of a Youtube video on *Monster Energy HK ACG Show 2012*. Page 1814 shows the Claw Device Mark and the Monster Energy Stylised Mark on a banner forming part of the backdrop of the event while page 1816 shows participants at the event wearing t-shirts reflecting the Monster Energy Composite Mark.

45 The Opponent also deposed that it has sponsored DreamHack, one of the biggest computer festivals in the world, since 2014 ([19(c)] OWS and [187] Opponent’s 1st SD). While the Opponent deposed that its family of marks “are prominently displayed at DreamHack Studios” ([187] Opponent’s 1st SD) there are no exhibits showing the actual marks displayed at the event.

46 The Opponent deposed that it also sponsors e-sports teams, that is, competitive video games teams over the years ([19(d)] OWS):

- (a) Team Evil Geniuses (since 2011);
- (b) The Alliance (since 2013);
- (c) Team EnVyUs (since 2014); and
- (d) Fnatic (since 2015⁴²).

The Opponent deposed that these events were broadcast live around the world. This included, in particular, 2012 IEM Season VII which was hosted in Singapore ([188] Opponent’s 1st SD). However, there are no exhibits showing the actual marks used at such events.

47 The Opponent also highlighted its extensive sales revenue worldwide, amounting to an average of approximately US\$ 2.57 billion annually ([20] OWS). However, as alluded above, the key is the marks which were reflected on the products. If the products were the cans as reflected on the Opponent’s website www.MonsterEnergy.com (Exhibit RCS-46 of the Opponent’s 1st SD), as mentioned above, the marks on the cans of energy drinks are the Claw Device Mark and the Monster Energy Stylised Mark.

48 The Opponent emphasized the “widespread popularity” of the Opponent’s marks on the following basis ([21] OWS):

⁴² Events after the Relevant Date are excluded.

- (i) The Opponent has sold more than 17.6 billion cans of MONSTER energy drinks worldwide.⁴³
- (ii) Worldwide retail sales of the Opponent's drinks now exceed 3 billion cans per year. Currently, MONSTER energy drinks are the best-selling energy drinks in the USA (35.6% share) and the second best-selling worldwide by unit volume.
- (iii) The Opponent has sponsored several teams that race in the FIA Formula One World Championship Series which had an extensive global television audience. This includes over 2 billion viewers for the 2012 season, 1.81 billion viewers for the 2013 season, 1.58 billion viewers for the 2014 season⁴⁴.
- (iv) A large number of articles have been published in internationally circulated magazines describing and referring to the Opponent.
- (v) For the period from 1 September 2010 to 1 September 2012, the MONSTER ENERGY website at www.monsterenergy.com received more than 10.1 million visits.
- (vi) In May 2012, business news channel CNBC reported that the MONSTER ENERGY Facebook page⁴⁵ is one of the top 10 most "liked" brands on Facebook worldwide.

49 RCS-59 contains articles about the Opponent:

- (i) Pages 1595 – 1596: Wall Street Journal article titled *A Real Advertising Vehicle* published 3 June 2003. The article reflects the Las Vegas Monorail. On the body of the monorail are the Monster Energy Stylised Mark and the Monster Energy Composite Mark.
- (ii) Pages 1602 – 1604: BusinessWeek article titled *Hansen⁴⁶ Natural, Charging at Red Bull with a brawny energy brew* published on 6 June 2005. The article contains a picture of 2 men holding the Opponent's cans of energy drinks. They are wearing t-shirts reflecting the Claw Device Mark.
- (iii) Pages 1612 – 1614: Forbes article titled *Monster vs. Red Bull* published on 20 March 2006. The article contains a picture of 2 men holding the Opponent's cans of energy drinks. They are wearing t-shirts reflecting the Claw Device Mark.

⁴³ Including in Singapore.

⁴⁴ Events after the Relevant Date are disregarded.

⁴⁵ RCS-49 contains excerpts of the Opponent's facebook pages. They are dated after the Relevant Date and thus they cannot be taken into account. Nonetheless it is noted that the Opponent is identified by the Monster Energy Composite Mark and the words "Monster Energy".

⁴⁶ The Opponent was previously known as this.

50 Finally, Exhibit RCS-55 contains an article titled *The World's Most "Liked" Brands* on the www.cnbc.com website updated on 17 May 2012 (page 1573). Page 1575 depicts a can of the Opponent's energy drink which reflects the Monster Energy Composite Mark. Further, at same page, the Opponent is described as "Monster Energy", being at the 9th place⁴⁷.

51 From the lengthy analysis above, it is clear that despite the expansive promotion and / or sales figures, the evidence above do not assist the Opponent in its quest to prove a family of marks as the actual marks exposed were not the ***Opponent's Earlier Monster Marks***. As alluded to above, the word "Monster", hardly appears on its own and when it does, it is usually reflected as **MΦNSTER**. It will become apparent that this same issue plagues the Opponent's case in relation to the objection under Section 8(4).

52 Having regard to all of the above, it is not necessary to look into the issue of access to overseas events by the Singapore audience⁴⁸. The Opponent has not established that it has a family of trade marks in relation to the ***Opponent's Earlier Monster Marks***.

Distinctiveness

53 I am mindful of the Court of Appeal's guidance in *Staywell* (above) that distinctiveness is a factor integrated into the visual, aural and conceptual analysis as to whether the competing marks are similar and it is not a separate step within the marks-similarity inquiry. However, for ease of analysis, I will summarise my findings first, before applying them within the context of the mark-similarity analysis (see *Hai Tong* at [26]).

Opponent's Earlier Monster Marks

54 The Opponent argued strenuously that the dominant and distinctive feature in the ***Opponent's Earlier Monster Marks*** is the word "MONSTER". The Opponent relied on the High Court decision of *Han's (F & B) Pte Ltd v Gusttimo World Pte Ltd* [2015] 2 SLR 825 ([41] OWS):

[61] Returning to the meaning of distinctiveness, the trade mark must necessarily, either inherently or as a result of use, perform the most basic function of distinguishing the goods of the trader from those of his competitors in the marketplace. Some trade marks carry a high level of "inherent distinctiveness" in the sense that these marks will be understood by the public as bearing a trade mark meaning, even if they have not yet been used or promoted to the public. Invented words are classic examples of such trade marks...

⁴⁷ RCS-56 is a print out (dated in 2012) titled *Facebook Brands Statistics* which tracks the number of fans of the brands on facebook ([161] and [163] of the Opponent's 1st SD. The Opponent is reflected to be at the 14th place at page 1578. Again it is referred as "Monster Energy". Finally, RCS-57 contains a mix of Facebook, Twitter and Youtube snippets. Pages 1585 – 1590 pertain to Twitter (dated in 2014). It is observed that the Opponent is identified via the Monster Energy Composite Mark and "Monster Energy" (see page 1585).

⁴⁸ Nor is it necessary to comment on whether such international athletes have more "star power" ([26] of the Opponent's 2nd SD.

[62] Another example is...[where] [e]ven though the words and phrase are not newly coined, the meaning has little bearing on the product to which it is to be applied...

[63] Other marks, on the other hand, while possessing the capability to distinguish goods or services in the course of trade, may have low levels of inherent distinctiveness. Often this will be because the mark includes a word or symbol or device that is at least partially descriptive of the goods or service. Alternatively, it may be that the word chosen has a laudatory meaning or some meaning that captures a mood or image of some relevance to the product or service in question...In other cases, it may be because a word with some desirable descriptive meaning is deliberately misspelt...Where a desirable descriptive word or phrase is misspelt, it is still possible, depending on the facts, that an obvious misspelling will not even avoid a conclusion that the sign lacks the basic capability to distinguish.

55 The Opponent also drew attention to the recent decision of *Monster Strike* at [37] ([40] OWS):

[37]...while the similarity of marks comparison is to be undertaken mark-for-mark, without consideration of any external matter, to the extent that the respective goods/services are relevant to the issue of the distinctiveness (in both its technical and non-technical senses) of the competing marks, they may be taken into account.

56 The Opponent concluded at [42] OWS:

[42] In short, trade marks which carry a high level of inherent distinctiveness are those which will be understood by the public as bearing a trade mark meaning even if they have not yet been used or promoted to the public. The Opponent submits that this category is not – and should not be – limited to only invented words, although these are "classic examples". Other marks which have no or little known significance to the goods or services in question may also bear a high level of inherent distinctiveness.

57 On the other hand, the Applicant submitted that ([20] Applicant's written submissions ("AWS")) and at [36] of the Applicant's SD) "monster" is an ordinary English word having the following meanings:

Noun

1. a. *An imaginary or legendary creature, such as a centaur or Harpy, that combines parts from various animal or human forms.*
1. b. *A creature having a strange or frightening appearance.*
2. *Archaic An organism that has structural defects or deformities.*
3. *Informal: A very large animal, plant, or object.*
4. *One who inspires horror or disgust: a monster of selfishness.*

Adjective

Informal: Extremely large; monstrous: a monster hit at the box office; ate a monster steak.

(Source: www.thefreedictionary.com/monster)

58 At the oral hearing, the Opponent zoomed into the definition above, in particular, “[a]n imaginary or legendary creature” and “[a] creature having a strange appearance” and submitted that it is not inconceivable that a monster may be cute. One example provided by the Opponent is the fictional creatures in the movie “Monsters Inc”. I am of the view that such instances are the exception rather than the norm. The primary meaning of a “monster” is still a creature which is bizarre or frightening. In this regard, it is observed that “monster” has been defined as follows as well:

S/N	Dictionary	Meanings
1	Cambridge ⁴⁹	<ol style="list-style-type: none"> 1. <i>any imaginary frightening creature, especially one that is large and strange</i> 2. a cruel person 3. something that is very big, or too big 4. to criticize someone severely or to treat someone very badly 5. a person who does very cruel and evil acts
2	Oxford ⁵⁰	<ol style="list-style-type: none"> 1. <i>A large, ugly, and frightening imaginary creature</i> <ol style="list-style-type: none"> 1.1 An inhumanly cruel or wicked person 1.2 A rude or badly behaved person, typically a child 2. A thing of extraordinary or daunting size. 3. A congenitally malformed or mutant animal or plant. 4. Criticize or reprimand severely.

[Emphasis in italics mine]

59 The Applicant continued at [25] AWS:

[25] Whilst the word “monster” may not be directly descriptive of the Opponent’s Goods, it is *allusive of an animalistic level of energy*, akin to that of a monster, which the consumer may possess when they consume the Opponent’s energy drinks and its other energy-boosting beverages⁵¹...It is submitted that the allusion to this idea would be all the more apparent in the present case given that the Opponent’s Goods are energy drinks [and other energy-boosting beverages], and not goods in Classes 9, 16, 18 and 25 as in [**Monster Strike**]. It is pertinent to note that “energy drinks” [and other energy-boosting beverages] are well known to the average consumer as being a type of beverage containing stimulant ingredients, usually including caffeine, which can provide mental and physical stimulation.

⁴⁹ <https://dictionary.cambridge.org/dictionary/english/monster?q=Monster>

⁵⁰ <https://en.oxforddictionaries.com/definition/monster>

⁵¹ See T0605639H which is a plain word mark “Monster” registered for “Beverages; fruit juices [beverages]; aerated fruit juices; soda water; vitamin enriched non-alcoholic beverages [vitamins not predominating]; isotonic beverages and drinks; energy drinks” in Class 32 (above).

[Emphasis in italics mine]

60 While I agree with the Opponent that the category of inherently distinctive marks includes marks which have no or little known significance to the goods or services in question, I am of the view that the current word mark “Monster” does not fall into this category.

61 Having regard to the allusive quality of the word mark “Monster”, it can be said to be at the lower end of the spectrum of distinctiveness. Thus, I am of the view that the ***Opponent’s Earlier Monster Marks*** are not of such a high level of technical distinctiveness that they “enjoy a high threshold before the Application Mark would be considered dissimilar to them” ([43] OWS).

Visual Similarity



62 For ease of comparison, the marks are as follows⁵²:

<i>Application Mark</i>	<i>Opponent’s Earlier Monster Marks</i>
SWEET MONSTER	MONSTER

Thus, it is apparent that the point in contention is the word “sweet” and its role in the Application Mark.

63 The Opponent argued ([44] and [47] OWS):

[44] In *Hai Tong Co (Pte) Ltd v Ventree Singapore Pte Ltd* [2013] 2 SLR 941, the Court of Appeal stated at [62] that “the visual similarity of two contesting marks or signs must normally be assessed by reference to the overall impressions created by the marks or signs, bearing in mind their distinctive and dominant components. When the other components of a complex mark or sign are of negligible significance, it is permissible to make the comparison solely on the basis of any dominant element(s).”
...

[47] Likewise and more recently in *Ceramiche Caesar SpA v Caesarstone Sdot-Yam Ltd* [2017] 2 SLR 308 (“*Caesarstone*”), the opponent relied on its prior registered mark, “” to oppose the applicant’s mark, “”. The Court of Appeal held that these marks were visually similar...after holding that the word “caesar” was distinctive in relation to non-metallic building materials, the Court of Appeal found that “the word “stone” was merely descriptive of the goods in Class 19. In this regard, the public will not generally consider a descriptive element forming part of a complex mark as the

⁵² See above as to the focus of the analysis.

distinctive and dominant element of the overall impression conveyed by that mark". For this reason, the Court of Appeal did not think that the presence of such a descriptive element could fairly be regarded as being effective to displace similarity.

64 Applying the above guidelines, the Opponent contended that there is a high degree of visual similarity between the marks as ([45] of OWS):

- (i) The [*Opponent's Earlier Monster Marks*] are wholly subsumed within the Application Mark.
- (ii) The additional word "SWEET" in the Application Mark:
 - (a) Is a common and laudatory descriptive term.
 - (b) Is merely descriptive of the Applicant's goods (and fails to distinguish itself sufficiently and substantially from the [*Opponent's Earlier Monster Marks*]).
 - (c) Is such that the focus of the consumer will undoubtedly be placed on the dominant element "MONSTER" (since the average consumer is unlikely to attach any significance to the descriptive element(s) in a mark).
 - (d) Being entirely descriptive of the goods, is of negligible significance⁵³.

65 As submitted by the Applicant at [30] AWS, where there is a common denominator, applying *The Polo/Lauren Co, LP v Shop In Department Store Pte Ltd* [2005] SGHC 175 at [26], "it is important to look at the differences between the mark and the sign in order to decide whether the challenged sign has been able to distinguish itself sufficiently and substantially".

66 I agree with the Applicant ([29] AWS) that *Ozone Community Corp v Advance Magazine Publishers Inc* [2010] 2 SLR 459 ("*Ozone Community*") is apposite:

(2) ...In the present instance, although the word marks of Ozone and AMP shared a common denominator in the word "glamour", there were many visual differences between the marks... Ozone's HYSTERIC GLAMOUR mark had 15 letters and consisted of *two words* while AMP's GLAMOUR mark had seven letters and consisted of only *one word*. Furthermore, given that the word "hysterical", which appeared at the *beginning* of Ozone's word mark, was *almost of equal length* to the word "glamour", it was *difficult to see how it would be entirely overlooked or overshadowed* by the word "glamour".

[Emphasis in italics mine]

67 It is observed that the syntax in the current case is similar to that in *Ozone Community* where the adjective "HYSTERIC" precedes the noun "GLAMOUR". In this case, the adjective "sweet" appears before the noun "monster". Next, the Application Mark consists of 2 words while the *Opponent's Earlier Monster Marks* consists of one word.

⁵³ As submitted at the oral hearing.

Last but not least, the differentiating word “sweet” which appears at the beginning of the Application Mark, is almost of equal length to “monster”⁵⁴. In light of all of the above, to paraphrase *Ozone Community*, it is “difficult to see how [“sweet”] would be entirely overlooked or overshadowed by the word [“monster”]”.

68 At the oral hearing, the Opponent sought to distinguish *Ozone Community* by submitting that the word “Hysteric” was not descriptive of the goods in question, i.e. paper and cardboard products such that the word “Hysteric” cannot be said to be negligible, in contrast to the instant case, above. However, I am of the view that it is not appropriate to dissect the mark in this way where the syntax is as described above (more below). It is the mark “HYSTERIC GLAMOUR”, as a whole, which is allusive of the content of the paper products.

69 Further, as submitted by the Applicant ([40(c)] AWS), applying *Monster Strike* at [46(a)]:

[46(a)] The words are in plain font with no stylisation or differences in font size... Visually, each of the word elements in the competing marks are *well balanced* in that they are both *equally visually prominent*. For the foregoing reasons, no element in either mark can be said to be more outstanding or memorable than the others visually.

[Emphasis in italics mine]

70 Aside from the visual attributes of the marks, the meaning of the marks also affects the visual appreciation of the marks⁵⁵. In this regard, the Applicant put forth the idea that a component of a composite word mark may not retain the independent distinctiveness of the earlier mark ([46] – [50] AWS).

71 The Applicant submitted ([46] AWS) that it has been recognised by the European Court of Justice that the principle of the “independent distinctive role” of the earlier mark within the later mark can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. This principle does not apply where the average consumer would perceive the composite mark as *a whole unit* having a *different meaning* to the meanings of the separate components. That includes the situation where the meaning of one of the components is *qualified* by another component (see *Whyte and Mackay Limited v. Origin Wine UK Limited, Dolce Co Invest Inc* [2015] EWHC 1271 (Ch) (“*Origin Wine*”) at [30]:

[30]...I will assume that...the average consumer would not be aware that JURA was an island in Scotland...It follows that...the average consumer would perceive the word JURA as being distinctive of the Appellant’s goods. In those circumstances, I consider that the expression JURA Origin would be understood by the average consumer as meaning that the goods originated from the producer called JURA:

⁵⁴ “Sweet” consists of 5 letters while “Monster” consists of 7 letters.

⁵⁵ In this regard, there is some overlap with the issue of conceptual similarity.

compare...photographic film labelled KODAK ORIGIN. Thus the expression would be *understood as a unit*. Accordingly, the word ORIGIN does *not* have an independent distinctive role in the JURA Mark.

[Emphasis in italics mine]

72 This concept was considered in *Taylor's Wines Pty Ltd v Taylor, Fladgate & Yeatman Limited* [2014] SGIPOS 11 (at [36]):

[36] In Singapore, the concept of the "independent distinctive role" of a registered trade mark within a later application mark/sign has not specifically been discussed. However, the court tries to determine if the earlier registered trade mark is "distinctive" and whether the other elements in the later application mark/sign erode the distinctiveness of the earlier mark within it.

73 Applying the above principle to the instant case, the Applicant submitted ([44] and [50] AWS):

[44] ...Here, however, the word "sweet" is the *qualifying* word in the Application Mark...the word "sweet" would most likely be interpreted by the average consumer in Singapore, who is well-versed in the English language, as *an adjective describing the noun following it*, i.e., "monster". In this case it would mean a monster that is "cute, gentle, pleasing, delightful"⁵⁶... the average consumer is unlikely to artificially dissect the Application Mark...Rather, the Application Mark will be viewed as a *single indissociable unit or phrase*.

...

[50] Applying the above to the present case, it is submitted that the words "sweet" and "monster" "hang together" to form a *unitary whole* to refer to a creature which is pleasant in nature... Because it is *natural in English syntax* to regard an adjective and a noun as *a combined unit* – the adjective being the qualifying word – it would be highly unnatural to dissociate the words "sweet" and "monster" from one another and regard them as two independent elements.

[Emphasis in italics mine]

74 In short, taken as wholes, the marks are visually more dissimilar than similar in comparison to the Application Mark as:

- (i) The Opponent's mark comprises one word whereas the Application Mark has two words.
- (ii) Both words in the Application Mark - "sweet" and "monster" - are of equal prominence.
- (iii) The additional word "sweet" appears at the beginning of the Application Mark, and is therefore unlikely to be overlooked by the average consumer.

⁵⁶ More on this under conceptual similarity.

- (iv) The word “sweet” being an adjective⁵⁷, colours the noun “monster” such that the Application Mark forms a unitary whole and projects a *different* overall impression⁵⁸ (relative to the *Opponent’s Earlier Monster Mark*).

75 Following the above line of thought, the Application Mark will be viewed as a single indivisible unit and the distinctiveness of the Application Mark resides in “SWEET MONSTER” as a *unitary whole*. Thus it is the Application Mark, as a whole (rather than the word “sweet” alone) which can be assessed against the goods as regards the issue of allusiveness.

76 Finally, with regard to the cases relied on by the Opponent:

- (i) I agree with the Applicant ([44] AWS) that *Caesarstone* can be distinguished on the factual basis that the descriptive word “stone” appears at the end of the application mark. In contrast, here, the word “sweet” (an adjective) precedes the word “monster” (a noun). This has the effect of causing the words “sweet” and “monster” to “hang together” to form an indivisible unit.
- (ii) A preliminary point that must be made is that cases from the European Union (“EU”) must be assessed with care, since the Court of Appeal in *Staywell* has clarified that the local approach, unlike that in the EU, is not a global assessment test:
- (a) In *Lancôme Parfums et Beauté & Cie v Focus Magazin Verlag GmbH* Case R 238/2009-2 (“*Lancôme*”) ([46] OWS), the marks in question were “COLOR FOCUS” by the Community Trade Mark proprietor, and “FOCUS” by the cancellation applicant. Both the words “COLOR” and “FOCUS” are nouns. This explains why “the additional first word element ‘COLOR’...is not such so as to counteract the overall similarity of the signs resulting from the overlap in the distinctive word element ‘FOCUS’...⁵⁹” even if “the word element ‘COLOR’ will be perceived as being...descriptive in relation to cosmetic products”⁶⁰. Any descriptive effect of the word “colour” in relation to the goods⁶¹ is of less effect.
- (b) In *Sky plc v easyGroup Ltd* [2017] Opposition No. B26829233 of November 27, 2017 ([48] OWS), the opponent relied on its earlier trade mark “SKY” to successfully oppose the registration of the applicant’s

⁵⁷ For the avoidance of doubt, whether the adjective, colours the noun such that the resultant mark forms a unitary whole and projects a *different* overall impression from the respective words remains, of course, very much on the nature of the adjective itself. For example, “Fearsome Monster” clearly exudes a similar perception as “Monster”.

⁵⁸ See above in relation to the Opponent’s argument that a monster may be cute.

⁵⁹ See [23] of *Lancôme*.

⁶⁰ As above.

⁶¹ As argued by the Opponent at the oral hearing.

" EASYSKY " mark⁶². One of the factors which was taken into consideration was that “[sky] is neither descriptive nor lacking distinctiveness for any of the relevant services in Classes 35, 39 and 43; *it does not describe or even allude to any of their essential characteristics*” (emphasis mine, see page 929 of the Opponent’s bundle of authorities). This is in contrast to my conclusion above that “[w]hile...the category of inherently distinctive marks includes marks which have no or little known significance to the goods or services in question...the current word mark “Monster” does not fall into this category.” ([59] above). In light of the above, it is no wonder that the EUIPO Opposition Division held that “the...element "SKY" was the most distinctive element of the contested sign, whereas the initial element "EASY"...[have] a somewhat subordinate role in relation to it.” (see OWS at [48]).

Conclusion



77 In conclusion, I agree with the Applicant that, taken as a whole, the marks are visually more dissimilar than similar⁶³.

Aural Similarity

78 With regard to aural similarity, the Court of Appeal in *Staywell* stated at [31] and [32] that there are two approaches. One approach is to consider the dominant component of the mark (“Dominant Component Approach”) and the other is to undertake a quantitative assessment as to whether the competing marks have more syllables in common than not (“Quantitative Assessment Approach”).

79 In this case, I have concluded above that the words in the Application Mark are of equal prominence. Thus, it would not be appropriate to apply the Dominant Component Approach (or, alternatively, it could be said that this approach would end up being the same as the Quantitative Assessment Approach).

80 Applying the Quantitative Assessment Approach, the marks have more syllables in common than not. The Application Mark consists of 3 syllables “sweet-mon-ster” of which 2 are identical to the *Opponent’s Earlier Monster Marks*.

⁶² While  is the mark as shown [48] of the OWS, the mark is reflected as “EASYSKY” in the decision; see tab 29 of the Opponent’s bundle of authorities at page 928. In the event that the mark in issue is , the capitalized “S” will only draw attention to itself and thus further bolster the argument why “Sky” is considered the more distinctive element in the mark.

⁶³ For the avoidance of doubt, the *Opponent’s Earlier Monster Suffix Marks* would also be recognised as word marks consisting of 2 nouns. To be precise, the earlier mark X-PRESSO Monster consists of an “invented noun” and a noun and thus would be considered to be even more dissimilar to the Application Mark. In this regard, the fact that “the Opponent’s MONSTER marks are used in the format comprising the pairing of the word MONSTER with another subsidiary word element” ([11] of the Opponent’s 2nd SD) does not assist the Opponent’s cause in this instance.

Conclusion

81 In light of the above, the *Opponent's Earlier Monster Marks* are aurally more similar than dissimilar in comparison to the Application Mark.

Conceptual Similarity

82 The Court of Appeal in *Staywell* expounded at [35] as follows:

[35] ...Unlike the aural analysis, which involves the utterance of the syllables without exploring the composite meaning embodied by the words, the conceptual analysis seeks to uncover the ideas that lie behind and inform the understanding of the mark as a whole...*Greater care is therefore needed in considering what the conceptually dominant component of a composite mark is, because the idea connoted by each component might be very different from the sum of its parts...*

[Emphasis in italics mine]

83 The Opponents argued ([58] OWS):

[58] ...there is a high level of conceptual similarity between the marks in the present case...the [*Opponent's Earlier Monster Marks*] are wholly subsumed within the Application Mark. The additional word "SWEET" in the Application Mark is merely descriptive of the Applicant's goods...and fails to conceptually distinguish the Application Mark sufficiently and substantially from the [*Opponent's Earlier Monster Marks*]. Instead, by incorporating "MONSTER" as a dominant and distinctive component, the Application Mark likewise seeks to import the characteristics of a monster.

84 The Applicant countered ([83] – [86] of AWS):

[83] The PAR's following observations in [*Monster Strike*] at [64] are particularly instructive:

In my view, it is *not helpful to break down* the respective marks into their constituent parts because the words must be read in context. Without context, one would not be able to properly uncover the ideas that lie behind and inform the understanding of the marks as wholes. *The first word can completely change the complexion of the next.* For instance, "nuclear energy" or "kinetic energy" or "high energy" is obviously different from "monster energy", just like "monster strike" is different from "air strike".

[84] As mentioned...the word "monster" could refer to an imaginary or frightening creature...or something that is extremely large. As the Opponent's mark is comprised solely of the word "monster", the *primary* conceptual identity will be that of a creature with a frightening appearance...

[85] On the other hand, the most likely overall impression of the Application Mark is a single compound unit which as a whole brings to mind a creature which is cute, pleasant or agreeable in nature. The concept of sweetness or approachability is not at all conveyed by the Opponent's "MONSTER" mark. This *paradoxical* idea of something as scary and frightening as a monster having a sweet and pleasant disposition is not conveyed by the Opponent's mark, which conveys the straightforward idea of a creature with dark or negative traits. The "MONSTER" mark evokes a sense of scariness and darkness which is a complete *antithesis* to the lightheartedness, cheerfulness and friendliness evoked by "SWEET MONSTER".

[86] It is submitted that, read in context, it is apparent that the word "sweet" in "SWEET MONSTER" *changes the complexion* of the word "monster" such that instead of conveying the primary dominant idea of scariness which the word "monster" *simpliciter* conveys, the whole phrase "sweet monster" evokes ideas of sweetness, lovability and cuteness...

[Emphasis in italics mine]

85 This approach was adopted in *Worldwide Brands, Inc. v Itochu Corporation* [2007] SGIPOS 9 ("*Itochu*") ([87] AWS):

[36] Although there is a common word "CAMEL" in all the marks, the marks must be assessed as wholes. The Court of Appeal in the *McDonald's Corp v Future Enterprises* case, at page 186 has said:

"A mark may very well consist of some common word(s) or device but it does not necessarily follow that it is thereby incapable of being distinctive or will be confused with an existing mark with the same word or words. One must look at the mark as wholes."

[37] Bearing in mind the Opponents' argument that the average consumer normally perceives the mark as a whole without analysing its various details...and that marks should not be compared side by side as marks are generally remembered by general impressions rather than by recollection of the whole; I find that there is *no conceptual similarity* between the Opponents' and the Applicants' marks. The Applicants' "SWEETCAMEL"⁶⁴ mark does not convey the same idea and impression as the Opponents' marks. The Opponents' "CAMEL" marks evoke the sense of ruggedness, adventure and masculinity whereas the Applicants' mark which is preceded by the adjective "sweet" projects *a totally opposite impression*.

[Emphasis in italics mine]

⁶⁴ I accept that there is no space between the word "sweet" and "camel". However, the analysis with regard to the ideas which exude from the marks remain relevant. In fact it is arguable that the perception which is conveyed by "SWEETCAMEL" would be less obvious than if the mark in question was "SWEET CAMEL".

86 At the oral hearing, the Opponent attempted to distinguish *Itochu* on the basis that “sweet” in “*SWEETCAMEL*” is not directly descriptive of the goods in contention, which were in Class 25. This is in contrast to the instant case, where “sweet” is directly descriptive of the goods in Class 30. As alluded to earlier, I am of the view that it is not appropriate to dissect the mark in this context. The mark is to be viewed as a *unitary whole* in the assessment against the goods as regards the issue of allusiveness.

87 Taking all of the above into consideration, I am of the view that the marks are conceptually more dissimilar than similar⁶⁵.

88 In coming to this conclusion, I am cognizant of the Opponent’s argument that a sweet monster is still a type of monster. However, the conclusion which is required to be drawn at the end of the day is whether the marks are more dissimilar than similar. In that regard, I am of the opinion that the marks are conceptually more dissimilar than similar here⁶⁶.

Conclusion on the similarity of marks

89 It is to be recalled that:

- (i) The court must ultimately conclude whether the marks, when observed in their totality, are similar rather than dissimilar. In this regard, trade-offs can occur between the three aspects of similarity.
- (ii) The average consumer:
 - (a) has an “imperfect recollection” and there is a need to consider the general impression that will likely be left by the dominant features of the marks.
 - (b) Is one who would exercise some care and a measure of good sense in making his or her purchases, not that of an unthinking person in a hurry.

90 I have concluded that the *Opponent’s Earlier Monster Marks* in comparison to the Application Mark is visually and conceptually more dissimilar than similar while there is some aural similarity. Overall, I am of the view that the marks are more dissimilar than similar⁶⁷.

⁶⁵For completeness, the *Opponent’s Earlier Monster Suffix Marks* would also be conceptually more dissimilar than similar in comparison with the Application Mark ([89] – [95] AWS).

⁶⁶See *Staywell* at [17] where the Court of Appeal rejected the minimal threshold approach:

[17]...The learned Amicus, Prof Ng-Loy Wee Loon submitted that while the court should consider each of the three established aspects of similarity, *viz*, visual, aural or conceptual similarity, as long as it found that there was some degree of similarity in any one of these three aspects, *no matter how weak*, the marks similarity requirement should be considered to have been met and the court would then be obliged to proceed to the next stage of the inquiry which will generally be the likelihood of confusion. *We respectfully disagree*.

[Emphasis in italics mine].

⁶⁷It has been mentioned above that, out of all the *Opponent’s Earlier Marks*, it is the *Opponent’s Earlier Monster Marks* which are *closest* to the Application Mark. This means that if the conclusion is that the *Opponent’s Earlier Monster Marks* are not similar to the Application Mark, the same will hold true for, in particular, the *Opponent’s Earlier Monster Suffix Marks*.

91 Having regard to the 3-step test, my conclusion above ends the inquiry with regard to the objection under Section 8(2)(b). The ground of opposition under Section 8(2)(b) therefore fails.

Ground of Opposition under Section 8(4)(b)(i)

92 Section 8(4) of the Act reads:

8. —(4) Subject to subsection (5), where an application for registration of a trade mark is made on or after 1st July 2004, if the whole or an essential part of the trade mark is identical with or similar to an earlier trade mark, the later trade mark shall not be registered if —

(a) the earlier trade mark is well known in Singapore; and
(b) use of the later trade mark in relation to the goods or services for which the later trade mark is sought to be registered —

(i) would indicate a connection between those goods or services and the proprietor of the earlier trade mark, and is likely to damage the interests of the proprietor of the earlier trade mark...

Decision on Section 8(4)(b)(i)

Similarity of marks

93 In relation to this ground, it is clear that the first element that must be satisfied is that "the whole or essential part of the trade mark must be identical or similar to an earlier mark". This element is essentially the same as the similar element under Section 8(2)(b) (see *Sarika Connoisseur Cafe Pte Ltd v Ferrero SpA* [2013] 1 SLR 531 (at [70] and [71])). I have already found that the Opponent has not satisfied this element.

94 In light of the above, there is no need for me to look into the other elements of this ground of objection. However, in light of the voluminous evidence filed by the Opponent, I will briefly touch on the element of "well-known in Singapore" under this ground of objection.

Well-known in Singapore

95 The critical question is whether the *Opponent's Earlier Monster Marks*⁶⁸ are well known in Singapore as at the Relevant Date.

96 The starting point for this inquiry is Sections 2(7), (8) and (9) of the Act. Section 2(7) of the Act states:

⁶⁸ As above.

Subject to subsection (8), in deciding, for the purposes of this Act, whether a trade mark is well known in Singapore, it shall be relevant to take into account any matter from which it may be inferred that the trade mark is well known, including such of the following matters as may be relevant:

- (a) the degree to which the trade mark is known to or recognised by any relevant sector of the public in Singapore;
- (b) the duration, extent and geographical area of –
 - (i) any use of the trade mark; or
 - (ii) any promotion of the trade mark, including any advertising of, any publicity given to, or any presentation at any fair or exhibition of, the goods or services to which the trade mark is applied;
- (c) any registration or application for the registration of the trade mark in any country or territory in which the trade mark is used or recognised, and the duration of such registration or application;
- (d) any successful enforcement of any right in the trade mark in any country or territory, and the extent to which the trade mark was recognised as well known by the competent authorities of that country or territory;
- (e) any value associated with the trade mark.

Section 2(8) of the Act reads:

Where it is determined that a trade mark is well known to *any relevant sector of the public in Singapore*, the trade mark shall be *deemed* to be well known in Singapore

Section 2(9) states:

In subsections (7) and (8), “relevant sector of the public in Singapore” includes any of the following:

- (a) all actual consumers and potential consumers in Singapore of the goods or services to which the trade mark is applied;
- (b) all persons in Singapore involved in the distribution of the goods or services to which the trade mark is applied;
- (c) all businesses and companies in Singapore dealing in the goods or services to which the trade mark is applied.

97 The provisions have been the subject of further exposition by the Courts:

- (i) Section 2(7)(a) is arguably the most crucial factor when determining whether a trade mark is well known in Singapore. This because Section 2(8) of the Act

deems a trade mark to be well known in Singapore where it is determined to be well known to *any* relevant sector of the public in Singapore (see [139] of *Novelty Pte Ltd v Amanresorts Ltd and another* [2009] SGCA 13 ("*Amanresorts*").).

- (ii) Aside from Section 2(7)(a) of the Act, the court is ordinarily free to disregard any or all of the factors listed in Section 2(7) as the case requires and to take additional factors into consideration (*Amanresorts* at [137]).
- (iii) In relation to Section 2(8) of the Act, the Court of Appeal in *Caesarstone* clarified that:

[101] ...we said in *Amanresorts* that it is “not too difficult” for a trade mark to be regarded as well known in Singapore⁶⁹...

[102] We do not think that this comment in *Amanresorts* was made to lay down a general principle...the context of this comment was the desire to clarify that, in order for a mark to be well known in Singapore, the relevant sector to which a mark must be shown to be well known can be *any* relevant sector of the Singaporean public, and this sector need not be large in size. *Beyond this, it should not be read as suggesting (more generally) that the threshold for a trade mark to be regarded as well known in Singapore is a low one.*

[Emphasis in italics mine]

- (iv) Last but not least, with regard to the ambit of Section 2(9)(a), the inquiry is into the specific goods or services to which the Opponent’s trade mark has been applied or the Opponent’s goods or services ([152] *Amanresorts*).

98 I have assessed the Opponent’s evidence in relation to the Singapore market above. In addition, the Opponent deposed ([32] Opponent’s 1st SD):

[32] I attach also at Exhibit RCS-4 a report based on data compiled using independent reports prepared by...The Nielsen Company, which shows that the *market share (by dollar value)* for MONSTER ENERGY drinks in certain markets in Singapore as of October 2014 was as follows: (i) in the [t]otal modern trade channel – 15.7%; (ii) in 7-Eleven stores only – 22.5%; (iii) in total petroleum/convenience stores – 22.5%; and (iv) in total supermarket channel – 5.9%.

[Emphasis in italics mine]

⁶⁹ The Court of Appeal in *Amanresorts* commented that it is *not too difficult* for a trade mark to be regarded as “well known in Singapore” since the trade mark in question need only be recognised or known by “*any* relevant sector of the public in Singapore” which could in certain cases be *miniscule* ([229] *Amanresorts*).

99 At the hearing, the Opponent submitted that 22.5% of the petroleum / convenience stores is sufficient to satisfy this element (that is, well-known to a relevant sector in Singapore) while the Applicant argued otherwise. There were no further submissions as to why I should agree with one side rather than the other.

100 Nevertheless, there is no need for me to come to a conclusion on this issue. It is clear that ***Opponent's Earlier Monster Marks*** are not well-known in Singapore since (as alluded above) the actual marks which were portrayed as shown via the evidence, are not the “monster” word mark *simpliciter*.

101 The ground of opposition under Section 8(4)(b)(i) fails.

Ground of Opposition under Section 8(4)(b)(ii)

102 The relevant provisions of the Act read:

8.—(4) Subject to subsection (5), where an application for registration of a trade mark is made on or after 1st July 2004, if the whole or an essential part of the trade mark is identical with or similar to an earlier trade mark, the later trade mark shall not be registered if —

(b) use of the later trade mark in relation to the goods or services for which the later trade mark is sought to be registered —

(i) if the earlier trade mark is well known to the public at large in Singapore;

(A) would cause dilution in an unfair manner of the distinctive character of the earlier trade mark; or

(B) would take unfair advantage of the distinctive character of the earlier trade mark.

Decision on Section 8(4)(b)(ii)

103 As I have found that the ***Opponent's Earlier Monster Marks*** are not “well-known in Singapore”, it must follow that they are not well-known to the public *at large* in Singapore. However, similar to the objection under Section 8(4)(b)(i), due to the extensive evidence tendered with regard to overseas use, I will make some observations in relation to the requirement “well-known to the public at large” in this instance.

Well-known to the public at large

104 The critical question is whether the ***Opponent's Earlier Monster Marks***⁷⁰ are well known to the public at large (in Singapore) as at the Relevant Date.

105 It is clear that the relevant provisions and case law which relate to the limb “well known in Singapore” (above) apply. Further, the following are pertinent:

⁷⁰ See above

- (i) The test “well known to the public at large in Singapore” has to mean *more* than just “well known in Singapore”. The mark has to necessarily enjoy a much *higher* degree of recognition. It has to be recognised by *most* sectors of the public though not so far as to all sectors of the public (*City Chain Stores (S) Pte Ltd v Louis Vuitton Malletier* [2010] 1 SLR 382 at [13]).
- (ii) A much more *extensive* level of protection is granted to trade marks which have attained the *coveted* status of being “well known to the public at large in Singapore”. These form *a rare and exclusive class*, and are entitled to protection from use of a trade mark⁷¹ on dissimilar goods or services even in the absence of a likelihood of confusion (*Amanresorts* at [233]).

106 The Opponent explained why it is of the view that this element has been made out at [107] – [115] OWS.

107 A comparison of the Opponent’s figures with cases where the element was made out is as follows (for the avoidance of doubt, the table is a guide only):

All figures pertain to activities in Singapore					
S/N		Expenditure on marketing	Exposure via physical sales outlets	Sales figures	Survey, if any
1	"Seiko" ⁷²	More than \$4 million <i>each year</i> for 5 years	100 optical shops	\$14 million <i>per annum</i> for 5 years	70% of consumer awareness
2	"Clinique" ⁷³	\$3 million <i>each year</i> for 4 years	13 stores and counters	\$10 million <i>per annum</i> for 4 years	
3	"Nutella" ⁷⁴	NA	94-98% of stores in Singapore that sell food items	2 million units of "Nutella" bread spread sold <i>every year</i>	70% of consumer awareness
4	Intel ⁷⁵	US\$600 million per annum for 4 years		US\$1 billion per annum for 7 years	85% of consumer awareness

⁷¹ Similar.

⁷² *Seiko Holdings Kabshiki Kaisha (trading as Seiko Holdings Corporation) v Choice Fortune Holdings Limited* [2014] SGIPOS 8

⁷³ *Clinique Laboratories, LLC v Clinique Suisse Pte Ltd and another* [2010] 4 SLR 510

⁷⁴ *Ferrero SPA v Sarika Connoisseur Cafe Pte Ltd* [2011] SGHC 176

⁷⁵ *Intel Corporation v Intelsteer Pte Ltd* [2015] SGIPOS 2

5	Gucci ⁷⁶	<p>- “[I]n the region of hundreds of thousands of euros”... “for many years, including in Singapore”⁷⁷</p> <p>- Exposure via approximately 30 publication.</p> <p>- Exposure via social media (Facebook with 15.9 million likes; Instagram – 17.8 followers; Twitter – 4.97 followers; Youtube – 136,000 subscribers)</p>	<p>- Changi Airport, the Paragon shopping mall in Orchard Road, the Takashimaya department store in Orchard Road and at The Shoppes retail complex in Marina Bay Sands</p>	<p>“[M]ore than tens of millions SGD” for 5 years⁷⁸</p>	
6	MONSTER	<p><i>An average of US\$550,000 promotional expenditure annually</i>⁷⁹</p>	<p><i>Retail stores, gas stations and other outlets such as drug stores and on-premise</i>⁸⁰</p>	<p><i>An average of 1.34 million cans sold annually</i>⁸¹.</p>	

108 Aside from the fact that the Opponent’s figures above appear to fall short in comparison to the other cases, the evidence tendered with regard to use in Singapore do not reflect the **Opponent’s Earlier Monster Marks**. Thus the above evidence do not assist.

⁷⁶ *Guccio Gucci S.P.A v Guccitech Industries (Private Ltd)* [2018] SGIPOS 1 (“**Guccitech**”). See [75] of **Guccitech**:

[75]...In my view, there is far more than sufficient evidence on which to find that the GUCCI trade mark is indeed a member of the rare and exclusive class of trade marks that is well known to the public at large in Singapore. It would be contrary not only to the weight of that evidence but also to corroborative common general knowledge (to borrow a term from patent law) to find otherwise...

⁷⁷ See [14] of **Guccitech**.

⁷⁸ See [13] of **Guccitech**.

⁷⁹ See above for the computation.

⁸⁰ No information has been provided as to number of such physical premises which sold the Opponent’s products. Exhibit RCS-4 of the Opponent’s 1st SD is a report based on data which shows that the *market share (by dollar value)* for MONSTER ENERGY drinks in *specific markets* in Singapore as of October 2014 including: (i) total modern trade channel – 15.7%; (ii) 7-Eleven stores only – 22.5%; (iii) total petroleum/convenience stores – 22.5%; and (iv) in total supermarket channel – 5.9%.

⁸¹ See above for the computation.

109 In light of the above, this element has not been made out. Nonetheless, I will proceed to examine the rest of the Opponent's submissions before coming to a final conclusion.

110 Exhibits RCS-31 to 40 contain extracts on the various international athletes sponsored by the Opponent ([111] OWS):

- (i) RCS-31: Youtube screen shots of Jake Brown's fall. There do not appear to be any marks captured.
- (ii) RCS-32: Opponent's website in relation to athletes sponsored. The excerpts are undated, although they were printed on 4 January 2010. One example is a write up about Jake Brown (pages 1432 – 1434). The Claw Device Mark is seen on the top left hand corner of the webpage.
- (iii) RCS-33: A blog excerpt about Ricky Carmichael titled *Kicking off the season Daytona style* published on 14 February 2011. The Claw Device Mark and the Monster Energy Stylised Mark are seen on the body of the car in the picture.
- (iv) RCS-35⁸²: Print outs from supercrossonline.com (print screens are indicated to be taken on 11 July 2012):
 - (a) Pages 1457 and 1459: The Claw Device Mark and the Monster Energy Stylised Mark are seen on the webpage.
 - (b) Pages 1461: The Monster Energy Composite Mark is seen at the bottom of the webpage.
- (v) RCS-36: Youtube screen shots about Ken Block.
 - (a) Page 1466: Youtube snippet titled *Ken Block's Gymkhana Seven: Wild in the Streets of Los Angeles*, published on 17 November 2014. The Claw Device Mark is seen on the body of the car.
 - (b) Page 1468: A Youtube snippet titled *Chris Harris on Ken Block's Gymkhana Seven AWD 1965 Mustang (The Hoonicorn)*, published on 3 December 2014. The Claw Device Mark is seen on the body of the car.
- (vi) RCS-37: A Full Throttle Motorcycle article titled *DC creates exclusive riding gear for Jeremy Mcgrath*, published in January 2011. Jeremy Mcgrath is wearing a cap with the Claw Device Mark.
- (vii) RCS-38: An article titled *Ryan Capes World Record Assault*⁸³. Some print outs are undated and will not be taken into account. The Opponent deposed at

⁸² RCS-34 contains undated pictures of Ricky Carmichael and thus will not be taken into account.

⁸³ While the print outs are dated 18 October 2016, it is indicated in the body of the excerpt that the event occurred on 29 October 2005.

[143(a)] that Ryan Capes is a freestyle motorcross athlete who in 2005 broke the world record by jumping a distance of 310.4 feet:

- (a) Page 1474: Shows Ryan Cape wearing a cap with the Claw Device Mark and holding a can with the Monster Energy Composite Mark.
 - (b) Page 1475: Shows Ryan Cape's bike with the Claw Device Mark and the Monster Energy Stylised Mark on it.
 - (c) Page 1476: Shows Ryan Cape wearing a cap with the Claw Device Mark and a t-shirt with the Claw Device Mark and the Monster Energy Stylised Mark on it.
- (viii) RCS-39: Youtube snippets about Mike Metzger. Pages 1488 and 1489 contain snippets published on 4 May 2006 showing Mike Metzger wearing a helmet with the Claw Device Mark and the Monster Energy Stylised Mark on it.
- (ix) RCS-40: An article titled *Flippin' out: Metzger goes head over heels at Caesars*, published on 4 May 2006, describing that Mike Metzger broke the world record for longest motorcycle backflip. No marks are seen in the article.

Aside from the issue of access to the different modes of promotion by the local audience, it is apparent that the "Monster" word mark *simpliciter* did not appear in the evidence.

111 Similarly, in relation to video gaming ([112] and [113] OWS), I have analysed the material above and will not repeat my analysis here. The "Monster" word mark *simpliciter* was also nowhere to be seen in the evidence.

112 To drive home the point, I refer to RCS-60 of the Opponent's 1st SD which is a copy of Adweek ([169] of the Opponent's 1st SD):

[169] Additionally, on August 2015, Adweek published an article entitled "Here's what 22 Famous Logos Would Look Like if They Swapped Colors with Competitors" in which *the Claw Icon and "Monster Energy" mark* is presented as one of the 22 "famous" logos, next to its competitor, Red Bull...Adweek is the second largest advertising trade publication leading source, and is available to viewers in Singapore.

[Emphasis in italics mine]

Page 1620 reflects the Monster Energy Composite Mark albeit not in its usual colours.

113 It is to be recalled that the marks which are entitled to the "extensive level of protection" granted under Section 8(4)(b)(ii) are of "a rare and exclusive class". I am unable to conclude that the *Opponent's Earlier Monster Marks* have attained this "coveted" status in light of the issues discussed above.

114 As this element has not been made out (in addition to the conclusion that the marks are not similar), there is no need for me to look at the other limbs of dilution and unfair advantage.

115 The ground of opposition under Section 8(4)(b)(ii) therefore fails.

Ground of Opposition under Section 8(7)(a)

116 Section 8(7)(a) of the Act reads:

8. —(7) A trade mark shall not be registered if, or to the extent that, its use in Singapore is liable to be prevented —

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade.

Decision on Section 8(7)(a)

117 In relation to this ground, there are three elements to be established:

- (i) Goodwill;
- (ii) Misrepresentation; and
- (iii) Damage.

118 The law in relation to goodwill can be summarised as follows:

- (i) Goodwill is “the benefit and advantage of the good name, reputation, and connection of a business...the attractive force which brings in custom” (*The Commissioners of Inland Revenue v Muller & Co's Margarine, Limited* [1901] AC 217).
- (ii) The position in Singapore is still the “hardline” approach⁸⁴, albeit having been softened to include pre-trading activity (*Staywell* at [136]).
- (iii) The Opponent must establish that they have acquired goodwill as at the *relevant date*, that is, the date on which the defendant's conduct complained of started. Applying this principle, it is the Relevant Date in this instance (*Law of Intellectual Property of Singapore (Sweet & Maxwell, 2014 Rev Ed)* by Professor Ng-Loy Wee Loon (“*Law of Intellectual Property of Singapore*”) at [17.2.5]).
- (iv) Goodwill, in the context of passing off, is concerned with goodwill in the *business as a whole*, and not specifically in its constituent elements. The issue of *whether a mark or get-up is distinctive* of a plaintiff's products or services

⁸⁴ See [132] *Staywell*:

The traditional position is that for goodwill to exist, it is essential for the trader to have carried on his trade within the jurisdiction...This has become known as the “hard-line” school of thought...

is a question best dealt with in the context of the inquiry as to whether the defendant has made a misrepresentation (*Singsung Pte Ltd v LG 26 Electronics Pte Ltd (trading as L S Electrical Trading* [2016] 4 SLR 86 (“**Singsung**”)).

- (v) Evidence of sales and income of the business are a “proxy for the attractive force of the business” (*Singsung* at [58]).
- (vi) The “get up” can include various aspects of the business, *including* a mark (*Law of Intellectual Property of Singapore* at [17.2.10] – [17.2.11]).
- (vii) Section 8(7)(a) of the Act at the very least requires an opponent to adduce sufficient evidence to establish a *prima facie* case on goodwill, misrepresentation, and damage (*Rovio Entertainment Ltd v Kimanis Food Industries Sdn Bhd* [2015] SGHC 216 (“**Rovio**”) at [164]).




119 In relation to goodwill, I have already set out my views above on the Opponent’s sales and promotional figures in Singapore. Bearing in mind the High Court’s guidance in *Rovio*, I am prepared to accept that the Opponent has the relevant goodwill in Singapore.

Misrepresentation

120 As alluded to above, in an action in passing off, it is permissible for the Opponent to rely on their *get-up* (which includes the **Opponent’s Earlier Monster Marks**). I have already commented on the Opponent’s evidence above. In essence, the bulk of the evidence tendered by the Opponent (via the Opponent’s 1st SD) pertains to the following marks:

- (i) the Monster Energy Composite Mark;
- (ii) the Claw Device; and
- (iii) the Monster Energy Stylised Mark.

121 For ease of reference, the marks are reproduced again as follows:

<i>Application Mark</i>	<i>Opponent’s Earlier Monster Mark</i>
SWEET MONSTER	MONSTER
	<i>Monster Energy Composite Mark</i>
	
	<i>Claw Device</i>
	
	<i>Monster Energy Stylised Mark</i>
	

122 The Opponent itself deposed at [37] of the Opponent's 1st SD:

[37] ...There are a number of reasons why Monster spends the majority of its advertising, marketing and promotions budget on the sponsorship of athletes and events. The first is... because the advertising, marketing and promotions that Monster carries in relation to the MONSTER marks are all about image. The MONSTER image needs to appeal to Monster's target market of *young adults aged 18 to 34 years old, primarily males*⁸⁵. The image of the MONSTER energy drinks is therefore "*edgy and aggressive*". The athletes and events Monster sponsors tend to be *edgy and aggressive, or extreme*.

[Emphasis in italics mine]

123 The frightening and aggressive aspect of a monster is clearly encapsulated by the Claw Device and the Monster Energy Stylised Mark which make up the Monster Energy Composite Mark. The final straw is the Opponent's tagline "Unleash the Beast!" (see RCS-2 and RCS-48 of the Opponent's 1st SD, which are printouts (dated 13 January 2015) from the localized version of the "Monster Energy website"). The above can hardly be said to be similar, and indeed stand in stark contrast to the Application Mark which conveys the idea of a sweet and pleasant creature.

124 At this juncture, I clarify that it is the Application Mark which can be taken into account⁸⁶. This is in light of the provision in Section 8(7)(a) of the Act above, which reads as follows:

- 8.** —(7) [The Application Mark] shall not be registered if, or to the extent that, its use in Singapore is liable to be prevented —
- (a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade.

125 Nonetheless, as alluded to above under the issue of conceptual similarity:

- (i) The most likely overall impression of the Application Mark is a single compound unit which as a whole brings to mind a creature which is pleasant in nature. The concept of sweetness or approachability is *not* at all conveyed by the Opponent's "MONSTER" mark.

⁸⁵ This is buttressed by RCS-58 of the Opponent's 1st SD which is a screen shot of Youtube's reporting feature for the period 25 August 2009 – 17 February 2016. The Opponent deposed at [165] of the Opponent's 1st SD that "Most of these viewers are *male (92%)* and majority are between the *ages of 18 and 44.*" (emphasis mine). While the period extends beyond the Relevant Date, it is still indicative of the Opponent's target audience.

⁸⁶ Although the actual use of the mark can be considered as one of the examples of notional use of the mark (see *Staywell* at [60] where the comment is made in the context of Section 8(2)(b)). This is in contrast to the situation where the Applicant brings an action for passing off under common law.

- (ii) The primary concept exuded by the Opponent's "MONSTER" mark is that of a creature with menacing traits. This is confirmed by the Opponent *itself* in its evidence ([37] of the Opponent's 1st SD above)⁸⁷.
- (iii) The word "sweet" in the Application Mark changes the complexion of the word "monster". The "MONSTER" mark evokes a sense of darkness which is a complete antithesis to the light-heartedness evoked by the Application Mark.

In short, the perceptions conveyed by the Application Mark are the converse of the negative notions portrayed by the Opponent's marks above.

126 Taking into account the extent of dissimilarity in the marks, I am of the view that, on a balance of probabilities, there is no likelihood of misrepresentation that the Applicant and the Opponent are one and the same or that they are economically linked.

Damage

127 As I have found that the element of misrepresentation has not been made out, there is no need for me to look into the element of damage.

Conclusion

128 The ground of opposition under Section 8(7)(b) therefore fails.

Conclusion

129 Having considered all the pleadings and evidence filed and the submissions made in writing and orally, I find that the opposition fails on all grounds. Accordingly, the Application Mark shall proceed to registration. The Applicant is also entitled to costs to be taxed, if not agreed.

Date of Issue: 20 April 2018

[The appeal from this decision to the High Court was dismissed. A further appeal to the Court of Appeal is pending.]

⁸⁷ For the avoidance of doubt, this perception is not eroded where the word "energy" is added after the word "monster". Where the mark in use is "Monster Energy" it is "*allusive of an animalistic level of energy, akin to that of a monster, which the consumer may possess when they consume the Opponent's energy drinks*" (see [25] of AWS above). For the record, I disagree with the Opponent that such an extrapolation is a "tenuous".