

EL645100359US

1 Quarles & Brady Streich Lang LLP  
2 Renaissance One  
3 Two North Central Avenue  
4 Phoenix, AZ 85004-2391  
5 TELEPHONE 602.229.5200

6 *Attorneys for Opposer*  
7 Glenn S. Bacal  
8 Christine M. Meis

10-14-2003  
U.S. Patent & TMO/c/TM Mail Rcpt Dt. #78

9  
10 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
11 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

12 CHINA MIST TEA COMPANY, an  
13 Arizona corporation,

14 Opposer,

15 v.

16 DR PEPPER/SEVEN UP, INC., an  
17 Delaware corporation,

18 Applicant.

OPPOSITION NO. \_\_\_\_\_

**NOTICE OF OPPOSITION**

Serial No.: 78/186079  
Mark: **Frozen Orange Frenzy**  
International Class: 32

19 Opposer China Mist Tea Company, an Arizona corporation having its principal  
20 place of business at 7435 East Tierra Buena Lane, Scottsdale, Arizona 85260-1608  
21 (hereinafter "Opposer"), believes that it will be damaged by registration of the mark  
22 "Frozen Orange Frenzy," Serial No. 78/186079, and opposes such registration on that  
23 basis.

24 The grounds for opposition are as follows:

OPPOSER'S MARK

25 1. Opposer is the owner the federal trademark registration for the mark  
26 FRENZY®, Registration No. 1,838,029, as used since May 22, 1993 for tea and iced tea  
in International Class 30.

1           2.     Since at least as early as May 22, 1993, Opposer has continuously used the  
2 mark FRENZY® in commerce in connection with tea and iced tea.

3           3.     Opposer's mark is symbolic of extensive goodwill and consumer  
4 recognition built up by Opposer through substantial amounts of time and effort in  
5 advertising and promotion.

6           4.     Opposer's mark is currently the only FRENZY® mark federally registered  
7 for a beverage.

8           APPLICANT'S APPLICATION

9           5.     On information and belief, Applicant is the owner of a pending intent-to-use  
10 application for "Frozen Orange Frenzy" in International Class 32 for slush type soft  
11 drinks, a type of beverage.

12          6.     On information and belief, Applicant's intent-to-use application was filed on  
13 November 18, 2002 and was published on July 22, 2003.

14          7.     On information and belief, applicant disclaims the words "frozen" and  
15 "orange" and therefore, primarily seeks protection of the word "Frenzy" which is identical  
16 to Opposer's mark.

17          LIKELIHOOD OF CONFUSION

18          8.     Opposer alleges that there is a likelihood of confusion between Opposer's  
19 mark, FRENZY®, in Class 30 for use in connection with tea and iced tea, and Applicant's  
20 proposed mark, "Frozen Orange Frenzy," in Class 32 for use in connection with slush type  
21 soft drinks.

22          9.     Both Opposer's mark and Applicant's proposed mark identically use the  
23 word "Frenzy" and relate to very similar goods, namely cold drinks.

24          10.    The likelihood of confusion between Opposer's marks and Applicant's  
25 proposed mark is furthered by the merely descriptive nature of the words "frozen" and  
26

1 "orange" in Applicant's mark, which have been disclaimed, and Applicant's focus on the  
2 predominant word, namely, "Frenzy" which is identical to Opposer's mark.

3 11. The likelihood of confusion is increased by Applicant's intended use of  
4 "Frenzy" with cold drinks, the same basic type of beverages that Opposer has  
5 continuously used its mark FRENZY® in connection with since at least May 22, 1993.

6 12. The likelihood of confusion is further increased by the crossover in the  
7 marketplace of these particular cold drinks between iced tea beverages and slushy drinks  
8 in the form of slushy iced teas.

9 13. Opposer has already considered and is currently considering coming out  
10 with a slushy iced tea beverage to add to its product line.

11 14. Consumers familiar with FRENZY® iced tea who see Frozen Orange  
12 Frenzy for a slushy drink, will believe, mistakenly, that Opposer has naturally extended its  
13 product line to slushy iced teas.

14 15. Given the similarity of the goods at issue, a strong likelihood exists that  
15 Applicant's intended use of the identical word "Frenzy" in conjunction with the merely  
16 descriptive words "frozen" and "orange" will lead consumers to believe Applicant's  
17 beverage is a variant of Opposer's long established FRENZY® brand.

18 16. This likelihood of confusion harms the extensive goodwill and consumer  
19 recognition of Opposer's marks.

20 17. On information and belief, Opposer's date of first use in 1993 is well prior  
21 to Applicant's filing date for its intent-to-use application of November 18, 2002 and  
22 therefore, Applicant is not entitled to a registration for "Frozen Orange Frenzy," given this  
23 likelihood of confusion.

24 18. Therefore, Opposer requests that its Notice of Opposition against Serial No.  
25 78/186079 be sustained.  
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**CERTIFICATE OF MAILING PURSUANT TO 37 C.F.R. §1.10**

Mark: FROZEN ORANGE FRENZY  
Serial No.: 78/186079  
Applicant: Dr Pepper/Seven Up, Inc  
Opposer: China Mist Tea Company  
Type of Filing: Notice of Opposition

I hereby certify that this correspondence is being deposited with the United States Postal Service, Express Mail No. EL645100395US under 37 C.F.R. §1.10, addressed to:

Commissioner for Trademarks  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, VA 22202-3513

Jamie Tuccio  
Jamie Tuccio  
October 14, 2003  
Date

**Quarles & Brady  
Streich Lang LLP**

One Renaissance Square  
Two North Central Avenue  
Phoenix, Arizona 85004-2391  
Tel 602.229.5200  
Fax 602.229.5690  
www.quarles.com

**Attorneys at Law in:**  
Phoenix and Tucson, Arizona  
Naples and Boca Raton, Florida  
Chicago, Illinois (Quarles & Brady LLC)  
Milwaukee and Madison, Wisconsin

Writer's Direct Dial: 602.229.5247  
E-Mail: cmeis@quarles.com

October 14, 2003

**VIA EXPRESS MAIL  
NO. EL645100359US**

Commissioner for Trademarks  
Box TTAB  
2900 Crystal Drive  
Arlington, VA 22202-3513

**RE: Notice of Opposition**

Dear Sir:

On behalf of the opposer, China Mist Tea Company, we enclose the following:

1. Notice of Opposition (in duplicate) against:  
Applicant: Dr. Pepper/Seven Up, Inc.  
Mark: FROZEN ORANGE FRENZY  
Serial No.: 78/186079  
Publication Date: July 22, 2003
2. Check in the amount of \$300.00 that represents the filing fee.

Also enclosed is a Certificate of Receipt postcard that identifies all of the enclosures. Please stamp this postcard "received" and return it to us to provide us with confirmation that you have in fact received the Notice of Opposition package.

The Commissioner is hereby authorized to charge the payment of any additional filing fees associated with this communication or credit any over-payment to the Quarles & Brady LLP Deposit Account No. 17-0055.

If you have any questions regarding this Notice of Opposition, please contact me at the above-referenced address.

Sincerely,



Christine Meis

CMEIS:JT:sc  
Enclosures

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10-14-2003  
U.S. Patent & TMO/TM Mail Rcpt Dt. #78