

ESTTA Tracking number: **ESTTA111136**

Filing date: **11/22/2006**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Dr Pepper/Seven Up, Inc.
Granted to Date of previous extension	01/03/2007
Address	5301 Legacy Drive Plano, TX 75024 UNITED STATES

Attorney information	Barbara A. Solomon Fross Zelnick Lehrman & Zissu, P.C. 866 United Nations Plaza New York, NY 10017 UNITED STATES bsolomon@frosszelnick.com Phone:212-813-5900
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Applicant Information

Application No	76614831	Publication date	09/05/2006
Opposition Filing Date	11/22/2006	Opposition Period Ends	01/03/2007
Applicant	DA BOMB PRODUCTS, INC. 7600 N. 71ST AVE. GLENDALE, AZ 85303 UNITED STATES		

Goods/Services Affected by Opposition

Class 034. All goods and services in the class are opposed, namely: Tobacco products, namely, flavored tobacco, cigars, cigar wraps and cigarettes

Attachments	76614831 notice of opposition.pdf (8 pages)(220468 bytes)
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Signature	/Barbara A. Solomon/
Name	Barbara A. Solomon
Date	11/22/2006

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

In the Matter of Application Serial No. 76/614,831
Mark: ORANGE CRUSH
Filed: October 7, 2004
Published in the *Official Gazette* on September 5, 2006

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DR PEPPER/SEVEN UP, INC.,

Opposer,

- against -

DA BOMB PRODUCTS, INC.

Applicant.

: : : : :
NOTICE OF OPPOSITION
: : : : :
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Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

BOX TTAB - FEE

Opposer, Dr Pepper/Seven Up, Inc. (“Opposer”), a company organized and existing under the laws of the State of Delaware, with its principal place of business at 5301 Legacy Drive, Plano, Texas 75024, believes that it would be damaged by the issuance of a registration of the trademark ORANGE CRUSH, applied for in intent-to-use application Serial No. 76/614,831 for “tobacco products, namely, flavored tobacco, cigars, cigar wraps and cigarettes” in International Class 34 and therefore opposes the same. As grounds for the opposition, Opposer, by its attorneys Fross Zelnick Lehrman & Zissu, P.C., alleges as follows:

1. Since at least as early as 1916 and continuing through the present, Opposer, through its predecessors in interest, has used the marks ORANGE CRUSH and CRUSH (collectively, the “CRUSH Marks”) for beverage products.

2. CRUSH brand beverages are sold in convenience stores, delis, supermarkets, mass merchandisers, wholesale clubs and gas stations throughout the United States. Millions of bottles and cans of CRUSH-branded beverages have been distributed in the United States with sales in the millions of dollars. Opposer and its predecessors-in-interest have been using the CRUSH Marks on beverages continuously for a period commencing long prior to any date on which Applicant can rely up to the current date.

3. Due to the extreme popularity of CRUSH-branded products, there have been significant opportunities for Opposer to expand its use of the CRUSH Marks. In addition to using the CRUSH mark in connection with beverages, Opposer uses the CRUSH mark on candy and confectionery which products are sold nationwide. Further, Opposer has licensed the CRUSH mark for use in connection with flavored lip balm, vitamin C drops and clothing. Opposer's use of the CRUSH Marks on such goods predates the application filing date.

4. Recently, Opposer licensed its CRUSH mark for use in connection with frozen novelties, including ice pops, ice cream cones and related goods.

5. Opposer is the owner by assignments recorded in May, 2006 of numerous U.S. trademark registrations for the CRUSH Marks including, but not limited to:

<i>Mark</i>	<i>Reg'n No.</i>	<i>First Use Date</i>	<i>Class and Goods</i>
CRUSH	2,895,772	October 31, 1999	IC 30: confectionery, namely candy
CRUSH	2,536,979	September, 1999	IC 30: Soft candies
CRUSH and Design	2,418,266	June 1, 1999	IC 32: soft drinks and concentrates for making the same
CRUSH (Stylized)	2,418,265	June 1, 1999	IC 32: soft drinks and concentrates for making the same
ORANGE CRUSH	683,361	June 15, 1916	IC 32: non-alcoholic, maltless orange-flavored beverages and concentrates and compounds for

			making the same
CRUSH	187,791	1915	IC 32: non-alcoholic, maltless beverages and concentrates and compounds for making the same

All of the registrations set forth above are valid, subsisting and in full force and effect, all serve as prima facie evidence of Opposer's exclusive rights in and to the registered marks, all establish that Opposer's rights in the CRUSH Marks are long-prior to any rights on which Applicant can rely, and all serve to place Applicant on notice of Opposer's rights. In addition, U.S. Registration No. 683,361 is incontestable and as such constitutes conclusive evidence of Opposer's exclusive right to use the CRUSH mark on the goods specified therein pursuant to Sections 7 and 33 of the Lanham Act, 15 U.S.C. §1057, 115(b).

6. Through the years of use and advertising of CRUSH and as a result of the expenditure of significant resources by Opposer and its predecessors to promote CRUSH products, Opposer through its predecessors has established strong common law rights in the CRUSH Marks in addition to its rights flowing from its federal registrations. The CRUSH Marks have come to be associated uniquely with Opposer, represent enormous goodwill of Opposer and identify and distinguish goods manufactured, approved of or licensed by Opposer from those of others.

7. As a result of the long use, registration and renown of the CRUSH Marks, Opposer's CRUSH Marks are entitled to an extremely broad scope of protection.

8. Upon information and belief, Applicant is a corporation located and doing business at 7600 N. 71st Avenue, Glendale, Arizona.

9. On or about March 9, 2006, Applicant acquired by assignment intent-to-use application Serial No. 76/614,831 for the mark ORANGE CRUSH for tobacco products, namely,

flavored tobacco, cigars, cigar wraps and cigarettes. The application was filed by Applicant's predecessor in interest on October 7, 2004.

10. As a matter of law, Applicant was on constructive notice of Opposer's rights in the CRUSH Marks, based on Opposer's federal trademark registrations for the same, at the time the application herein opposed was filed. Upon information and belief, as a result of Opposer's and its predecessors' extensive use of the CRUSH Marks for almost 90 years, Applicant was on actual notice of Opposer's or its predecessors' prior rights in and to the CRUSH Marks. Moreover, on August 2, 2005, Opposer contacted Applicant's predecessor objecting to the application to register the mark ORANGE CRUSH based on Opposer's CRUSH Marks. As a result, the current Applicant clearly was on notice of Opposer's prior rights in ORANGE CRUSH and CRUSH and its objection to the opposed application prior to obtaining by assignment the ORANGE CRUSH mark herein opposed.

11. The filing date of the application, and the only date on which Applicant can rely, is decades after the use, registration and acquisition of rights in the CRUSH Marks by Opposer or its predecessors-in-interest. As such, Opposer's rights in its CRUSH Marks are prior and superior to any rights Applicant may claim in the mark ORANGE CRUSH.

12. Applicant's filing date is well after Opposer's ORANGE CRUSH and CRUSH marks were first used nationwide and became famous nationwide.

13. Applicant's mark is identical to Opposer's prior used and registered ORANGE CRUSH trademark and incorporates in its entirety Opposer's various CRUSH marks.

14. Applicant seeks to use the Opposer's identical mark in connection with tobacco products, namely, flavored tobacco, cigars, cigar wraps and cigarettes. Given Opposer's licensing of the ORANGE CRUSH and CRUSH marks for use on a wide variety of goods, from personal care products such as lip balm to Vitamin C drops to clothing and the fact that

consumers recognize that trademarks are licensed for a broad array of goods, consumers are likely to believe that Applicant's goods, like the already existing ORANGE CRUSH lip balm, are licensed products of Opposer or otherwise are scented or flavored with Opposer's ORANGE CRUSH products or otherwise believe that there is some relationship between Applicant and Opposer.

15. The application herein opposed is not limited with respect to channels of trade or consumers for goods to be sold under the ORANGE CRUSH mark. As a matter of law, Applicant's tobacco products under Opposer's ORANGE CRUSH mark will be deemed to be sold to all customers and through all channels of trade that are customary for such products. These channels of trade and customers clearly overlap with those consumers who are familiar with Opposer's CRUSH Marks and through which Opposer or its licensees sell Opposer's CRUSH and ORANGE CRUSH branded products.

16. Given the renown of Opposer's ORANGE CRUSH and CRUSH marks, Applicant's registration and use of a mark that is identical to Opposer's ORANGE CRUSH mark is likely to dilute the distinctive quality of Opposer's marks and lessen Opposer's ability to identify and distinguish its goods from those of others.

17. Registration of Applicant's mark is inconsistent with Opposer's prior rights in its CRUSH and ORANGE CRUSH marks, is inconsistent with Opposer's statutory grant of exclusivity of use of the registered CRUSH Marks, and would destroy Opposer's investment and goodwill in its CRUSH and ORANGE CRUSH marks.

CLAIM FOR RELIEF UNDER SECTION 2(d)

18. Opposer repeats and re-alleges each and every allegation contained in paragraphs 1 through 17 as if fully set forth herein.

19. The CRUSH Marks are associated exclusively with Opposer and its predecessors-in-interest and have been used continuously and registered by Opposer or its predecessors since a date long prior to any date on which Applicant can rely.

20. Applicant's mark ORANGE CRUSH is identical to Opposer's prior registered and prior used ORANGE CRUSH marks and otherwise incorporates Opposer's CRUSH mark. Applicant seeks to use its ORANGE CRUSH mark in connection with goods sold or made available to a broad section of the public, including those who use or are familiar with Opposer's ORANGE CRUSH and CRUSH branded products.

21. Applicant seeks to use its mark on products that have a specific flavoring. Opposer has licensed its ORANGE CRUSH and CRUSH marks to third parties in connection with products that have a specific scent or taste that is associated with Opposer's ORANGE CRUSH products. Thus, Applicant is making the same use of ORANGE CRUSH in connection with its flavored tobacco products as are Opposer's duly authorized licensees.

22. By virtue of the use of the CRUSH Marks by Opposer, its predecessors and its licensees, the goodwill associated with Opposer's CRUSH Marks, the registrations owned by Opposer for the CRUSH Marks, the fame of the CRUSH Marks, the use of the CRUSH Marks on various food and beverage products, the registration by Applicant of ORANGE CRUSH for the goods identified in Application S.N. 76/614,831 is likely to create the erroneous impression that Applicant's goods originate from, come from or are otherwise associated with Opposer or that Applicant's use of ORANGE CRUSH for its flavored products is licensed by, or its products are endorsed or in some way connected with Opposer. Registration of the mark ORANGE CRUSH in connection with the goods set forth in Application S.N. 76/614,831 is likely to cause confusion, cause mistake, or to deceive the public into the belief that the products offered by

Applicant under the mark ORANGE CRUSH come from or are otherwise sponsored by Opposer in violation of Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d).

23. By reason of the foregoing, Opposer is likely to be harmed by registration of Application S.N. 76/614,831 for the mark ORANGE CRUSH.

CLAIM FOR RELIEF UNDER SECTION 2(F)

24. Opposer repeats and re-alleges each and every allegation contained in Paragraphs 1 through 22 as if fully set forth herein.

25. Opposer's ORANGE CRUSH and CRUSH marks are inherently distinctive, have been used for nearly 90 years in connection with goods sold and advertised nationally, have become well-known among consumers, and are the subject of numerous U.S. federal trademark registrations as identified above, including an incontestable federal trademark registration. As a result, the ORANGE CRUSH mark and CRUSH marks are famous marks under the Latham Act.

26. Applicant's application to register ORANGE CRUSH was filed long after Opposer had been using its ORANGE CRUSH and CRUSH marks nationally, long after Opposer had been selling and advertising its product nationally, long after Opposer had generated significant sales of goods under the ORANGE CRUSH and CRUSH marks nationally and long after Opposer's ORANGE CRUSH and CRUSH marks had become widely recognized by the general consuming public as a designation of source of goods of Opposer.

27. Registration of the mark ORANGE CRUSH to Applicant would impair the distinctiveness of the famous ORANGE CRUSH and CRUSH marks by lessening the capacity of Opposer's marks to identify and distinguish goods exclusively from or licensed by Opposer.

28. Registration of the mark ORANGE CRUSH for tobacco products is likely to dilute Opposer's ORANGE CRUSH and CRUSH marks in violation of Section 2(f) of the Latham Act, 15 U.S.C. Section 1052(f).

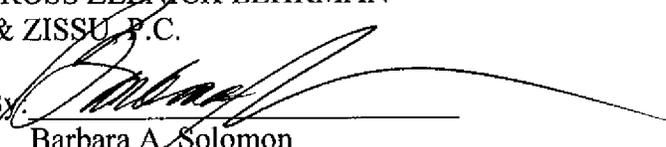
29. By reason of the foregoing, Opposer is likely to be harmed by registration of Application Serial No. 76/614,831 for the mark ORANGE CRUSH

WHEREFORE, it is respectfully requested that this opposition be sustained and that the registration sought by Applicant in Application S.N. 76/614,831 be denied.

Opposer authorizes the opposition fee in the amount of \$300.00 for one class to be debited from Opposer's attorneys' Deposit Account No. 23-0825-0576900.

Dated: New York, New York
November 22, 2006

FROSS ZELNICK LEHRMAN
& ZISSU, P.C.

By: 

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