

ESTTA Tracking number: **ESTTA291214**

Filing date: **06/22/2009**

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

Proceeding	91178927
Party	Plaintiff Royal Crown Company, Inc.
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Date	06/22/2009
Attachments	AMENDED NOTICE OF OPPOSITION (Fully consolidated) (F0474916).PDF (10 pages)(380827 bytes)

CHERRY ZERO as shown in Application Serial No. 77/175,066; PIBB ZERO as shown in Application Serial No. 77/097,644; COKE ZERO ENERGY, as shown in Application Serial No. 76/674,382; COKE ZERO BOLD, as shown in Application Serial No. 76/674,383; VANILLA COKE ZERO, as shown in Application Serial No. 77/176,099; VANILLA COCA-COLA ZERO, as shown in Application Serial No. 77/257,653; POWERADE ZERO, as shown in Application Serial No. 77/309,752; FANTA ZERO, as shown in Application Serial No. 78/620,677; FULL THROTTLE ZERO, as shown in Application Serial No. 77/413,618; and VAULT ZERO, as shown in Application Serial No. 78/698,990, all in international Class 32, and therefore opposes the same. As grounds for its opposition, Opposer, by its attorneys Fross Zelnick Lehrman & Zissu, P.C., alleges as follows:

1. Opposer and its predecessors have been manufacturing and distributing soft drink products for over one century.
2. In 1958, Opposer launched Diet Rite as the first diet soft drink. With this introduction, calorie conscious soft drink lovers were given a product that fit their lifestyle.
3. Opposer and its predecessors have continued to lead in innovations in the diet soft drink category by introducing unique flavor extensions. DIET RITE cola was the first diet drink to be salt/sodium free; was the first sodium-, caffeine- and calorie-free soft drink made with Nutrasweet; and was the first sodium-, caffeine-, calorie- and aspartame-free soft drink made with Splenda.
4. Since at least 2004, Opposer continuously has been using the term “zero” in connection with its diet beverages. The term “zero” is descriptive of characteristics of such products, namely that the products have zero calories.

5. On February 28, 2005, Opposer filed Application Serial No. 78/576,257 to register the mark DIET RITE PURE ZERO for “soft drinks and syrups used in the preparation thereof” in International Class 32 based on a bona fide intent to use the mark in commerce.

6. On August 9, 2005, a non-final office action issued requiring Opposer to disclaim “zero” on the basis that the term is descriptive of one or more features of Opposer’s product namely, that Opposer’s product has zero calories or zero carbohydrates or zero sugar.

7. On March 7, 2005, Opposer filed Application Serial No. 78/581,917 to register the mark PURE ZERO for “soft drinks and syrups and concentrates used in the preparation thereof” in International Class 32 based on an intent to use the mark in commerce.

8. On August 9, 2005, a non-final office action issued in connection with Opposer’s PURE ZERO application requiring Opposer to disclaim the term “zero” because it merely describes one or more features of the beverage product, namely that the product has zero calories or zero carbohydrates or zero sugar.

9. Opposer has disclaimed the term “zero” in both its DIET RITE PURE ZERO and PURE ZERO applications and is not seeking any exclusive rights in the term “zero” when used in connection with beverages that have zero calories, zero sugar and/or zero carbohydrates.

10. Upon information and belief, Opposer is not the only entity that uses or is entitled to use the term “zero” to describe characteristics of soft drinks. Rather, the term “zero” is commonly used in the trade to inform consumers that the beverages at issue have no calories, no carbohydrates and/or no sugar.

11. Upon information and belief, applicant The Coca-Cola Company (“Applicant”) is a Delaware corporation located and doing business at One Coca-Cola Plaza NW, Atlanta, Georgia 30313.

12. Upon information and belief and according to the records of the United States Patent and Trademark Office (“PTO”), Applicant applied to register with the PTO the following marks for beverages, all incorporating the term “zero”:

(a) Application Serial No. 78/580,598, filed March 4, 2005, for the mark COCA-COLA ZERO for “Beverages, namely soft drinks; syrups and concentrates for the making of the same” in International Class 32;

(b) Application Serial No. 78/664,176, filed July 6, 2005, for the mark COKE ZERO for “Beverages, namely soft drinks; syrups and concentrates for the making of the same” in International Class 32;

(c) Application Serial No. 78/316,078, filed October 20, 2003, for the mark SPRITE ZERO for “Beverages, namely carbonated soft drinks; syrups, concentrates and powders for making same” in International Class 32;

(d) Application Serial No. 77/176,279, filed May 9, 2007, for the mark COCA-COLA CHERRY ZERO for “non-alcoholic beverages, namely soft drinks; syrups and concentrates for making non-alcoholic beverages, namely, soft drinks” in International Class 32;

(e) Application Serial No. 77/176,127, filed May 9, 2007, for the mark CHERRY COKE ZERO for “non-alcoholic beverages, namely, soft drinks; concentrates for making non-alcoholic beverages, namely, soft drinks” in International Class 32;

(f) Application Serial No. 77/176,108, filed May 9, 2007, for the mark COCA-COLA VANILLA ZERO for “Non-alcoholic beverages, namely, soft drinks” in International Class 32;

(g) Application Serial No. 77/175,127, filed May 8, 2007, for the mark CHERRY COCA-COLA ZERO for “Non-alcoholic beverages, namely, soft drinks” in International Class 32;

(h) Application Serial No. 77/175,066, filed May 8, 2007, for the mark COKE CHERRY ZERO for “Non-alcoholic beverages, namely, soft drinks” in International Class 32;

(i) Application Serial No. 77/097,644, filed February 2, 2007, for the mark PIBB ZERO for “non-alcoholic beverages, namely soft drinks and concentrates for the making of the same” in International Class 32;

(j) Application Serial No. 76/674,382, filed March 22, 2007, for the mark COKE ZERO ENERGY for “Non-alcoholic beverages, namely, soft drinks and energy drinks; syrups and concentrates for making soft drinks and energy drinks” in International Class 32;

(k) Application Serial No. 76/674,383, filed March 22, 2007, for the mark COKE ZERO BOLD for “Non-alcoholic beverages, namely, soft drinks and energy drinks; syrups and concentrates for making soft drinks and energy drinks” in International Class 32;

(l) Application Serial No. 77/176,099, filed May 9, 2007, for the mark VANILLA COKE ZERO for “Non-alcoholic beverages, namely, soft drinks; syrups and concentrates for making non-alcoholic beverages, namely, soft drinks” in International Class 32;

(m) Application Serial No. 77/257,653, filed August 17, 2007, for the mark VANILLA COCA-COLA ZERO for “Non-alcoholic beverages, namely, soft drinks” in International Class 32;

(n) Application Serial No. 77/309,752, filed October 22, 2007, for the mark POWERADE ZERO for “Non-alcoholic beverages, namely, sports drinks” in International Class 32;

(o) Application Serial No. 78/620,677, filed May 2, 2005, for the mark FANTA ZERO for “Beverages, namely, soft drinks, syrups and concentrates for the making of the same” in International Class 32;

(p) Application Serial No. 77/413,618, filed March 5, 2008, for the mark FULL THROTTLE ZERO for “Non-alcoholic beverages, namely, energy drinks” in International Class 32; and

(q) Application Serial No. 78/698,990, filed August 24, 2005, for the mark VAULT ZERO for “Non-alcoholic beverages, namely, soft drinks and energy drinks; syrups and concentrates for making soft drinks and energy drinks” in International Class 32.

13. Prior to any date on which Applicant can rely, the term “zero” was being used in the beverage industry to describe a characteristic of beverages, namely, beverages with zero calories and/or zero carbohydrates and/or zero sugars.

14. In respect of each of the opposed applications, the PTO issued an office action noting that the term “zero” is merely descriptive of a feature of Applicant’s goods, and therefore requiring Applicant to disclaim the descriptive wording.

15. In respect of each of the opposed applications, Applicant proffered to the PTO various evidence purportedly supporting the claim that the term “zero” had acquired distinctiveness under Section 2(f) of the Lanham Act such that its primary meaning was to identify source, not to describe a characteristic or characteristics of Applicant’s zero calorie beverage products. The PTO apparently accepted this evidence and approved each of the opposed applications for publication prior to registration.

16. If the opposed applications are allowed to mature to registration without a disclaimer of the term “zero,” Applicant will be granted rights in a descriptive or generic term that should be freely available for use throughout the beverage industry, and Opposer will be prejudiced and harmed thereby.

17. Applicant already has attempted to assert its claimed rights in the descriptive or generic term “zero” against Opposer, including by opposing Opposer’s applications to register the DIET RITE PURE ZERO and PURE ZERO marks.

FIRST CLAIM FOR RELIEF UNDER SECTION 2(e)

18. Opposer repeats and realleges paragraphs 1 through 17 above as if fully set forth herein.

19. Applicant’s claim that the marks identified in the opposed applications are registerable without disclaimer of the term “zero” is inconsistent with the use by Opposer and others in the beverage industry to describe fundamental characteristics of their beverage products. In view of such use, the term “zero” cannot be source-indicating as denoting goods emanating substantially exclusively from Applicant.

20. In arguing that the term “zero” has acquired distinctiveness the evidence submitted by Applicant refers repeatedly to the “no-cal,” “no-sugar,” “no-calorie,” or “zero-calorie” attributes of the products offered under each of marks applied for in the opposed applications, thereby showing that as used by Applicant the term “zero” is merely descriptive.

21. Registration to Applicant of the opposed applications without a disclaimer of the term “zero” will harm Opposer by giving Applicant presumptive exclusivity in and to a term widely in use by others, including the Opposer, thereby impairing Opposer’s ability to use this common term in connection with beverages.

22. By reason of the foregoing, Opposer is likely to be harmed by registration of the opposed applications.

SECOND CLAIM FOR RELIEF UNDER SECTION 2 AND/OR SECTION 2(e)

23. Opposer repeats and realleges paragraphs 1 through 22 above as if fully set forth herein.

24. The term “zero” or number zero (0) names distinctive characteristics and/or the most important attributes of certain beverage products, including all or some of the beverage products for which the opposed marks are sought to be registered and for which the marks are or are intended to be used.

25. Because the term “zero” or number (0) names distinctive characteristics and/or the most important attributes of certain beverage products, it is generic when applied to such goods and cannot function to indicate source.

26. Registration of the opposed marks without a disclaimer of the generic term “zero” is contrary to Section 2 of the Lanham Act, which permits registration only to marks capable of distinguishing the goods of the applicant from those of others, and/or Section 2(e) of the Lanham Act, which prohibits registration of merely descriptive marks.

27. Because “zero” is generic and unregistrable, Applicant cannot be permitted to register the opposed marks without disclaiming the term “zero.”

28. Registration to Applicant of the opposed marks without a disclaimer of the term “zero” would harm Opposer by giving Applicant presumptive exclusivity in and the right to usurp a generic term, impairing Opposer’s ability to use this common term in connection with its own beverage products.

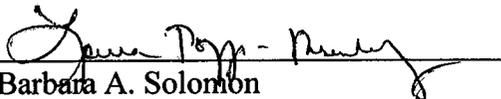
29. By reason of the foregoing, Opposer is likely to be harmed by registration of the opposed marks.

WHEREFORE, it is respectfully requested that Opposer’s opposition be sustained and that the registrations sought by Applicant for COCA-COLA ZERO, as shown in Application Serial No. 78/580,598; COKE ZERO, as shown in Application Serial No. 78/664,176; SPRITE ZERO, as shown in Application Serial No. 78/316,078; COCA-COLA CHERRY ZERO as shown in

Application Serial No. 77/176,279; CHERRY COKE ZERO as shown in Application Serial No. 77/176,127; COCA-COLA VANILLA ZERO as shown in Application Serial No. 77/176,108; CHERRY COCA-COLA ZERO as shown in Application Serial No. 77/175,127; COKE CHERRY ZERO as shown in Application Serial No. 77/175,066; PIBB ZERO as shown in Application Serial No. 77/097,644; COKE ZERO ENERGY, as shown in Application Serial No. 76/674,382; COKE ZERO BOLD, as shown in Application Serial No. 76/674,383; VANILLA COKE ZERO, as shown in Application Serial No. 77/176,099; VANILLA COCA-COLA ZERO, as shown in Application Serial No. 77/257,653; POWERADE ZERO, as shown in Application Serial No. 77/309,752; FANTA ZERO, as shown in Application Serial No. 78/620,677; FULL THROTTLE ZERO, as shown in Application Serial No. 77/413,618; and VAULT ZERO, as shown in Application Serial No. 78/698,990, all be denied absent the entry of a disclaimer of the term “zero.”

Dated: New York, New York
June 22, 2009

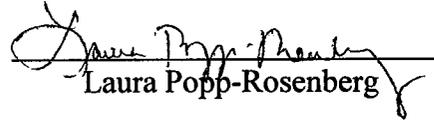
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CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of **AMENDED CONSOLIDATED NOTICE OF OPPOSITION** to be deposited with the United States Postal Service as First Class mail, postage prepaid, in an envelope addressed to counsel for The Coca-Cola Company, Bruce Baber, Esq., King & Spalding LLP, 1185 Avenue of the Americas, New York, NY 10036-4003, this 22nd day of June, 2009.


Laura Popp-Rosenberg