

ESTTA Tracking number: **ESTTA238773**

Filing date: **09/24/2008**

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	Royal Crown Company, Inc.
Granted to Date of previous extension	09/24/2008
Address	5301 Legacy Drive Plano, TX 75024 UNITED STATES

Attorney information	Laura Popp-Rosenberg Fross Zelnick Lehrman & Zissu, P.C. 866 United Nations Plaza New York, NY 10017 UNITED STATES lpopp-rosenberg@fzlj.com,bsolomon@fzlj.com Phone:212-813-5900
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Applicant Information

Application No	77257653	Publication date	05/27/2008
Opposition Filing Date	09/24/2008	Opposition Period Ends	09/24/2008
Applicant	The Coca-Cola Company One Coca-Cola Plaza Atlanta, GA 30313 UNITED STATES		

Goods/Services Affected by Opposition

Class 032. All goods and services in the class are opposed, namely: Non-alcoholic beverages, namely, soft drinks

Applicant Information

Application No	78620677	Publication date	06/10/2008
Opposition Filing Date	09/24/2008	Opposition Period Ends	
Applicant	The Coca-Cola Company One Coca-Coca Plaza Atlanta, GA 30313 UNITED STATES		

Goods/Services Affected by Opposition

Class 032. All goods and services in the class are opposed, namely: Beverages, namely, soft drinks, syrups and

concentrates for the making of the same

Applicant Information

Application No	77309752	Publication date	09/09/2008
Opposition Filing Date	09/24/2008	Opposition Period Ends	10/09/2008
Applicant	The Coca-Cola Company One Coca-Cola Plaza Atlanta, GA 30313 UNITED STATES		

Goods/Services Affected by Opposition

Class 032. First Use: 2008/05/00 First Use In Commerce: 2008/05/00 All goods and services in the class are opposed, namely: Non-alcoholic beverages, namely, sports drinks

Grounds for Opposition

The mark is merely descriptive	Trademark Act section 2(e)(1)
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Attachments	Consolidated Notice of Opposition (Fanta, Powerade, Vanilla) (F0351824).PDF (6 pages)(230462 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Laura Popp-Rosenberg/
Name	Laura Popp-Rosenberg
Date	09/24/2008

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

In the Matter of:

Application S.N. 77/257,653 (VANILLA COCA-COLA ZERO)
Published in the *Official Gazette* on May 27, 2008

-and-

Application S.N. 78/620,677 (FANTA ZERO)
Published in the *Official Gazette* on June 10, 2008

-and-

Application S.N. 77/309,752 (POWERADE ZERO)
Published in the *Official Gazette* on September 9, 2008

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ROYAL CROWN COMPANY, INC., :
 :
 Opposer, :
 : Consolidated Opposition No. _____
 - against - :
 :
 THE COCA-COLA COMPANY, :
 :
 Applicant. :
-----X

CONSOLIDATED NOTICE OF OPPOSITION

Royal Crown Company, Inc., a Delaware corporation located and doing business at 5301 Legacy Drive, Plano, Texas 75024 (“Opposer”), believes that it will be damaged by the issuance of registrations for the marks VANILLA COCA-COLA ZERO as shown in Application Serial No. 77/257,653; FANTA ZERO as shown in Application Serial No. 78/620,677; and POWERADE ZERO as shown in Application Serial No. 77/309,752, all for beverages 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 2003, Opposer continuously has been using the term “zero” in connection with its diet beverages. The term “zero” is descriptive of characteristics of such products.

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”, on an intent-to-use basis:

- (a) Application Serial No. 77/257,653, filed August 17, 2007, for the mark VANILLA COCA-COLA ZERO for “[n]on-alcoholic beverages, namely soft drinks” in International Class 32;
- (b) Application Serial No. 78/620,677, filed May 2, 2005, for the mark FANTA ZERO for “[b]everages, namely, soft drinks, syrups and concentrates for the making of the same” in International Class 32; and
- (c) Application Serial No. 77/309,752, filed October 22, 2007, for the mark POWERADE ZERO for “[n]on-alcoholic beverages, namely, sports drinks” in International Class 32

(collectively, the “Opposed Applications”).

13. At the time Applicant filed the Opposed Applications, the term “zero” was being used in the beverage industry to describe a characteristic of beverages.

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, namely the calorie and/or carbohydrate and/or calories from fat content 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 characteristics of Applicant’s beverages sold or to be sold under the marks applied for in the Opposed Applications. 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 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 term “zero” against Opposer, including by filing Notices of Opposition against Opposer’s applications to register the DIET RITE PURE ZERO and PURE ZERO marks.

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.

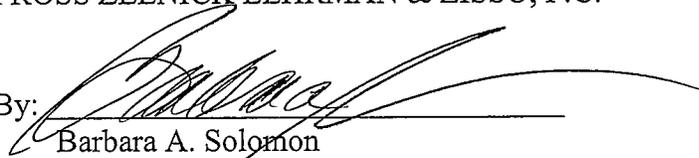
20. Registration to Applicant of the opposed applications without a disclaimer of the term "zero" will harm Opposer by giving Applicant presumptive exclusivity in and to a term widely in use by others, including the Opposer, thereby impairing Opposer's ability to use this common term in connection with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

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

WHEREFORE, it is respectfully requested that Opposer's opposition be sustained and that the registrations sought by Applicant in VANILLA COCA-COLA ZERO as shown in Application Serial No. 77/257,653; FANTA ZERO as shown in Application Serial No. 78/620,677; and POWERADE ZERO as shown in Application Serial No. 77/309,752, all be denied absent the entry of a disclaimer of the descriptive term "zero."

Dated: New York, New York
September 24, 2008

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: 

Barbara A. Solomon
Laura Popp-Rosenberg
866 United Nations Plaza
New York, New York 10017
(212) 813-5900

Attorneys for Opposer Royal Crown Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Notice of Opposition to be sent this 24th day of September 2008 by prepaid first-class mail to Applicant's correspondents of record as follows:

Paula Guibault, Esq.
The Coca-Cola Company
One Coca-Cola Plaza
Atlanta, GA 30313

- and -

Caroline K. Pearlstein, Esq.
The Coca-Cola Company
1 Coca-Cola Plz NW
Atlanta, GA 30313-2499

- and -

Kamau King, Esq.
The Coca-Cola Company
1 Coca-Cola Plz NW
Atlanta, GA 30313-2499

with a courtesy copy to

Bruce Baber, Esq.
King & Spalding LLP
1185 Avenue of the Americas
New York, NY 10036-4003.


Elaine Chambers