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

Proceeding	92055569
Party	Plaintiff Ecuabeverage Corporation
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**In the Matter of: Trademark Registration No. 4,120,917**

**For the Trademark: "TROPICAL (AND DESIGN)" (International Class 32)**

**Registered: April 3, 2012**

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<b>ECUABEVERAGE CORPORATION,</b>	:	
	:	<b>Cancellation No. 92055569</b>
<b>Petitioner,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>BALORU S.A.,</b>	:	
	:	
<b>Respondent.</b>	:	

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**PETITIONER ECUABEVERAGE CORPORATION'S**  
**MOTION FOR SUMMARY JUDGMENT, PURSUANT TO FED.R.CIV.P. 56**

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*Certificate of Service, dated June 20, 2012*

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## **I. Petitioner Ecuabeverage Corporation's Motion for Summary Judgment**

Petitioner Ecuabeverage Corporation ("Ecuabeverage") served its *Initial Disclosures*, pursuant to Fed.R.Civ.P. 26(a)(1), upon Respondent Baloru S.A. ("Baloru") on June 5, 2012, and now respectfully moves for the entry of summary judgment under Fed.R.Civ.P. 56 on the ground that there is no material issue of fact in dispute and that Ecuabeverage is entitled to judgment, as a matter of law, and *either*:

(1) the cancellation of U.S. Trademark Registration No. 4,120,917, on the ground that Baloru lacks an exclusive right to use "TROPICAL" in connection with the marketing and sale of beverages, inasmuch as Baloru's "related company" in the United States, Brooklyn Bottling of Milton, New York, Inc. ("Brooklyn Bottling"), stated under oath that Ecuabeverage has the right to use "TROPICAL" in the commercialization of its competing beverage goods in the United States, and because Baloru as the successor-in-interest, by assignment, of the registered trademark "TROPICAL PURO SABOR NACIONAL" U.S. Trademark Registration No. 1,474,395, previously owned and litigated by Brooklyn Bottling against Ecuabeverage, and at the time of Brooklyn Bottling's ownership, Brooklyn Bottling's president declared that "Brooklyn Bottling is not claiming that Defendant [Ecuabeverage] cannot use the term 'tropical' to market its product."; *or*,

(b) Baloru, in lieu of the cancellation of U.S. Trademark Registration No. 4,120,917, be required to amend U.S. Trademark Registration No. 4,120,917 to enter a disclaimer under 15 U.S.C. §1056 of the term "TROPICAL," apart from the mark, as shown, because Baloru can claim no exclusive right to "TROPICAL" as a trademark in

the marketing and sale of beverages in the United States.

## **II. Statement of Material Facts to Which No Genuine Dispute Exists**

Ecuabeverage respectfully submits that no genuine dispute exists with respect to the following material facts in support of Ecuabeverage's *Motion for Summary Judgment*, which is based upon evidence acquired in litigation between Ecuabeverage and Baloru's "related company," Brooklyn Bottling of Milton, New York, Inc., or evidence otherwise available as a matter of public record:

### **Baloru Cannot Claim An Exclusive Right to "TROPICAL" for Beverage Goods**

1. Baloru, S.A. is the owner of U.S. Trademark Registration No. 4,120,917, issued April 3, 2012, for the trademark "TROPICAL (AND DESIGN)" for goods recited as "SOFT DRINKS, IN CLASS 32." (*Exhibit 1*)

2. Baloru is a manufacturer of concentrates used for making soft drinks that are sold in the United States, as explained by Panagiota Betty Tufariello, Esq., attorney for Brooklyn Bottling of Milton, New York, Inc., at a hearing conducted by the U.S. District Court for the Southern District of New York on March 5, 2012, in the civil action entitled *Brooklyn Bottling of Milton, New York, Inc. v. Ecuabeverage Corporation*, Civil Action No. 07-cv-08483 (AKH). (*Exhibit 2: Transcript of Hearing Conducted on March 5, 2012, at Page 8, lines 8-12*)

3. "Baloru SA is the manufacturer of the concentrates that are coming into the United States and used by Brooklyn Bottling for purposes of formulating soft drinks, a number of soft drinks, one of which is the soft drink that bears the mark 'Tropical Puro Sabor Nacional.'" (*Exhibit 2: Transcript of Hearing Conducted on March 5, 2012, at Page*

8, lines 8-12)

4. “Baloru SA manufactures the concentrates. Royal Signature makes the arrangements for the purchasing of the concentrates by US distributors and imports those concentrates into the United States, and then Royal Signature in turn sells them or provides them to its distributors, one of which is Brooklyn Bottling.” (*Exhibit 2: Transcript of Hearing Conducted on March 5, 2012, at Page 8, lines 17-22*)

5. Brooklyn Bottling acts as a distributor of soft drinks and other beverages in the eastern portion of the United States for Baloru by distributing in the United States soft drinks made from concentrate, or syrup, supplied by Baloru for making the soft drinks that are distributed by Brooklyn Bottling. (*Exhibit 2: Transcript of Hearing Conducted on March 5, 2012, at Page 8, line 17 – Page 9, line 2*)

6. Brooklyn Bottling is a “related company” of Baloru, §5 of the Trademark Act, 15 U.S.C. §1055, and Brooklyn Bottling’s use of the trademark of Trademark Registration No. 4,120,917, issued April 3, 2012, inures to the benefit of Baloru. (*Exhibit 2: Transcript of Hearing Conducted on March 5, 2012, at Page 8, lines 8-12; Page 8, line 17 – Page 9, line 2*)

7. In the civil litigation of *Brooklyn Bottling of Milton, New York, Inc. v. Ecuabeverage Corporation*, Civil Action No. 07-cv-08483 (AKH), Brooklyn Bottling has alleged that Baloru possesses a “family of marks” based upon the term “TROPICAL” for the relevant goods marketed in the United States by both Ecuabeverage and Baloru’s “related company,” Brooklyn Bottling. (*Exhibit 3*)

8. On August 23, 2011, Brooklyn Bottling of Milton, New York, Inc. wrote to the Court in the civil litigation of Brooklyn Bottling of Milton, New York, Inc. v. Ecuabeverage Corporation, Civil Action No. 07-cv-08483 (AKH), that:

“Baloru acquired [U.S. Trademark Registration No. 1,474,395 for the mark ‘TROPICAL PURO SABOR NACIONAL’] for the purpose of consolidating its rights to its international family of TROPICAL trademarks, which are used world wide, in connection with soft drinks, and flavored syrups for the preparation and manufacturing of soft drinks, directed to the Ecuadorian community all over the world. Such family of TROPICAL trademarks includes but is not limited to [U.S. Trademark Application Serial No. 85/336,274, now U.S. Trademark Registration No. 4,120,917, for the color design mark TROPICAL].”

*Exhibit 3.*

9. Brooklyn Bottling of Milton, New York, Inc. informed the Court in the civil litigation of Brooklyn Bottling of Milton, New York, Inc. v. Ecuabeverage Corporation, Civil Action No. 07-cv-08483 (AKH), that U.S. Trademark Registration No. 1,474,395 for the mark “TROPICAL PURO SABOR NACIONAL” and U.S. Trademark Application Serial No. 85/336,274 (since issued as U.S. Trademark Registration No. 4,120,917) for the mark “TROPICAL (AND DESIGN)” are both part of Baloru’s alleged “international family of TROPICAL trademarks.” (*Exhibit 3*)

10. Brooklyn Bottling of Milton, New York, Inc. sued Ecuabeverage in the U.S. District Court for the Southern District of New York claiming that Ecuabeverage infringed the registered trademark “TROPICAL PURO SABOR NACIONAL,” U.S. Trademark Registration No. 1,474,395. (*Exhibit 4*)

11. Eric Miller, president of Brooklyn Bottling of Milton, New York, Inc., filed an “Affidavit” on December 22, 2009, in the civil action of Brooklyn Bottling of Milton,

*New York, Inc. v. Ecuabeverage Corporation*, Civil Action No. 07-cv-08483 (AKH), in which Eric Miller testified (at ¶ 8) that: “Brooklyn Bottling is not claiming that Defendant [Ecuabeverage] cannot use the term ‘tropical’ to market its product.” (*Exhibit 5*)

12. On December 22, 2009, when Brooklyn Bottling’s president, Eric Miller, filed his Affidavit, through counsel, affirming that “Brooklyn Bottling is not claiming that Defendant [Ecuabeverage] cannot use the term ‘tropical’ to market its product,” Brooklyn Bottling was the exclusive owner of registered trademark “TROPICAL PURO SABOR NACIONAL” of U.S. Trademark Registration No. 1,474,395. (*Exhibit 6*)

13. Baloru S.A. acquired ownership of the registered trademark “TROPICAL PURO SABOR NACIONAL,” U.S. Trademark Registration No. 1,474,395, by assignment from Brooklyn Bottling giving Baloru S.A. “all right, title, and interest” in and to the registered trademark “TROPICAL PURO SABOR NACIONAL,” which assignment was recorded in the U.S. Patent and Trademark Office on May 27, 2011, making Baloru a successor-in-interest to the rights previously owned by Brooklyn Botting. (*Exhibit 7*)

### **III. Argument**

#### **A. Standard for Granting Summary Judgment**

Fed.R.Civ.P. 56(c) provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party seeking summary judgment “bears the initial responsibility of informing the district court of the basis for its motion,” and identifying

which materials “it believes demonstrates the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, *supra*, 477 U.S. at 323, 106 S.Ct. at 323. Once a motion for summary judgment is properly made, the burden shifts to the nonmoving party, which “must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, *supra*, 477 U.S. at 247.

*B. Because Baloru Cannot Claim An Exclusive Right to the Term “TROPICAL,” U.S. Trademark Registration No. 4,120,917 for “TROPICAL (AND DESIGN)” Should Be Cancelled for Failure to Include a Disclaimer of “TROPICAL”*

Cancellation is appropriate where an unregistrable component of a composite mark has not been disclaimed. *See, Kellogg Co. Pack’Em Enterprises Inc.*, 14 USPQ2d 1545, 1549 (T.T.A.B. 1990). Brooklyn Bottling of Milton, New York, Inc. is a distributor of beverage goods in the eastern portion of the U.S. made from concentrate supplied by Baloru with usages by Brooklyn Bottling of Baloru’s “family of TROPICAL trademarks” inuring to the benefit of Baloru, as Brooklyn Bottling is a “related” company of Baloru as defined by 15 U.S.C. §1055. (*Statement of Material Facts Nos. 2-6*) U.S. Trademark Registration No. 1,474,395 for the trademark “TROPICAL PURO SABOR NACIONAL” and U.S. Trademark Registration No. 4,120,917 for the mark “TROPICAL (AND DESIGN)” are both part of Baloru’s alleged “family of TROPICAL trademarks.” (*Statement of Material Facts Nos. 8 and 9*)

Brooklyn Bottling brought a civil action against Ecuabeverage alleging trademark infringement of the “TROPICAL PURO SABOR NACIONAL” registered trademark

and, as is the case with the “TROPICAL (AND DESIGN)” mark of Trademark Registration No. 4,120,917 which Ecuabeverage has petitioned to cancel, the “TROPICAL PURO SABOR NACIONAL” trademark is a part of Baloru’s alleged “family of TROPICAL trademarks.” (*Statement of Material Facts Nos. 7-10*) During the civil action, and at a point in time when Brooklyn Bottling exclusively owned all rights to the “TROPICAL PURO SABOR NACIONAL” trademark, Brooklyn Bottling’s president, Eric Miller, testified in a sworn Affidavit that “Brooklyn Bottling is not claiming that Defendant [Ecuabeverage] cannot use the term ‘tropical’ to market its product.” (*Statement of Material Facts No. 11*)

Ecuabeverage, which is most certainly not a “related” company of Baloru, has been acknowledged by Baloru’s “related” company and predecessor-in-interest, Brooklyn Bottling, of the registered trademark, “TROPICAL PURO SABOR NACIONAL,” to have the right to “use the term ‘tropical’ to market its product.” At the time Brooklyn Bottling’s president, Eric Miller, stated in an “Affidavit” filed in federal district court, Brooklyn Bottling was the exclusive owner of the “TROPICAL PURO SABOR NACIONAL” registered trademark. (*Statement of Material Facts Nos. 11 and 12*)

On or about May 27, 2011, Baloru S.A. acquired an assignment from Brooklyn Bottling giving Baloru “all right, title, and interest” in and to the registered trademark “TROPICAL PURO SABOR NACIONAL.” (*Statement of Material Facts No. 13*) As the assignee of the “TROPICAL PURO SABOR NACIONAL” registered trademark, Baloru “stands in the shoes” of the assignor and acquires the same rights as the assignor possessed and is chargeable with the knowledge, duties and liabilities possessed by its

assignor. *Hyosung America, Inc. v. Sumagh Textile Co., Ltd.*, 934 F. Supp. 570, 574-576 (S.D.N.Y. 1996) (noting that “the knowledge of an assignor must be attributed to its assignee”), *aff'd in part, rev'd in part on other grounds*, 137 F.3d 75 (2d Cir. 1998).

Balour therefore legally acquired all rights, title and interest in, and to, the “TROPICAL PURO SABOR NACIONAL” registered trademark with the liability that its assignor and “related company,” Brooklyn Bottling, assured Ecuabeverage that Ecuabeverage could use the term “tropical” to market its competing goods. (*Statement of Material Facts Nos. 11-13*) This “assurance” to Ecuabeverage is now legally binding against Baloru. Simply put, because Ecuabeverage has been acknowledged to have to right to use “tropical” in connection with the marketing of its competing beverage goods, Baloru, by logical extension, cannot claim exclusivity to use of “tropical” as an indicia of the source of its goods, as marketed in the U.S. by its distributor, Brooklyn Bottling.

Where a trademark owner can claim no exclusivity to a component of a composite trademark, that component is unregistrable and must properly be disclaimed. *See, In re Slokevage*, 441 F.3d 957, 962, 78 USPQ2d 1395, 1399 (Fed. Cir. 2006) (“The disclaimer requirement ‘provides the benefits of the Lanham Act to applicants for composite marks with unregistrable components’ and, at the same time, ‘prevents an applicant from claiming exclusive rights to disclaimed portions apart from composite marks.’”), *citing Dena Corp. v. Belvedere International Inc.*, 950 F.2d 1555, 1560, 21 USPQ2d 1047, 1051 (Fed. Cir. 1991) (“A disclaimer shows that the applicant enjoys no exclusive rights to the disclaimed symbols apart from the composite mark.”); *United States Steel Corporation v. Vasco Metals Corporation*, 394 F.2d 1009, 1012, 157 USPQ 627, 629 (C.C.P.A. 1968),

citing *In re Hercules Fasteners, Inc.*, 203 F.2d 753, 757, 97 USPQ 355, 357 (C.C.P.A. 1953) (“The purpose of a disclaimer is to show that the applicant is not making claim to the exclusive appropriation of such matter except in the precise relation and association in which it appeared in the drawing and description.”).

Brooklyn Bottling’s president, having affirmed in a sworn affidavit filed with the federal district court in litigation attesting to Ecuabeverage’s right to use “tropical” in the marketing of its competing beverage goods, and Baloru having obtained an assignment from Brooklyn Bottling which carries with it Ecuabeverage’s legal right to use “tropical” for its competing goods, which knowledge Baloru is legally and conclusively presumed to possess, Baloru cannot claim any exclusivity to the term “tropical” and a disclaimer of this term is therefore legally mandated and should have been required as a prerequisite for registration of the “TROPICAL (AND DESIGN)” trademark of U.S. Trademark Registration No. 4,120,917. Inasmuch as Baloru’s trademark registration was issued without the legally appropriate and required disclaimer, cancellation of Trademark Registration No. 4,120,917 is legally mandated or, in the alternative, a requirement should be imposed by the Board demanding that Baloru amend U.S. Trademark Registration No. 4,120,917, by a date certain, to now enter a disclaimer of “TROPICAL” as a condition for retaining its registration for its “TROPICAL (AND DESIGN)” mark.

#### **IV. Conclusion**

Accordingly, Respondent Baloru, S.A., can claim no exclusive right to the term “tropical” in connection with the marketing of beverage goods in the United States and, because Baloru, S.A.’s registered trademark for “TROPICAL (AND DESIGN),” U.S.

Trademark Registration No. 4,120,917, fails to include a disclaimer of the term “tropical” apart from the mark, as shown, the summary judgment motion brought by Petitioner Ecuabeverage Corporation should be granted and either: (1) U.S. Trademark Registration No. 4,120,917 should be cancelled for failure to disclaim “TROPICAL”; or (2) Baloru, S.A. should be required to amend U.S. Trademark Registration No. 4,120,917 by a date certain to include a disclaimer of “TROPICAL” as a condition for maintaining its trademark registration.

Respectfully submitted

ECUABEVERAGE CORPORATION

Dated: June 20, 2012  
Huntington, New York

By   
Edwin D. Schindler  
*Attorney for Petitioner*  
Reg. No. 31,459

**EXHIBIT 1**

# United States of America

United States Patent and Trademark Office



**Reg. No. 4,120,917**

**Registered Apr. 3, 2012**

**Int. Cl.: 32**

**TRADEMARK**

**PRINCIPAL REGISTER**

BALORU S.A. (ECUADOR SOCIEDAD ANONIMA (SA))  
KM. 16 1/2 VIA DAULE  
GUAYAQUIL, ECUADOR

FOR: SOFT DRINKS, IN CLASS 32 (U.S. CLS. 45, 46 AND 48).

FIRST USE 0-0-1952; IN COMMERCE 0-0-1989.

OWNER OF U.S. REG. NOS. 3,927,391, 3,946,678, AND 3,949,746.

THE COLOR(S) RED, YELLOW AND BLUE IS/ARE CLAIMED AS A FEATURE OF THE MARK.

THE MARK CONSISTS OF THE WORD "TROPICAL" IN BLUE SCRIPT APPEARING OVER A YELLOW OVAL BACKGROUND WITH A RED OUTLINE. THE COLOR BLUE APPEARS IN THE WORD "TROPICAL", THE COLOR YELLOW APPEARS IN THE OVAL DESIGN AND COLOR RED APPEARS IN THE OUTLINE OF THE PERIMETER OF THE OVAL DESIGN.

SER. NO. 85-336,274, FILED 6-2-2011.

COLLEEN KEARNEY, EXAMINING ATTORNEY



*David J. Kyffers*

Director of the United States Patent and Trademark Office

**EXHIBIT 2**

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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK  
2 -----x

3 BROOKLYN BOTTLING OF MILTON,  
3 NEW YORK, INC.,

4  
4 Plaintiff,

5 v. 07 CV 8483(AKH)

6 ECUABEVERAGE, CORP.,

7  
7 Defendant.

8 -----x

9  
10 March 5, 2012

11  
11  
12 Before:

13 HON. ALVIN K. HELLERSTEIN,  
13  
14 District Judge

15 APPEARANCES

16 LAW OFFICES OF P.B. TUFARIELLO, PC

16 Attorneys for Plaintiff

17 BY: PANAGIOTA BETTY TUFARIELLO

17  
18 EDWIN D. SCHINDLER

18 Attorney for Defendant

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1 (In open court)

2 THE DEPUTY CLERK: Appearing for the plaintiff today,  
3 your Honor, is Betty Tufariello. Representing the defendant,  
4 Mr. Edwin Schindler.

5 Please be seated, counsel.

6 THE COURT: I think the first thing I'd like to do,  
7 Ms. Tufariello, is for you to explain the assignments.

8 What we have here is a case that was begun in 2007.  
9 As I recall, all discovery was completed in April of 2010. So  
10 these are now motions made after discovery.

11 No trial date has yet been set. Nothing has happened,  
12 as far as I understand, in the case for about a year. And we  
13 have two motions before me, one by the defendant to dismiss for  
14 lack of prosecution and for sanctions, and one by the plaintiff  
15 to add an allegedly indispensable party, the present owner, I  
16 guess, of the trademark.

17 The trademark number 1,474,395 issued by the United  
18 States Patent and Trademark Office for a first use April 19,  
19 1966 in commerce is Tropical Puro Sabor Nacional, the words  
20 tropical having been disclaimed as a trademark in itself.  
21 Also, there is a disclaimer to the use of Puro Sabor by itself.  
22 Puro sabor is Spanish for pure flavor. And Nacional can't be a  
23 trademark either. So each element of this trademark is  
24 disclaimed in its own right. And you have the trademark for  
25 the entire phrase in English translated as tropical true

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1 national flavor.

2 The trademark was issued to Banco del Pacifico, SA, a  
3 corporation incorporated in Ecuador.

4 I am not clear, I have to say, on the various  
5 assignments, one to a company named Royal and now to a company  
6 named Baloru. And I'll ask Ms. Tufariello to clear that up.

7 MS. TUFARIELLO: Thank you, your Honor. And good  
8 afternoon.

9 THE COURT: Good afternoon.

10 MS. TUFARIELLO: Indeed, when you look at the way this  
11 trademark has gone back and forth, it is confusing.

12 THE COURT: Answer my question, please. Explain the  
13 assignments. Who is the assignee? Who is the assignor?  
14 What's the situation?

15 MS. TUFARIELLO: Today at this moment presently, the  
16 assignor is Brooklyn Bottling. The assignee is Baloru SA.

17 THE COURT: B-A-L-O-R?

18 MS. TUFARIELLO: U, space --

19 THE COURT: A corporation incorporated in Ecuador?

20 MS. TUFARIELLO: Yes, your Honor.

21 THE COURT: With any presence in New York?

22 MS. TUFARIELLO: Not currently, your Honor.

23 THE COURT: Okay. And when was that assignment made?

24 MS. TUFARIELLO: The assignment, as is indicated in my  
25 papers, I believe, was in May of 2011.

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1 THE COURT: Now, previously there had been another  
2 assignment, a company with the name Royal. Tell me about that.

3 MS. TUFARIELLO: Previously to that, actually, there  
4 was an assignment from Royal to Brooklyn Bottling, not from  
5 Tuba Royal. When these proceedings were brought to this Court  
6 initially, the trademark belonged to Royal Signature.

7 THE COURT: The Royal Signature was a company?

8 MS. TUFARIELLO: It is a company --

9 THE COURT: Corporation?

10 MS. TUFARIELLO: Yes.

11 THE COURT: Incorporated where?

12 MS. TUFARIELLO: It's in Panama.

13 THE COURT: Panamanian company?

14 MS. TUFARIELLO: Yes, your Honor.

15 THE COURT: And any presence in New York?

16 MS. TUFARIELLO: We have an agent and, in fact,  
17 Mr. Carlos Arias, who is here with me today, is the agent and  
18 representative of Royal Signature in the United States.

19 THE COURT: And Royal Signature assigned the trademark  
20 to Brooklyn Bottling?

21 MS. TUFARIELLO: Yes, your Honor. But that assignment  
22 was contingent on certain things happening. And that is, too,  
23 in fact, of record in this court, by virtue of one of the  
24 exhibits that was put by Mr. Schindler, my adversary, in reply.

25 THE COURT: Let me find the reply. All I have is a

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1 brief.

2 MS. TUFARIELLO: Actually, your Honor, it is document  
3 130-3 on the court docket.

4 THE COURT: Security interest?

5 MS. TUFARIELLO: Yes, your Honor. It's not really a  
6 security interest. It was an assignment, and it was contingent  
7 on certain events happening.

8 THE COURT: So then how is Brooklyn Bottling a real  
9 party in interest?

10 MS. TUFARIELLO: They had an assignment, and the  
11 understanding was --

12 THE COURT: But it's contingent. Contingent means  
13 subject to conditions precedent.

14 MS. TUFARIELLO: It was an outright assignment, except  
15 that in exchange for that assignment, certain things had to  
16 happen. Consideration had to be paid, had to be made for that  
17 assignment.

18 When the assignment was actually filed showing the  
19 transfer of the trademark from Royal Signature to Brooklyn  
20 Bottling, part of the consideration had been fulfilled, but  
21 part of it was still in the process. But the assignment was  
22 filed so that Brooklyn Bottling could be given the opportunity  
23 to continue with the prosecution of this case.

24 Subsequently, after I was retained and I reviewed the  
25 documents, we came to recognize that the second item in the

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1 consideration, which was the security of \$2 million, if the  
2 Court takes a moment to look at that assignment, which is 130-3  
3 on the court record --

4 THE COURT: Is it part of the record?

5 THE LAW CLERK: It's in the declaration.

6 (Pause)

7 THE COURT: Is it Exhibit 3 to Mr. Schindler's  
8 affirmation?

9 MS. TUFARIELLO: I believe so, your Honor. I believe  
10 so. And if I may direct the Court's attention to the first  
11 page of the assignment, which is identified on the court docket  
12 as page three of seven, paragraph D --

13 THE COURT: I have page one of seven, page two of  
14 seven, I have page three of seven, all right.

15 MS. TUFARIELLO: Yes, your Honor.

16 So if I may direct your attention, your Honor, to  
17 paragraph D, it says notwithstanding anything to the contrary,  
18 the amount of the collateral secured by this agreement will be  
19 \$2 million. And if the Court takes the time to read the rest  
20 of this assignment, this agreement, the Court will see that in  
21 addition -- that in exchange for this assignment, a  
22 collateral -- a lien would be put on Brooklyn Bottling's assets  
23 of \$2 million. That lien was never -- it never occurred. It  
24 never happened.

25 THE COURT: So does this mean that \$2 million was

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1 advanced by Royal to Brooklyn?

2 MS. TUFARIELLO: No. The other way around. Brooklyn  
3 Bottling was supposed to permit Royal Signature to take a  
4 security on \$2 million worth of assets of Brooklyn Bottling.

5 THE COURT: In exchange for what?

6 MS. TUFARIELLO: In exchange for the assignment.

7 THE COURT: I see. Okay. So in effect, the trademark  
8 was assigned to Brooklyn Bottling for use in its business, and  
9 a lien of \$2 million secured the obligation of Brooklyn  
10 eventually to pay the money back?

11 MS. TUFARIELLO: Yes, your Honor.

12 THE COURT: Is there a note?

13 MS. TUFARIELLO: Other than the -- no, there was never  
14 a note.

15 THE COURT: Was there some kind of promise that  
16 regulated how and when the \$2 million would be paid?

17 MS. TUFARIELLO: There was an understanding, but the  
18 details of that understanding I'm not privy to.

19 THE COURT: All right. I understand. This is a  
20 five-year agreement?

21 MS. TUFARIELLO: Yes, your Honor.

22 THE COURT: It was made in January of 2008?

23 MS. TUFARIELLO: Yes, your Honor.

24 THE COURT: So how would there be another assignment  
25 to --

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1 MS. TUFARIELLO: Well, upon the breakdown of  
2 consideration, there was a discussion as to the return of the  
3 trademark to Royal Signature. Royal Signature in turn had an  
4 understanding -- if I may, your Honor, before I discuss how the  
5 transfer occurred from Brooklyn Bottling to Baloru, I feel  
6 obligated to share certain basic background facts that are  
7 necessary to understand as to what happened.

8 Baloru SA is the manufacturer of the concentrates that  
9 are coming into the United States and used by Brooklyn Bottling  
10 for purposes of formulating soft drinks, a number of soft  
11 drinks, one of which is the soft drink that bears the mark  
12 Tropical Puro Sabor Nacional.

13 Now, Baloru has an agreement with Royal Signature.  
14 Royal Signature is acting as the importer of the concentrates  
15 from Baloru through Panama into the United States. And I'm not  
16 sure if that's exactly the route, but the relationship is  
17 exactly that. Baloru SA manufactures the concentrates. Royal  
18 Signature makes the arrangements for the purchasing of the  
19 concentrates by US distributors and imports those concentrates  
20 into the United States, and then Royal Signature in turn sells  
21 them or provides them to its distributors, one of which is  
22 Brooklyn Bottling.

23 Currently we have one distributor in the east all the  
24 way up the Mississippi, and we're currently negotiating a  
25 second distributorship with a distributor west of the

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1 Mississippi, and I believe that distributorship is already in  
2 place.

3           So Royal Signature is basically the party that goes  
4 between the manufacturer and ultimately the bottler and the  
5 distributor in the United States. For whatever reason, a long  
6 time ago in the wisdom of the parties, of the officers of these  
7 two companies, Baloru and Royal Signature, Baloru at that time  
8 had decided to turn over the trademark to Royal Signature. The  
9 underlying business reasons, I don't know, and I'm still in the  
10 process of investigating, but they made that decision. So for  
11 all intents and purposes, since the very beginning the mark  
12 Tropical Puro Sabor Nacional was moved from Baloru SA to Royal  
13 Signature. And Royal Signature, in turn, had the right to  
14 sublicense out the trademark to its distributors in the United  
15 States.

16           THE COURT: And none of these parties is mentioned in  
17 the principal register. So how does the owner, which is a bank  
18 in Ecuador, how does it assign its interest to someone who has  
19 standing to sue in this --

20           MS. TUFARIELLO: No, your Honor, on the contrary. If  
21 you're looking strictly at the front of the trademark office  
22 site, indeed, it looks like Banco Pacifico was the original  
23 owner. However, if you click to the assignment status -- and  
24 now I'm going purely from memory -- when you first go to the  
25 trademark website, along the top there is a series of buttons,

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1 a sequence of buttons. One is called test. The other one's  
2 called tar. The other one is called TDR, which is basically  
3 trademark document retrieval. And then there's a little  
4 section that talks about assignments, and it says assignment  
5 history or something along those lines.

6 If, your Honor, if the Court were to click on that  
7 button, it would bring you to a new site where it actually  
8 shows all the assignments. What happened was Baloru SA  
9 actually purchased the trademark, Tropical Puro Sabor Nacional  
10 from Banco Pacifico. That's how Baloru came to be the owner of  
11 the trademark, who in turn as an assignor assigned it to Royal  
12 Signature. And then Royal Signature gave it to Brooklyn  
13 Bottling. And ultimately, when this consideration fell  
14 through, Brooklyn Bottling turned it back to its original  
15 owner, Baloru SA.

16 THE COURT: Well, this may be beautiful and true, but  
17 none of it is alleged. Pleadings are supposed to show the  
18 entitlement of the trademark owner to own and enforce the  
19 copyright -- the trademark, sorry. This is not set out.

20 MS. TUFARIELLO: I understand, your Honor.

21 THE COURT: And what you tell me, and you may be the  
22 first competent expositor of this information after we have had  
23 five years of litigation. All of it should have been set out.

24 MS. TUFARIELLO: I'm sorry, your Honor?

25 THE COURT: All of this should have been set out, and  
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1 all of this would have made unnecessary several motions that I  
2 ruled on. And even now it doesn't set anything out. All  
3 you're telling me is a process in motion but without any strong  
4 indication that anyone has a trademark in the United States.

5 MS. TUFARIELLO: Oh, yes, your Honor, we do have a  
6 trademark, because -- and that's part of the problem.  
7 Unfortunately, as secondary counsel, I'm bound by whatever is  
8 in the pleadings and by whatever discovery has already been  
9 done. And in an effort to --

10 THE COURT: You're telling me a different case than  
11 the one that started here.

12 MS. TUFARIELLO: I understand, your Honor. And I'm  
13 doing the best I can under the circumstances. And I hope the  
14 Court can appreciate my position and the position of both my  
15 clients, both Brooklyn Bottling as well as Royal Signature, as  
16 well as Baloru SA.

17 THE COURT: So what you're telling me should have  
18 happened is that there was a chain that was set out from the  
19 bank in Ecuador to Baloru, to Royal to Brooklyn Bottling and  
20 back along the same path?

21 MS. TUFARIELLO: To Baloru.

22 THE COURT: So Baloru, in effect, should have moved in  
23 this court to at least intervene or be substituted for Brooklyn  
24 Bottling, severed to a great number of challenges by  
25 Ecuabeverages, who's been litigating now under a different set

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1 of years for five years, and you're in effect starting a new  
2 lawsuit. Doesn't make sense.

3 MS. TUFARIELLO: Well, your Honor, one of the things  
4 that the Court indicated in response to my letter to bring this  
5 motion back in August was bring your motion so long as you're  
6 ready to go to trial. I don't need a lot of discovery. I'm  
7 prepared --

8 THE COURT: You're not going to get any. You're not  
9 going to get any. The case is finished in April 2010. And  
10 you're describing a different case from the one that's been  
11 pleaded. The point you're making in the motion is that I  
12 should not grant the defendants' motion because you called upon  
13 them to settle and they didn't want to settle. But that's not  
14 their obligation. They don't have to settle if they don't want  
15 to.

16 MS. TUFARIELLO: Actually, we have begun settlement  
17 discussions and we've come a long way, your Honor. At this  
18 point we have --

19 THE COURT: I'm really not interested in that. I'm  
20 not interested in the settlement discussions. I'm interested  
21 in where the case stands now. I do understand what you've told  
22 me. Thank you, because it makes sense for the first time.

23 All right. With that, let me pass on your motion. I  
24 will not grant your motion to include Baloru as an  
25 indispensable party. If Baloru wants to take possession of its

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1 rights, it has a right to intervene -- it could have had a  
2 right to intervene at an earlier time. But it chose not to  
3 intervene. You're suing the party that has no presence here.  
4 You want to sue a party that has no presence here because you  
5 believe that its presence is indispensable to litigation. You  
6 admit that you can't carry on the litigation without it, and  
7 it's obvious that you can't.

8 So I will deny the motion because we're not going to  
9 start again at this point in time and waste all the years that  
10 we've wasted. The motion is denied.

11 MS. TUFARIELLO: Thank you, your Honor.

12 THE COURT: Now, Mr. Schindler, your turn.

13 MR. SCHINDLER: Thank you, your Honor.

14 As an initial matter, I'd like to address the question  
15 of the assignment. The initial assignment in this case,  
16 presumably was from Royal Signature to Brooklyn Bottling, but  
17 according to the security interest from Royal Signature to  
18 Brooklyn Bottling says that the duration of the assignment of  
19 the trademark from the secured party, which is Royal Signature,  
20 to Brooklyn Bottling is five years from the date hereof. And  
21 it could end sooner, depending upon if there's a termination of  
22 the security interest for any reason.

23 The assignment with the reversion of the interest is  
24 not an assignment. It does not convey all the substantial  
25 rights. And, in fact, my understanding is Royal Signature

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1 might still be the owner and Brooklyn Bottling never acquired  
2 rights to the --

3 THE COURT: That's one of the reasons I denied the  
4 motion, because it's uncertain what the situation is. And you  
5 would be involved in discovery proceedings, you would ask for  
6 such, and we would have to open up the case again that's been  
7 closed since April of 2010. I decline to do that.

8 MR. SCHINDLER: Concerning the lack of prosecution,  
9 there has been no prosecution in this case for well over a  
10 year. In addition, if, according to the Second Circuit and the  
11 law of the case in this court, only the registered owner of the  
12 trademark can prosecute trademark -- a federal infringement  
13 claim under 15, 1114(1) section --

14 THE COURT: Title 15, what's the section number?

15 MR. SCHINDLER: 1114(1). The Second Circuit has held  
16 that only the registered owner, only the registrant has  
17 standing to bring that claim. And I think two or three claims  
18 of the amended complaint are dependent upon being a registered  
19 owner of that trademark. Otherwise, the Second Circuit held  
20 those claims must be dismissed for lack of standing.

21 This Court has held that also in this case back in  
22 October 3rd -- excuse me, March 3, 2007, when an initial motion  
23 to dismiss was brought, that Brooklyn Bottling did not own the  
24 registration that brought the federal trademark infringement  
25 claim on. This Court granted that motion. There was a quick

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1 assignment done for purposes strictly of the lawsuit, which is  
2 arguably an improper assignment.

3 THE COURT: Let's not get involved in --

4 MR. SCHINDLER: Okay.

5 THE COURT: Your point, Mr. Schindler, is that nothing  
6 has been done in this lawsuit since the discovery has closed,  
7 but that's true of your client as well. You also have not done  
8 anything in the lawsuit. You have counterclaims for relief to  
9 cancel the trademark. You have not done anything in the  
10 lawsuit either. Your motion directed to the plaintiff could  
11 just as well be made by the plaintiff against you.

12 MR. SCHINDLER: That's true, your Honor. We're  
13 willing to --

14 THE COURT: Nobody's done anything in this case.

15 MR. SCHINDLER: There's another issue, your Honor.

16 THE COURT: You know what, this is what I think I need  
17 to do: I think I should dismiss this lawsuit and the  
18 counterclaims without prejudice and without costs and forget  
19 about my own desire to levy sanctions on both of you for  
20 basically wasting my time for five years.

21 This is a different case now than it was. It's  
22 different from both points of view. Both sides have been  
23 remiss in not carrying this fight the way they wanted to and  
24 the way they said they would, and there's absolutely no need to  
25 continue this lawsuit at this point in time, because the whole

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1 basis for this lawsuit is uncertain.

2 I might add, how this trademark could be used in any  
3 offensive way is beyond me. It's entirely descriptive. Every  
4 single word is disclaimed in its own sense, and putting it  
5 together doesn't say anything more than the parts do.

6 But that's not something I adjudicate now. This is an  
7 uncertain trademark with uncertain ownership and uncertain  
8 alleged infringements, and there's no basis for it at this  
9 point in time. So the motion to dismiss for lack of  
10 prosecution is granted. It's going to apply to both the claims  
11 and the counterclaims.

12 I deny the motion for sanctions. I think there's  
13 blame to go around, including on me for not pushing you harder,  
14 and, therefore, the claims are dismissed.

15 So the motion for joining the required party, as  
16 Rule 19 puts it, rather than indispensable party, is denied.

17 The motion to dismiss is granted.

18 Thank you very much.

19 MS. TUFARIELLO: And, your Honor, just to be clear, I  
20 understand it is being dismissed without prejudice?

21 THE COURT: That's correct.

22 MS. TUFARIELLO: Thank you, your Honor.

23 THE COURT: You can bring it again.

24 MS. TUFARIELLO: Thank you.

25 THE COURT: But don't ask me to be the judge.

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1 MS. TUFARIELLO: Thank you, your Honor.  
2 MR. SCHINDLER: Thank you, your Honor.  
3 THE COURT: And I suspect that if you bring it again,  
4 it won't hang around for very long because it doesn't seem to  
5 me that there's an enforceable trademark here.  
6 Thank you.  
7 (Adjourned)  
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**EXHIBIT 3**



INTELLECTUAL LAW  
THE LAW OFFICES OF P.B. TUFARIELLO, P.C.

Hon. Alvin K. Hellerstein  
U.S.D.J. - S.D.N.Y.  
August 23, 2011  
Page 2

On May 27, 2011, Brooklyn Bottling sold, assigned and transferred to Baloru, all right, title, and interest in and to the Mark at issue in this case, *i.e.* TROPICAL PURO SABOR NACIONAL, together with the goodwill of the business symbolized by the Mark and its corresponding U.S. Registration. No. 1,474,395.

Baloru acquired this trademark registration for the purpose of consolidating its rights to its international family of TROPICAL trademarks, which are used world wide, in connection with soft drinks, and flavored syrups for the preparation and manufacturing of soft drinks, directed to the Ecuadorian community all over the world. Such family of TROPICAL trademarks includes but is not limited to the following U.S. Trademark Applications and Registrations:

- U.S. Trademark Registration 3,946,678 for the color design mark TROPICAL BALORU (a drawing specimen of the mark is annexed hereto as Exhibit 1);
- U.S. Trademark Registration 3,949,746 for the color design mark TROPICAL (a drawing specimen of the mark is annexed hereto as Exhibit 2);
- U.S. Trademark Application Serial No: 85/336,274 for the design mark TROPICAL (a drawing specimen of the mark is annexed hereto as Exhibit 8);
- U.S. Trademark Application Serial No: 85/322,593 for the mark ORO TROPICAL;
- U.S. Trademark Application Serial No: 85/322,573 for the design mark ORO TROPICAL (a drawing specimen of the mark is annexed hereto as Exhibit 7);
- U.S. Trademark Application Serial No.: 85/322,562 for the color design mark ORO TROPICAL (a drawing specimen of the mark is annexed hereto as Exhibit 6);
- U.S. Trademark Application Serial No.: 85/307,041 for the design mark TROPICAL BALORU SABOR (a drawing specimen of the mark is annexed hereto as Exhibit 5);
- U.S. Trademark Application Serial No: 85/306,953 for the mark BALORU SABOR TROPICAL;
- U.S. Trademark Application Serial No: 85/306,937 for the mark TROPICAL;
- U.S. Trademark Application Serial No: 85/306,924 for the design mark BALORU SABOR TROPICAL (a drawing specimen for the mark is annexed hereto as Exhibit 4); and
- U.S. Trademark Application Serial No.: 85/280,809 for the color design mark BALORU SABOR TROPICAL TUTTIFRUTTI (a drawing specimen for the mark is annexed hereto as Exhibit 3).

Since Baloru's acquisition of the Mark at issue in this case, *i.e.*, TROPICAL PURO SABOR NACIONAL, together with its corresponding U.S. Registration. No. 1,474,395, Baloru has engaged in the process of formalizing and finalizing its relationship with its licensees for the use of its family of TROPICAL marks in the United States. One of such licensees includes the plaintiff in this case, Brooklyn Bottling.

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Hon. Alvin K. Hellerstein  
U.S.D.J. - S.D.N.Y.  
August 23, 2011  
Page 3

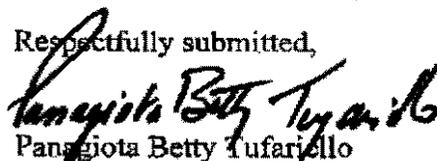
Defendant in the present matter is being accused of infringing TROPICAL PURO SABOR NACIONAL. Further, Defendant is being accused of infringing the trade dress associated with the goods in connection with which the mark TROPICAL PURO SABOR NACIONAL is being used (see Doc. No. 81, Jacobson Aff. Ex. 9), which is identical to the trade dress of the goods in connection with which Baloru's marks set forth herein above is being used (compare Ex. 9 to exhibits attached hereto). Accordingly, Baloru has a substantial interest in the outcome of this litigation, in that Baloru's property is at stake.

Many courts have made it clear that it is necessary for the owner of a trademark to be made a party to an infringement action involving the owner's mark. Lisseveld v. Marcus, 173 F.R.D. 689, 693 (M.D. Fla. 1997) (*quoting* JTG of Nashville, Inc. v. Rhythm Band, Inc., 693 F. Supp. 623, 626 (M.D. Tenn. 1988)). Further, many courts have held that in actions concerning trademark rights, the owner of a trademark is a necessary party under Rule 19, so that the Court may accord complete relief among the parties, and avoid the risk of multiple or inconsistent obligations or repetitive litigation arising from the same facts. Marrero Enters. of Palm Beach, Inc. v. Estefan Enters., Inc., 2007 WL 4218990, at \*2 (S.D. Fla. Nov. 29, 2007); St. James v. New Prague Area Community Ctr., 2006 WL 2069197, at \*2 (D. Minn. Jul. 26, 2006) ("It is well established, in suits for . . . trademark infringement, that the owner of the . . . trademark is subject to compulsory joinder."); Lion Petroleum of Missouri, Inc. v. Millenium Super Stop, LLC et. al., 467 F. Supp. 2d 953, 956 (E.D. Mo. 2006) (the owner of the trademark is a necessary party in a suit for trademark infringement); JTG, 693 F. Supp. at 626 ("Courts have held consistently that the owner of allegedly infringed intellectual property rights is a person needed for just adjudication under Rule 19."); Ass'n of Co-Op Members v. Farmland Indus., Inc., 684 F.2d 1134, 1143 (5th Cir. 1982) (licensor of trademark is typically a necessary and indispensable party in an infringement action); Lisseveld, 173 F.R.D. at 694 (A trademark owner "presents a prime example of a party to be joined, if feasible, under Rule 19"); Earl v. Peverett, 20 U.S.P.Q.2d 1559 (S.D.N.Y. 1991).

Thus, and for all of the foregoing reasons, we respectfully submit that joining Baloru as a party plaintiff is warranted, and respectfully reiterate our request for a pre-motion conference to further explore the possibility of bringing a motion to effectuate such Joinder.

Your Honor's patience, understanding and professional courtesies are greatly appreciated

Respectfully submitted,



Panagiota Betty Tufariello

PBT:ic

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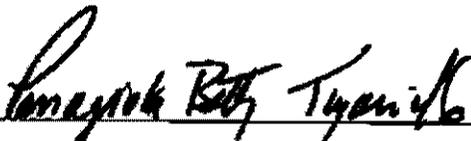
Hon. Alvin K. Hellerstein  
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August 23, 2011  
Page 4

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **LETTER TO HON. HELLERSTEIN with its enclosure** has been served to counsel for Defendant via Facsimile and via Electronic Mail, addressed to:

Edwin D. Schindler  
Patent Attorney  
Five Hirsch Avenue  
P.O. Box 966  
Coram, NY 11727  
Fax: (631)-474-5374  
E-mail:edschindler@att.net

on Tuesday, August 23, 2011

  
\_\_\_\_\_  
Panagiotis Betty Tufariello, Esq.



BALORU

EXHIBIT 1

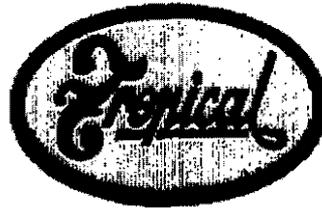


EXHIBIT 2



EXHIBIT 3

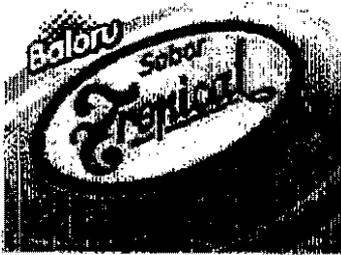


EXHIBIT 4



EXHIBIT 5

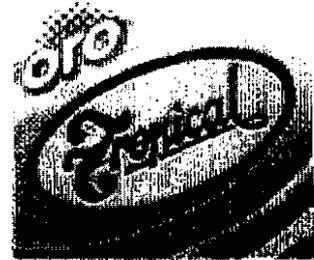


EXHIBIT 6

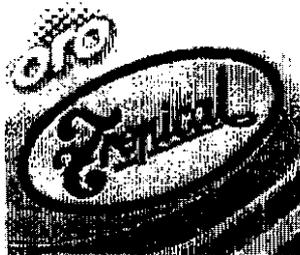


EXHIBIT 7



EXHIBIT 8

# FAX COVER SHEET

<b>Send to:</b> United States District Court Southern District of New York	<b>FROM: Panagiota Betty Tufariello, Esq.</b>
<b>Attention:</b>  Honorable District Judge Alvin K. Hellerstein	Date: Tuesday, August 23, 2011
<b>Office location:</b>  United States District Judge Daniel Patrick Moynihan U.S. Courthouse 500 Pearl Street New York, NY 10007	<b>Office location:</b>  INTELLECTULAW The Law Offices of P.B. Tufariello, P.C. 25 Little Harbor Road Mt. Sinai, NY 11766
Fax number: 1-212-805-7942 Phone No.:	Phone number: 631-476-8734 Fax number: 631-476-8737

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Total pages, including cover: 6

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**EXHIBIT 4**

Jeffrey E. Jacobson (JEJ 1199)  
Bruce E. Colfin (BEC 5815)  
Jacobson & Colfin, P.C.  
60 Madison Avenue, Suite 1026  
New York, NY 10010  
(212) 691-5630  
Attorneys for Plaintiff  
BROOKLYN BOTTLING OF MILTON,  
NEW YORK, INC.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X		
BROOKLYN BOTTLING OF MILTON, NEW YORK, INC.,	:	Index No. 07 CIV 8483 (AKH)
Plaintiff,	:	
	:	
-against-	:	AMENDED COMPLAINT
	:	
ECUABEVERAGE, CORP.	:	
Defendant.	:	
-----X		

For its Amended Complaint, Brooklyn Bottling of Milton, New York, Inc. allege as follows:

NATURE OF THE CASE

This is an action by Plaintiff Brooklyn Bottling of Milton, New York, Inc, the assignee of the federally registered trademark TROPICAL PURO SABOR NACIONAL for soft drinks and flavored syrups used in the preparation of making soft drinks. Plaintiff Brooklyn Bottling of Milton, New York, Inc., is the exclusive licensor of said mark and has claims against Defendant Ecuabeverage, Corp., for trademark infringement and unfair competition.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331

and 1338(a) & (b).

2. This Court has personal jurisdiction over Defendant Ecuabeverage, Corp., because it is a New York State Corporation and it regularly conducts business in this judicial district.

#### FACTUAL ALLEGATIONS

3. Plaintiff Brooklyn Bottling of Milton, New York, Inc. (“BROOKLYN”) is a corporation existing under the laws of the State of New York.

4. BROOKLYN is a soft drink bottling company and distributor of soft drinks.

5. BROOKLYN is the exclusive assignee from Royal Signature, Inc. (“ROYAL”), a Panama corporation and the registrant of the federal trademark registered with the United States Patent and Trademark Office (“USPTO”) for TROPICAL PURO SABOR NACIONAL, (“the MARK”), in class 032 for soft drinks and flavored syrups used in the preparation of making soft drinks. The MARK was originally registered on January 26, 1988 in the name of Royal and given registration number 1474395; and was, assigned to Brooklyn and registered.

6. Pursuant to an agreement dated June 1, 2007, between BROOKLYN and ROYAL, BROOKLYN was assigned the exclusive rights to use the federally registered trademark TROPICAL PURO SABOR NACIONAL for use with soft drinks and flavored syrups used in the preparation of making soft drinks.

7. As a result, BROOKLYN owns the exclusive rights in this jurisdiction to use TROPICAL PURO SABOR NACIONAL for soft drinks and flavored syrups used in the preparation of making soft drinks.

8. BROOKLYN is entitled to an injunction against others, including the defendant, who use the TROPICAL PURO SABOR NACIONAL mark or confusingly similar marks in connection with the same or related types of goods.

9. Defendant does use the TROPICAL PURO SABOR NACIONAL mark or confusingly similar marks on or in connection with the same or related types of goods.

10. Defendant's use of the MARK includes the ® symbol, which is the USPTO symbol for a registered trademark.

11. Defendant is not the owner of the registered mark, nor has it received any authority to use the mark from ROYAL, the original registrant or BROOKLYN the current registrant as well as assignee of the exclusive rights.

12. Based on Defendant's conduct, in selling products with the MARK or similarly confusing marks without authorization, BROOKLYN's counsel sent a cease and desist letter to Defendant accusing Defendant of infringing BROOKLYN's exclusive rights in the territory.

13. BROOKLYN demanded that Defendant stop distribution of beverages bearing the mark or similarly confusing marks, cease using the phrase TROPICAL PURO SABOR NACIONAL, or any version thereof, and cease using images similar to those used on BROOKLYN's labels affixed to the soft drink bottles.

#### COUNT I

(Trademark Infringement under the Lanham Act, 15 U.S.C. § 1114)

14. BROOKLYN repeats and realleges each allegation set forth in the preceding paragraphs as if set forth herein.

15. Defendant has used and/or is using in commerce a trademark, which is a reproduction, counterfeit, copy, or derivative imitation of the MARK, in connection with the sale, offers for sale, distribution, or advertising of soft drinks and flavored syrups used in the preparation of making soft drinks, which such use is likely to cause confusion, or to cause mistake, or to deceive.

16. As a direct and proximate result of such trademark infringement, BROOKLYN has suffered and will continue to suffer monetary loss and irreparable injury to its business, reputation, and goodwill.

17. Defendant has committed such acts with knowledge that such imitation is intended to cause confusion, or to cause mistake, or to deceive.

18. The Defendant is directly liable for the infringing conduct.

## COUNT II

(Trademark Infringement under the Lanham Act, 15 U.S.C. § 1114)

19. BROOKLYN repeats and realleges the allegations set forth in paragraphs 1 through 18 as if fully set forth herein.

20. Defendant has used and is using in commerce various marks, which are derived from the MARK and constitute a reproduction, counterfeit, copy, or colorable imitation of the registered MARK which BROOKLYN possesses exclusivity in connection with the sale, offers for sale, distribution, or advertisements for soft drinks and flavored syrups used in the

preparation of making soft drinks, in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

21. By adopting such similar marks, the Defendant has reproduced, counterfeited, copied, or colorably imitated the registered MARK which BROOKLYN possesses exclusivity and is using such reproductions, counterfeits, copies, or colorable imitations in commerce in connection with the sale, offers for sale, or advertising of for soft drinks and flavored syrups used in the preparation of making soft drinks, in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

22. As a direct and proximate result of such trademark infringement, BROOKLYN has suffered and will continue to suffer monetary loss and irreparable injury to its business, reputation, and goodwill.

23. Defendants have committed such acts with knowledge that such imitation is intended to cause confusion, or to cause mistake, or to deceive.

24. The Defendant is directly liable for the infringing conduct.

### COUNT III

(Unfair Competition under the Lanham Act, 15 U.S.C. § 1125(a))

25. BROOKLYN repeats and realleges the allegations set forth in paragraphs 1 through 24 as if set forth herein.

26. Defendant's use of the MARK and other derivative marks in commerce in connection with the sale of goods constitutes a false designation of origin, false or misleading

description of fact, or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Defendant with ROYAL and/or BROOKLYN, or as to the origin, sponsorship, or approval of Defendant's goods by ROYAL and/or BROOKLYN.

27. As a direct and proximate result of such unfair competition, BROOKLYN has suffered and will continue to suffer monetary loss and irreparable injury to its business, reputation, and goodwill.

28. The Defendant is directly liable for the infringing conduct.

#### COUNT IV

(Trade dress infringement under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a))

29. BROOKLYN repeats and realleges the allegations set forth in paragraphs 1 through 28 as if set forth herein.

30. The trade dress of the bottle and design affixed to the bottle by BROOKLYN has obtained "secondary meaning" in the marketplace.

31. The trade dress of the two competing products is confusingly similar and likely to cause confusion in the marketplace.

32. That the appropriated features of the trade dress are primarily nonfunctional.

33. The Defendant is directly liable for the infringing conduct.

#### COUNT V

(Unfair competition under common law)

34. BROOKLYN repeats and realleges the allegations set forth in paragraphs 1 through 33 as if set forth herein.

35. Defendant has engaged in unfair competition under the common law of the State of New York.

36. As the direct and proximate result of Defendant's conduct BROOKLYN has suffered and will continue to suffer damages in an amount to be determined at trial.

37. The Defendant is directly liable for the infringing conduct.

#### COUNT VI

(Prohibited Importation Pursuant to Sec. 526 of the 1930 Tariff Act, 19 U.S.C. Sec., 1526 )

38. BROOKLYN repeats and realleges the allegations set forth in paragraphs 1 through 37 as if set forth herein.

39. Section 526 of the 1930 Tariff Act, 19 U.S.C. Sec., 1526 prohibits entry into the United States of any merchandise of foreign manufacture if such merchandise bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States unless written consent of the owner of such trademark is produced at the time of making entry.

40. Defendants imported and continues to import soft drinks manufactured in Ecuador which bear the Tropical mark registered by Royal Signature and assigned exclusively to Plaintiff BROOKLYN without the written consent of Plaintiff.

41. As the direct and proximate result of Defendant's conduct BROOKLYN has suffered and will continue to suffer damages in an amount to be determined at trial.

42. The Defendant is directly liable for the infringing conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff BROOKLYN respectfully requests that the Court:

A. Grant temporary, preliminary and permanent injunctive relief prohibiting Defendant, its successors, assigns and agents from:

1. Using the TROPICAL PURO SABOR NACIONAL and any confusingly similar marks in connection with any soft drinks and flavored syrups used in the preparation of making soft drinks;

2. Pursuing or maintaining federal or state trademark applications or registrations for any version of the MARK or any confusingly similar marks; and

3. Owning or using any domain names comprised of the term TROPICAL PURO SABOR NACIONAL or any confusingly similar domain name.

B. Award compensatory, consequential, statutory, exemplary, and other damages (including, but not limited to actual damages, profits, award for corrective advertising) to BROOKLYN for each cause of action in an amount to be determined at trial;

- C. Award attorneys' fees and costs to BROOKLYN; and
- D. Grant to BROOKLYN whatever other relief is just and proper.

Dated: New York, New York  
February 20, 2008

JACOBSON & COLFIN, P.C.

By:           /Jeffrey E. Jacobson/            
Jeffrey E. Jacobson (JEJ 1199)  
Bruce E. Colfin (BEC 5815)  
Jacobson & Colfin, P.C.  
Attorneys for Plaintiff  
BROOKLYN BOTTLING OF MILTON,  
NEW YORK, INC.  
60 Madison Avenue, #1026  
New York, New York 10010  
(212) 691-5630

TO: Edwin D. Schindler  
Attorney for Defendant  
5 Hirsch Avenue  
PO Box 966  
Coram, NY 11727-0966  
631-474-5373

C/L/bklyntropicalTMCMP.amended

**EXHIBIT 5**

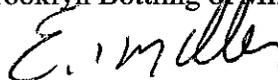


5. "Brooklyn Bottling" was assigned ownership in the TROPICAL PURO SABOR NACIONAL mark from Royal Signature, Inc., a Panamanian corporation on February 11, 2008.
6. Brooklyn Bottling believes that the Defendant Ecuabeverage ("Defendant") is infringing Brooklyn Bottling's rights in and to its registered trademark and trade dress by marketing a product that is causing confusion among consumers.
7. Brooklyn Bottling and Defendant are direct competitors in the soft drink industry, and specifically in the east coast markets comprised of individuals of Ecuadorian descent.
8. Brooklyn Bottling is not claiming that Defendant cannot use the term "tropical" to market its product.
9. However, Brooklyn Bottling does have a problem with Defendant's use of the term "tropical" in such a way as to confuse and deceive consumers about the source of Brooklyn Bottling's product and Defendant's product.
10. Defendant has, in many ways, duplicated or approximated elements of Brooklyn Bottling's trademark and trade dress.
11. Defendant is using the same primary colors on its labeling (red, blue, and yellow) as Brooklyn Bottling, and which are also the colors of the Ecuadorian flag.
12. Defendant has copied numerous design elements from Brooklyn Bottling including the use of blue script font for the word "Tropical," and setting that word on a yellow background.
13. Brooklyn Bottling uses the phrase "Puro Sabor Nacional" which means "Pure National

Flavor” in English while the Defendant uses the phrase “Puro Sabor Ecuatoriano” which means “Pure Ecuadorian Flavor.”

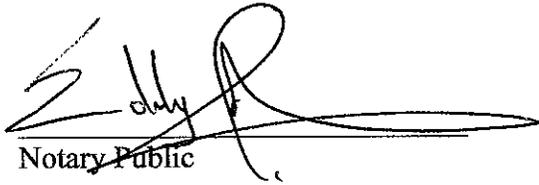
14. There is no difference between these two phrases because the consumers being targeted by the parties’ products are generally Ecuadorian.
15. Although Brooklyn Bottling’s mark does not contain references to Ecuador, our packaging does indicate that it has “flavor” from Ecuador
16. Frequently, our products are sold in the same stores and sit next to each other on the same shelves.
17. Brooklyn Bottling’s biggest concern is that Defendant uses the term “Tropical” on its products in the same manner that Brooklyn Bottling uses the term “Tropical” on its products.
18. As a result of Defendant’s practices, consumers have been confused as to which product is the original beverage which has caused Brooklyn Bottling damage.
19. Accordingly, I respectfully ask that this Court grant Brooklyn Bottling’s instant motion for partial summary judgement on all of Brooklyn Bottling’s claims.

Brooklyn Bottling of Milton, New York, Inc.



Eric Miller, President

Sworn to before me  
this 11<sup>th</sup> day of December, 2009

  
Notary Public



millar.afd support motion sj.121109

**EXHIBIT 6**

Form PTO-1594 (Rev. 07/05)  
OMB Collection 0651-0027 (exp. 6/30/2008)

U.S. DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office

### RECORDATION FORM COVER SHEET TRADEMARKS ONLY

To the Director of the U. S. Patent and Trademark Office: Please record the attached documents or the new address(es) below.

**1. Name of conveying party(ies):**

Rozar Signature Inc.

- Individual(s)
- General Partnership
- Corporation - State: FL
- Other \_\_\_\_\_
- Association
- Limited Partnership

Citizenship (see guidelines) PANAMA

Additional names of conveying parties attached?  Yes  No

**3. Nature of conveyance )/Execution Date(s) :**

Execution Date(s) 2/11/08

- Assignment
- Security Agreement
- Other \_\_\_\_\_
- Merger
- Change of Name

**2. Name and address of receiving party(ies)**

Additional names, addresses, or citizenship attached?  Yes  No

Name: BROOKLYN Bottling of Milton, NY, Inc.

Address: \_\_\_\_\_

Street Address: 1900 Linden Blvd

City: BROOKLYN

State: NY

Country: USA Zip: 11207

- Association Citizenship \_\_\_\_\_
- General Partnership Citizenship \_\_\_\_\_
- Limited Partnership Citizenship \_\_\_\_\_
- Corporation Citizenship NY
- Other \_\_\_\_\_ Citizenship USA

If assignee is not domiciled in the United States, a domestic representative designation is attached:  Yes  No  
(Designations must be a separate document from assignment)

**4. Application number(s) or registration number(s) and identification or description of the Trademark.**

A. Trademark Application No.(s)

73489879

B. Trademark Registration No.(s)

1474395

Additional sheet(s) attached?  Yes  No

C. Identification or Description of Trademark(s) (and Filing Date if Application or Registration Number is unknown):

TROPICAL PURO SABOR NACIONAL

**5. Name & address of party to whom correspondence concerning document should be mailed:**

Name: JACOBSON & KALIN, PC

Internal Address: Jeffrey E Jacobson

Street Address: 60 MADISON AVE, Suite 1026

City: New York

State: NY Zip: 10010

Phone Number: 212 691 5630

Fax Number: 212 645 5038

Email Address: Jeffrey@jshemicon.com

**6. Total number of applications and registrations involved:**

1

**7. Total fee (37 CFR 2.6(b)(6) & 3.41) \$40.00**

- Authorized to be charged by credit card
- Authorized to be charged to deposit account
- Enclosed

**8. Payment Information:**

a. Credit Card Last 4 Numbers 8001  
Expiration Date 08/10

b. Deposit Account Number \_\_\_\_\_  
Authorized User Name Eric Miller

**9. Signature:**

Jeffrey E Jacobson  
Signature  
Name of Person Signing

2/15/08  
Date

Total number of pages including cover sheet, attachments, and document: 2

Documents to be recorded (including cover sheet) should be faxed to (571) 273-0140, or mailed to:  
Mail Stop Assignment Recordation Services, Director of the USPTO, P.O. Box 1450, Alexandria, VA 22313-1450

OP \$40.00 73489879



# Jacobson & Colfin, P.C.

Attorneys at Law

Jeffrey E. Jacobson\*  
Bruce E. Colfin

60 Madison Avenue  
Suite #1026  
New York, N.Y. 10010

(212) 691-5630  
Fax: (212) 645-5038  
www.thefirm.com  
email: thefirm@thefirm.com

Bonnie L. Mohr\*\*  
Of Counsel:

\*Also Member of D.C. Bar

\*\*Also Member of N.J. Bar

February 15, 2008

Mail Stop Assignment Recordation Services  
Director of the USPTO  
PO Box 1450  
Alexandria, VA 22313-1450

Via fax: 571-273-0140

Re: Assignment

TROPICAL PURO SABOR NACIONAL  
Reg. No. 1474395

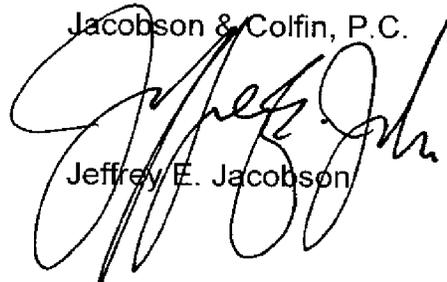
Dear Director:

Kindly record the enclosed assignment. The Recordation Form Cover Sheet, Assignment and Credit Card Payment Form are attached.

Should you have any further requirements or concerns, please contact this office.

Sincerely Yours,

Jacobson & Colfin, P.C.



Jeffrey E. Jacobson

Encl.s

CC: Mr. Eric Miller  
Brooklyn Bottling of Milton, New York, Inc.

1208 West Broadway, Hewlett, LI, 11557 • 516-295-7689

TRADEMARK

RECORDED: 02/15/2008

REEL: 003721 FRAME: 0533

**EXHIBIT 7**

**TRADEMARK ASSIGNMENT**

Electronic Version v1.1  
 Stylesheet Version v1.1

<b>SUBMISSION TYPE:</b>	NEW ASSIGNMENT		
<b>NATURE OF CONVEYANCE:</b>	ASSIGNS THE ENTIRE INTEREST AND THE GOODWILL		
<b>CONVEYING PARTY DATA</b>			
<b>Name</b>	<b>Formerly</b>	<b>Execution Date</b>	<b>Entity Type</b>
BROOKLYN BOTTLING OF MILTON, NY, INC.		04/25/2011	CORPORATION: NEW YORK
<b>RECEIVING PARTY DATA</b>			
<b>Name:</b>	BALORU S.A.		
<b>Street Address:</b>	Km. 16 1/2, Via Daule		
<b>City:</b>	Guayaquil		
<b>State/Country:</b>	ECUADOR		
<b>Entity Type:</b>	SOCIEDAD ANONIMA(SA): ECUADOR		
<b>PROPERTY NUMBERS Total: 1</b>			
<b>Property Type</b>	<b>Number</b>	<b>Word Mark</b>	
Registration Number:	1474395	TROPICAL PURO SABOR NACIONAL	
<b>CORRESPONDENCE DATA</b>			
<b>Fax Number:</b>	(631)476-8737		
	<i>Correspondence will be sent via US Mail when the fax attempt is unsuccessful.</i>		
<b>Phone:</b>	6314768734		
<b>Email:</b>	betty@intellectulaw.com		
<b>Correspondent Name:</b>	Panagiota Betty Tufariello, Esq.		
<b>Address Line 1:</b>	25 Little Harbor Rd.		
<b>Address Line 4:</b>	Mt. Sinai, NEW YORK 11766		
<b>ATTORNEY DOCKET NUMBER:</b>	7373-21		
<b>DOMESTIC REPRESENTATIVE</b>			
<b>Name:</b>	Panagiota Betty Tufariello, Esq.		
<b>Address Line 1:</b>	25 Little Harbor Road		
<b>Address Line 4:</b>	Mount Sinai, NEW YORK 11766		

OP \$40.00 1474395

<b>NAME OF SUBMITTER:</b>	Panagiota Betty Tufariello, Esq
<b>Signature:</b>	/panagiotabettytufariello/
<b>Date:</b>	05/27/2011
<b>Total Attachments: 3</b> source=TRADEMARK ASSIGNMENT FROM BROOKLYN BOTTLING to BALORU#page1.tif source=TRADEMARK ASSIGNMENT FROM BROOKLYN BOTTLING to BALORU#page2.tif source=TRADEMARK ASSIGNMENT FROM BROOKLYN BOTTLING to BALORU#page3.tif	

## **TRADEMARK ASSIGNMENT**

**WHEREAS**, BROOKLYN BOTTLING OF MILTON, NY, INC., a corporation organized and existing under the laws of the state of New York, having places of business at **1900 LINDEN BLVD. BROOKLYN, NY 11207** and **P.O. BOX 808, South Road, Milton, New York, 12457** (hereinafter "**Assignor**"), has adopted, owns, has used and is using the Mark

## **TROPICAL PURO SABOR NACIONAL**

(hereinafter "**the Mark**") in connection with the following goods and/or services:

–SOFT DRINKS AND FLAVORED SYRUPS  
USED IN THE PREPARATION OF MAKING  
SOFT DRINKS IN INTERNATIONAL CLASS  
032–

**WHEREAS**, Assignor is the owner of all rights, title and interest to U.S. Trademark Registration for the Mark on the Principal Register of the United States Patent and Trademark Office in connection with the above described goods and/or services, *i.e.*, U.S. Registration No. 1,474,395, registered on January 26, 1988; and

**WHEREAS**, BALORU S.A., a sociedad anonima(sa) of ECUADOR, having a principal place of business at **Km. 16 1/2, Via Daule, Guayaquil, Ecuador** (hereinafter "**Assignee**"), is desirous of acquiring the Mark and its corresponding, U.S. Registration No. 1,474,395;

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Assignor does hereby sell, assign and transfer to Assignee, all right, title, and interest in and to the said Mark, together with the goodwill of the business symbolized by the Mark and its above-identified corresponding U.S. Registration.

BROOKLYN BOTTLING OF MILTON, NY INC.

E. J. Miller

By: Eric S Miller

Title: President

Date effective as of: 4/29/11

**JURAT**

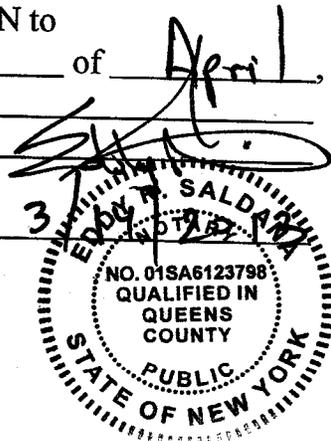
On April 29, 2011 before me, Eric Miller, personally appeared \_\_\_\_\_, personally known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity on behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

SUBSCRIBED and SWORN to  
before me this 29 of April,  
2011

Notary Public

My Commission Expires: 3



Page 2 TRADEMARK ASSIGNMENT U.S. REGISTRATION NO.:1,474,395 FROM BROOKLYN BOTTLING OF MILTON, NY, INC., TO BALORU S.A.

**CERTIFICATE OF SERVICE**

I, EDWIN D. SCHINDLER, hereby certify that I served a true, and complete, copy of Ecuabeverage Corporation's *Motion for Summary Judgment* (including Exhibits 1 – 7) upon the following counsel-of-record for Respondent Baloru S.A. via First-Class Mail, postage pre-paid:

Thomas M. Wilentz  
75 South Broadway, 4<sup>th</sup> Floor  
White Plains, New York 10601

on June 20, 2012.



Edwin D. Schindler  
*Attorney for Petitioner*  
Reg. No. 31,459