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Filing date: **06/28/2004**

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

<b>Name</b>	DC Comics
<b>Granted to Date of previous extension</b>	08/25/2004
<b>Address</b>	DC Comics 1700 Broadway New York, NY 10019 UNITED STATES

<b>Attorney information</b>	ZOE HILDEN FROSS ZELNICK LEHRMAN & ZISSU, P.C. 866 UNITED NATIONS PLAZA NEW YORK, NY 10017 UNITED STATES zhilden@frosszelnick.com, pperkins@frosszelnick.com Phone:212-813-5900
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#### Applicant Information

<b>Application No</b>	76367233	<b>Publication date</b>	04/27/2004
<b>Opposition Filing Date</b>	06/28/2004	<b>Opposition Period Ends</b>	08/25/2004
<b>Applicant</b>	Romero, D. Jose Pascual		

## Goods/Services Affected by Opposition

Class 032. First Use: First Use In Commerce:

All goods and services in the class are opposed, namely: non-alcoholic beverage, namely energy drinks and sports drinks

<b>Attachments</b>	Notice of Opposition.tif ( 10 pages )
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<b>Signature</b>	/Zoe Hilden/
<b>Name</b>	ZOE HILDEN
<b>Date</b>	06/28/2004

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

Our Ref.: DCC USA TC-0420423

In the matter of Application Serial No. 76/367,233  
Published in the Official Gazette on April 27, 2004

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DC COMICS,	:	
	:	
Opposer,	:	Opposition No.
	:	
- against -	:	
	:	
D. JOSE PASCUAL ROMERO,	:	
	:	
Applicant.	:	
-----X	:	

**NOTICE OF OPPOSITION**

DC Comics (“DC” or “Opposer”), a New York partnership located at 1700 Broadway, New York, New York 10019, believes that it is or will be damaged by the issuance of a registration of the trademark KRYPTONITE POWER OF DANCE as applied for in Application S.N. 76/367,233 filed on February 5, 2002 by D. José Pascual Romero (“Applicant”) for “non-alcoholic beverage, namely energy drinks and sports drinks” in Class 32 and therefore opposes the same. As grounds for the opposition, Opposer, by its attorneys Fross Zelnick Lehrman & Zissu, P.C., alleges as follows:

**FACTS**

1. DC is a New York partnership with its principal place of business at 1700 Broadway, New York, New York 10019.
2. DC and its predecessors-in-interest (collectively “DC Comics”) is the publisher of comic books and magazines featuring comic characters and stories, including the world-famous

character Superman. DC Comics is among the most well known and successful publishers of comic magazines in the world. It has created and published the highly successful and well-known characters Superman, Batman, Wonder Woman, and The Flash, among others.

3. Over the many years since the Superman character was first introduced in 1938, DC Comics has focused an enormous amount of attention and effort to develop the Superman mythos, including the character, his associates, his world, and other indicia associated with him. Throughout the period of Superman's existence, DC Comics has invested a vast amount of creative energy and resources to continually update and improve the Superman property to keep the character and his adventures timely and fresh in the public's mind. Plaintiff's efforts in this regard have led to a vast array of literary works, television series and feature films which fully explore in great depth Superman himself and the fictional world inhabited by him. Due to Plaintiff's extraordinary nurturing of the Superman mythos, the character and his universe have captured the popular imagination and it is beyond dispute that today the Superman lore is one of a rarified group of legends known and loved throughout the world.

4. As has been oft repeated in DC Comics' many well-known works, while still an infant, Superman was sent by his parents to Earth aboard a space ship from his distant homeworld, Krypton, as Krypton was destroyed by cosmic forces. On Earth, Superman is secretly possessed of extraordinary physical abilities, including superhuman strength and speed, x-ray vision, super-sensitive hearing, the ability to fly, and the ability to withstand bullets, among others. In his ordinary life, Superman is a mild-mannered newspaper reporter for The Daily Planet known as Clark Kent, while in his dramatic role, Superman is a costumed heroic figure who uses his extraordinary abilities to perform great feats for the public good.

5. Shortly after his creation, DC Comics authorized the appearance of Superman in

media other than comic books. Beginning in 1940, DC Comics embarked on the aforementioned project to nurture and develop the then fledgling Superman story beyond the comic book genre. In connection therewith, Superman was featured in a regular radio program from 1940 through 1951, during the height of radio as a storytelling medium. In 1941, Superman also began to appear in a series of animated motion pictures. The first of these was nominated for an Academy Award. Then, beginning in 1948, Superman appeared in a series of live action movie serials. In the 1970's, Superman again appeared on the big screen in four major, big budget motion pictures, featuring Hollywood stars such as Marlon Brando, Christopher Reeve, and Gene Hackman. All of this activity came as part of the careful development of the Superman story by Plaintiff, with each new work introducing a new facet to that story.

6. Superman has also widely appeared on television. In 1953, the live action television series The Adventures of Superman began running and, due to its extreme popularity, 104 episodes were created and broadcast. The Adventures of Superman is today considered a television classic and has rarely been "off the air" since its premiere in 1953, appearing since that time in syndication on the schedule of numerous U.S. television stations. Beginning in 1991, the major cable television network NICKELODEON, began broadcasting episodes of The Adventures of Superman nightly as part of its NICK-AT-NITE service.

7. In 1966, Superman appeared in his first animated television cartoon series, entitled The New Adventures of Superman. This series ran for many years and individual episodes were re-broadcast in subsequent animated series, such as The Superman-Aquaman Hour and The Batman-Superman Hour, until 1984. Superman also appeared in numerous other animated television series including Super Friends, which ran from 1973 to 1986, Superman, which ran in 1988, and Superman: The Animated Series which premiered in September 1996.

Superman: The Animated Series continues to be broadcast on the WB Kids! television network.

8. In the early 1990's, the American Broadcasting Company ("ABC") produced a new Superman television series, Lois & Clark: The New Adventures of Superman, which first aired in 1993.

9. In the fall of 2001, the WB television channel began airing a new Superman television series entitled Smallville. The program has garnered excellent reviews and is highly rated.

10. Superman's appearance in each of the above media represented a broadening and reinvigoration of the character, his universe and the lore surrounding him, always under the watchful eye of DC Comics.

11. In addition to Opposer's entertainment productions featuring Superman described above, DC Comics has also achieved international publishing success with various Superman literary works. Comic books, in almost every comic book format, including periodicals, magazine serializations, albums, trade paperbacks and pocket books, have been published in approximately twenty languages in approximately forty-five countries throughout the world, all under Plaintiff's supervision and/or control.

12. Opposer has also licensed the Superman character and related indicia with a broad array of consumer products, including food products.

13. All of the aforementioned Superman entertainment services and goods have originated with, or were sponsored or approved by, a single source, namely DC Comics.

14. Because of DC Comics' shepherding and careful development of not just the Superman character, but also of his universe and of the things and people that populate that universe, Superman has become associated with certain symbols and indicia which in the public

mind are inextricably linked with the Superman character and which function as trademarks, both for literary and entertainment works featuring Superman and for various goods and services for which Plaintiff has licensed others to use these marks. One of these indicia is Kryptonite.

Kryptonite, as is well-known throughout the world, is an element from Superman's home planet, Krypton. While Superman is virtually invulnerable and can withstand such things as a hail of bullets, he is helpless in the face of Kryptonite radiation.

15. Kryptonite was first introduced by DC Comics in a 1943 Superman radio episode. Kryptonite became a well-known part of the Superman lore in 1945 as a result of a radio episode in which the super villainess Scarlet Widow obtained a chunk of Kryptonite and divided it among several other villains to use against Superman. Thereafter, Kryptonite made its first comic book appearance in "Superman # 61," published in November or December 1949. In that telling, Kryptonite is introduced as a rock from Superman's home planet, Krypton, that has a debilitating affect on Superman's power.

16. Since its introduction into the Superman mythos, Kryptonite has come to be recognized as a powerful symbol standing alone, and is immediately recognized as associated with and identifying the character Superman, as well as goods and services manufactured, distributed and/or licensed by or on behalf of Plaintiff.

17. As virtually the only thing that can stop Superman, Plaintiff has prominently featured Kryptonite in the Superman works and in connection with the Superman character. Through time different forms of Kryptonite were developed by Plaintiff and were featured in connection with Superman.

18. By virtue of DC Comics' ceaseless efforts to develop the Superman character and his universe, including the introduction and continuing use of Kryptonite in intimate association

with Superman, the popularity of the Superman mythos in the aforementioned Superman television series, motion pictures, and comic books and in connection with other various goods and services, and the enormous affect and goodwill associated by the public therewith, Kryptonite has become famous and instantly represents to the public Superman and such goods and products to consumers.

19. For many years, KRYPTONITE has been affixed to or has been a part of a wide array of products coming from or licensed by Plaintiff, including video games, in addition to its prior use in connection with Superman comic books and the previously noted television series and motion pictures.

20. KRYPTONITE is an arbitrary and famous mark and thus is strong and entitled to the broadest scope of protection.

21. Opposer owns the following valid and subsisting federal trademark registrations for the KRYPTONITE mark: No. 1,239,506, for clothing in International Class 25 and No. 2,656,768 in International Class 28 for toys and sporting goods. Opposer also owns App. S.N. 78/169,684 to register the mark, also in International Class 28 for a broad range of toys and sporting goods. Reg. No. 1,239,506 has become incontestable pursuant to Section 15 of the Lanham Act, 15 U.S.C. § 1065.

22. Opposer's foregoing registrations are valid, subsisting and in full force and effect; as such, they constitute *prima facie* evidence of the validity of the registered marks and of the registrations thereof, of Opposer's ownership of the marks shown therein and of Opposer's exclusive right to use the marks in commerce in connection with the goods and services named therein, without condition or limitation; they also constitute notice to Applicant of Opposer's claim of ownership of the marks shown therein; all as provided in Sections 7(b), 22 and 33(a) of



the Lanham Trademark Act of 1946 as amended (the “Lanham Act”).

23. Upon information and belief Applicant is an individual who is a citizen and resident of Spain. On February 5, 2002, Applicant filed Application S.N. 76/367,233 in the United States Patent and Trademark Office to register the mark KRYPTONITE POWER OF DANCE for “non-alcoholic beverage, namely energy drinks and sports drinks” in Class 32.

24. Upon information and belief, Applicant adopted and applied to register KRYPTONITE POWER OF DANCE with full knowledge of Opposer’s rights in and to the Superman character and related indicia and in and to the KRYPTONITE mark and with an intent to trade off of the good will of Opposer’s marks.

25. The application is based upon an alleged bona fide intent to use the mark as of the filing date of the application, February 5, 2002. This date, the only date upon which Applicant may rely, is long after Opposer’s first use of the Superman character and the KRYPTONITE mark and well after they became famous.

26. Upon information and belief, Applicant willfully chose its KRYPTONITE POWER OF DANCE mark in a deliberate attempt to associate its goods and services with Opposer and its Superman character and the overwhelming goodwill therein.

27. The dominant part of Applicant’s mark, KRYPTONITE, is identical in appearance, sound, and meaning to Opposer’s mark, and the parties’ respective marks make virtually identical commercial impressions.

28. The goods listed in Applicant’s application are related to goods with which Opposer has licensed some of its Superman related indicia. In addition, Applicant’s application does not limit the channels of trade through which Applicant’s goods will travel nor does it limit the consumers to whom the goods are directed. Thus, Applicant’s goods are presumed to travel

through all channels of trade and to be directed to all relevant consumers.

29. Applicant's use of KRYPTONITE POWER OF DANCE falsely suggests an association with or approval by Opposer of Applicant's goods, and will inevitably create confusion in the marketplace, as consumers will assume that Applicant's goods are authorized or endorsed by Opposer. Such false suggestion will cause irreparable harm to Opposer.

30. Applicant's use of its KRYPTONITE POWER OF DANCE mark is also certain to dilute Opposer's famous mark.

FIRST GROUND FOR RELIEF  
UNDER 15 U.S.C. § 1052(d)

31. Opposer incorporates by reference paragraphs 1 through 30 as if fully set forth herein.

32. The Superman character and related indicia, including KRYPTONITE, have been used continually by Opposer since a date prior to any date on which Applicant may rely.

33. Applicant's KRYPTONITE POWER OF DANCE mark is highly similar in appearance and in commercial impression to the KRYPTONITE mark.

34. The goods of Applicant to be offered under its KRYPTONITE POWER OF DANCE mark are intended and are likely to be perceived as related to Opposer's goods under the KRYPTONITE mark and to the Superman character itself. In addition, the goods, a sports drink, are closely related to the goods listed in Opposer's KRYPTONITE Reg. No. 2,656,768 – (sporting goods) and to those with which Opposer has licensed use of the Superman character in the past.

35. The use by Applicant of its mark for the goods listed in the application is likely to create the erroneous impression that Applicant's goods originate with, are sponsored or promoted

by, come from, or are otherwise associated with Opposer or Opposer's goods or services provided under the KRYPTONITE or other Superman-related marks or that Applicant's goods are endorsed, sponsored, or in some way connected with Opposer. Any use of KRYPTONITE POWER OF DANCE by Applicant is, therefore, likely to cause confusion, cause mistake or to deceive the public into the belief that the goods offered under Applicant's KRYPTONITE POWER OF DANCE mark come from or are otherwise authorized or sponsored by Opposer in violation of Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

SECOND GROUND FOR RELIEF  
DILUTION UNDER 15 U.S.C. § 1125(c)

36. Opposer incorporates by reference paragraphs 1 through 30 as if fully set forth herein.

37. Opposer's KRYPTONITE mark is strong and famous and has been so from a date prior to Applicant's application date.

38. Applicant's use of KRYPTONITE POWER OF DANCE will cause dilution of the distinctive quality of Opposer's KRYPTONITE mark.

39. Applicant's use and registration of Applicant's KRYPTONITE POWER OF DANCE mark are in violation of Section 43(c) of the Federal Trademark Act, 15 U.S.C. § 1125(c).

WHEREFORE, it is respectfully requested that this opposition be sustained and that the registration sought by Application S.N. 76/367,233 be denied.

Please charge the opposition fee in the amount of \$300.00 to our deposit Account No. 23-0825-0576900.

Dated: New York, New York  
June 28, 2004

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Respectfully submitted,

FROSS ZELNICK LEHRMAN  
& ZISSU, P.C.

By: /Patrick T. Perkins/

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