

ESTTA Tracking number: **ESTTA274397**

Filing date: **03/25/2009**

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

Proceeding	91178927
Party	Plaintiff Royal Crown Company, Inc.
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Submission	Motion to Amend Pleading/Amended Pleading
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Date	03/25/2009
Attachments	MOTION TO AMEND AND TO SUSPEND (F0435696).PDF (122 pages) (1518702 bytes)

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

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ROYAL CROWN COMPANY, INC.,	:	<u>Consolidated Proceedings</u>
	:	
Opposer,	:	Opposition No. 91178927
	:	Opposition No. 91180771
- against -	:	Opposition No. 91180772
	:	Opposition No. 91183482
THE COCA-COLA COMPANY,	:	Opposition No. 91185755
	:	Opposition No. 91186579
Applicant.	:	
-----X		

—and—

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THE COCA-COLA COMPANY,	:	
	:	
Applicant,	:	
	:	
- against -	:	Opposition No. 91184434
	:	
ROYAL CROWN COMPANY, INC.,	:	
	:	
Opposer.	:	
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**ROYAL CROWN COMPANY, INC.’S MOTIONS
FOR LEAVE TO AMEND ITS NOTICES OF OPPOSITION AND TO SUSPEND,
AND MEMORANDUM IN SUPPORT THEREOF**

Royal Crown Company, Inc. (“RC”) hereby moves pursuant to Federal Rule of Civil Procedure 15(a) and Trademark Rule of Practice 2.107(a), 37 C.F.R. § 2.107(a), for leave to amend its Notices of Opposition in the above-referenced consolidated proceedings to assert an additional ground for its opposition to bar The Coca-Cola Company (“TCCC”) from registering the applied-for marks, all of which include the term “zero,” without disclaiming that term. Specifically, and as detailed further herein, RC proposes to add as a basis for refusal of registration without disclaimer that the “zero” portion of TCCC’s applied-for marks is generic

and therefore incapable of functioning as an indication of source. A copy of each of RC's proposed amended pleadings is attached hereto as Exhibits 1-6; a copy of each of RC's proposed amended pleadings blacklined to show changes to the original Notices of Opposition is attached hereto as Exhibits 1a-6a.¹

RC further moves to suspend these proceedings pending decision on its Motion to Amend.

STATEMENT OF FACTS

Through its Motion to Amend, RC seeks to amend its Notices of Opposition in the six of these seven consolidated proceedings in which RC is in the position of opposer. All six of the opposition proceedings in question (collectively, the "Oppositions") involve the same question: the meaning of the term "zero" when applied to TCCC's beverage products at issue.

The Oppositions concern the following fifteen marks sought to be registered by TCCC, all employing the term "zero": COCA COLA ZERO, COKE ZERO, SPRITE ZERO, COCA-COLA CHERRY ZERO, CHERRY COCA-COLA ZERO, CHERRY COKE ZERO, COKE CHERRY ZERO, COCA-COLA VANILLA ZERO, VANILLA COCA-COLA ZERO, VANILLA COKE ZERO, PIBB ZERO, FANTA ZERO, POWERADE ZERO, COKE ZERO ENERGY and COKE ZERO BOLD (collectively, "TCCC's Marks"). TCCC seeks to register each of these marks in International Class 32 in connection with beverage products.

During the prosecution of the trademark applications for TCCC's Marks, the United States Patent and Trademark Office (the "USPTO") initially refused registration to each mark on the basis that "zero" as applied to the beverage products at issue is merely descriptive of those

¹ In addition to alternations made in connection with the proposed new ground, in certain instances non-substantive changes have been made to conform to changed circumstances, such as to reflect RC's new business address. RC does not expect these additional changes to be controversial.

products, and that therefore the marks could not be registered without a disclaimer of the term. In each case, TCCC eventually overcame the rejection by asserting that the term “zero” had developed secondary meaning. When the USPTO approved each of TCCC’s Marks for publication, RC initiated the underlying opposition proceedings.

In its Notices of Opposition, RC alleges that the “zero” portion of TCCC’s Marks describes fundamental characteristics of the applied-for products, that competitors including RC and others should be free to use the term “zero” in connection with their beverage products, and that therefore the marks at issue should not be issued to TCCC without disclaimer of the term “zero.”² In each of the Notices of Opposition, RC asserted that registration of TCCC’s Marks without disclaimer of the term “zero” is in violation of Section 2(e) of the Lanham Act, 15 U.S.C. § 1052(e), because the term is merely descriptive of the applied-for goods. TCCC denied the relevant allegations of the Notices of Opposition.

Under the current schedule set in these Oppositions, expert disclosures are due May 3, 2009, fact discovery closes on June 2, 2009, and RC’s testimony period opens on August 1, 2009.

Through this motion, RC seeks to amend its Notices of Opposition to add as an alternate theory that the “zero” portion of TCCC’s Marks is the ultimate type of descriptive term: a generic term. RC’s proposed Amended Notices of Opposition allege that because “zero” names distinctive characteristics and/or the most important attributes not just of TCCC’s goods, but of all similar beverages, it is a generic term, incapable of indicating source – regardless of any acquired descriptiveness TCCC claims attaches to the term when used as part of TCCC’s Marks – and that therefore TCCC’s Marks cannot be registered without disclaimer of the term.

² Similar allegations have been made by third parties, including Companhia de Bebidas das Américas – AMBEV, which has opposed TCCC’s Marks on grounds of descriptiveness (*see* Opposition No. 91178953 and oppositions consolidated therewith); and Ben & Jerry’s Homemade, Inc., which is defending an opposition proceeding brought by TCCC (*see* Opposition No. 91181930).

ARGUMENT

A. Motions for Leave to Amend are Freely Granted

Pursuant to Trademark Rule of Practice 2.107, pleadings in opposition proceedings against applications filed under Section 1 of the Lanham Act (as here) “may be amended in the same manner and to the same extent as in a civil action in a United States district court, except that, after the close of the time period for filing an opposition including any extension of time for filing an opposition, an opposition may not be amended to add to the goods or services opposed.” 37 C.F.R. § 2.107. Amendments of pleadings in civil actions in United States district courts are governed by Rule 15 of the Federal Rules of Civil Procedures, which provides in pertinent part that “a party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given* when justice so requires.” Fed. R. Civ. P. 15(a) (emphasis added). Rule 15(a) “allows for liberal amendment in the interests of resolving cases on the merits.” 3 *Moore’s Federal Practice* § 15.02[1] at 15-9 (3d ed. 2006). *See also Foman v. Davis*, 371 U.S. 178 (1962).

“The Supreme Court has emphasized that amendment should normally be permitted, and has stated that refusal to grant leave without justification is ‘inconsistent with the spirit of the Federal Rules.’” *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234 (2d Cir. 1995) (quoting *Foman*, 371 U.S. 178). Consequently, “[t]he Board liberally grants leave to amend pleadings at any stage of the proceeding when justice requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party.” *Boral Ltd. v. FMC Corp.*, 59 U.S.P.Q.2d 1701, 1702 (T.T.A.B. 2000) (citing *Commodore Elecs. Ltd. v. CBM Kabushiki Kaisha*, 26 U.S.P.Q.2d 1503 (T.T.A.B. 1993); *U.S. Olympic Comm. v. O-M Bread Inc.*, 26 U.S.P.Q.2d 1221 (T.T.A.B. 1993)). Thus, the Board generally denies applications

for leave to amend only where the amendment is unduly prejudicial to the opponent or where the amendment would be futile.

B. Justice Requires that RC Be Permitted to Amend Its Notices of Opposition

In this case, granting RC's request to amend its pleadings to add a claim that the "zero" portion of TCCC's Marks is generic would best serve the interests of justice. Not only RC, but also many third parties, would potentially be prejudiced if RC is not permitted to amend its pleadings. RC would be prejudiced because it would be foreclosed from bringing a valid ground to oppose registration of TCCC's Marks without disclaimer. Third parties also potentially would be prejudiced, since registration to TCCC of a generic term would allow TCCC to monopolize a term that everyone selling similar products must be free to use. Indeed, TCCC already has sought to enforce its alleged rights in the term "zero" against both RC and multiple third parties.³

On the other hand, there would be no prejudice to TCCC if RC is permitted to amend the Notices of Opposition. From a substantive perspective, TCCC will not be prejudiced by the amendment because the additional ground sought to be asserted is but a refinement of the current pleadings. TCCC has been on notice since the first Notice of Opposition was filed that RC challenged the very registrability of the term "zero" as part of TCCC's marks. In each of its Notices of Opposition, RC alleged that term "zero" was used by both TCCC and others in the beverage industry "to describe fundamental characteristics of their beverage products." Whether the term is unregistrable under Section 2(e) of the Lanham Act as merely descriptive, or whether the term is unregistrable as generic and therefore fundamentally incapable of distinguishing the goods of TCCC from the goods of others is merely a question of degree. *Cf. Bangert v. Local Plumber, Inc.*, Canc. No. 32,791, <http://ttabvue.uspto.gov/ttabvue/v?pno=92032791&pty=>

³ For example, TCCC has filed oppositions against numerous third parties on the basis of its alleged rights in the term "zero." *See, e.g.*, Opposition Nos. 91187638, 91187355, 91186175, 91185018, 91183580 and 91181930.

[CAN&eno=10](#), also available at 2003 WL 880558, *1 (T.T.A.B. March 4, 2003) (granting request to amend answer to add defense of genericness to already-pleaded defense of descriptiveness because “the further assertion that the ‘mark’ is generic is deemed to be in one respect an elaboration of that [descriptiveness] defense, because genericness, as the ultimate in descriptiveness, is encompassed within a descriptiveness defense”); see also *BellSouth Corp. v DataNational Corp.*, 60 F.3d 1565, 1569 (Fed. Cir. 1995) (“the generic name of a thing is in fact the ultimate in descriptiveness”) (quotations, citations and alterations omitted).

Moreover, the Board already has noted that adding a genericness claim in a proceeding that already includes a descriptiveness claim is not substantively prejudicial to the applicant, since the former is harder to prove than the latter. *Bangert*, 2003 WL 880558 at *1 (“because it is more difficult to prove that a term is generic than it is to prove that a term is merely descriptive, there is no prejudice”).

In addition, and critically, TCCC cannot claim that it is somehow surprised by the addition of the genericness claim. The genericness of the “zero” portion of TCCC’s Marks already is at issue in these consolidated proceedings by virtue of the pleadings in the opposition TCCC filed against RC’s applications to register PURE ZERO and DIET RITE PURE ZERO (at issue in Opposition No. 91184434, one of the seven proceedings consolidated here), wherein RC alleged as an affirmative defense that “zero” is generic. See Answer (Docket No. 9), ¶ 10. Thus, ever since the recent consolidation of the opposition proceedings brought by RC with the opposition proceeding brought by TCCC, TCCC has been on notice that the genericness of the term “zero” is at issue, that genericness is ripe for discovery in these proceedings, and that

genericness will be on trial in these proceedings.⁴ Therefore, there will be no unfair surprise to TCCC if RC's Motion to Amend is granted.

Even if genericness were not already an issue in this proceeding, TCCC could not claim prejudice since the case is still in the discovery phase, with at least two months until discovery closes. TCCC has ample time to seek any discovery from RC or others that it believes it may need to defend the additional ground. Further, TCCC currently has more than *seven* months until the close of its testimony period, providing it more than enough time to prepare its defense to the additional claim. *U.S. Olympic Comm.*, 26 U.S.P.Q.2d at 1223 (motion for leave to amend granted where proceeding still in discovery phase); *Flatley v. Trump*, 11 U.S.P.Q. 1284, 1286 (T.T.A.B. 1989) (same); *see also* Beth A. Chapman, *TIPS FROM THE TTAB: Amending Pleadings: The Right Stuff*, 81 TMR 302, 305 (1991) (if a proceeding "is still in the pre-trial stage (*i.e.*, in discovery, or prior to any testimony having been taken by the plaintiff in its testimony period), leave to amend, if otherwise appropriate, will be allowed"). And if TCCC for some reason believes it needs additional discovery time in order to gather evidence responsive to the additional claim, RC hereby consents to an extension of the discovery and trial schedule in these consolidated proceedings.

In sum, under the circumstances described above, the interests of justice clearly favor permitting the amendment, and TCCC simply cannot meet its heavy burden of demonstrating prejudice sufficient to deny RC's request for leave to amend the Notices of Opposition.

⁴ Moreover, refusing to permit RC to add a claim of genericness to the pending oppositions runs the risk of inconsistent rulings. RC will be filing at least two more opposition proceedings against marks of TCCC that contain "zero": FULL THROTTLE ZERO, which is the subject of Application No. 77413618 and for which RC's opposition deadline is April 22, 2009; and VAULT ZERO, which is the subject of Application No. 78698990 and for which RC's opposition deadline is June 17, 2009. RC will assert as a ground in the yet-to-filed oppositions that "zero" is generic. If RC is not permitted to amend its pleadings in the consolidated Oppositions to add genericness as a basis for refusal of registration without disclaimer, the Board could determine in these Oppositions that "zero" is descriptive but has acquired secondary meaning, and thus that TCCC is permitted to register TCCC's Marks without disclaimer, but then determine in the FULL THROTTLE ZERO and VAULT ZERO oppositions that "zero" is generic and therefore incapable of registration without disclaimer.

C. Amendment of the Notices of Opposition Would Not Be Futile

Permitting RC leave to amend its pleadings to assert that the “zero” portion of TCCC’s Marks is generic would not be an exercise in futility. The Board considers proposed amendments to be futile only where the newly asserted claim or defense is legally insufficient or would serve no useful purpose. TBMP § 507.02 at 500–32. When considering a motion to amend to add a new claim, the Board does *not* consider whether the party seeking amendment has sufficient evidence to prove the proposed claim; that is a matter left for trial or decision on summary judgment. *Id.* at 500–32-33.

RC’s proposed additional ground of genericness is not legally insufficient. There can be no question that RC’s proposed Amended Notices of Opposition satisfy the minimal pleading requirements in connection with the proposed additional ground of opposition – namely, an allegation that the term sought to be registered as part of TCCC’s various marks is generic when used in connection with the goods at issue since it denotes an essential characteristic of those goods, and therefore such term cannot be registered as part of the TCCC Marks at issue without a disclaimer thereof.

There also can be no question that such a claim is a valid basis on which to oppose registration of TCCC’s Marks without disclaimer. Although, in trademark parlance, the category of “generic” and unregistrable terms may more typically be thought to apply to words that denote a particular *category* of goods, the law is clear that words that denote a fundamental *characteristic* of a class of goods also can fall into the unregistrable “generic” category. *See, e.g., Miller Brewing Co. v. G. Heileman Brewing Co.*, 561 F.2d 75, 80 (7th Cir. 1977) (adjective can be an unregistrable generic term); *Miller Brewing Co. v. Joseph Schlitz Brewing Co.*, 605 F.2d 990, 203 U.S.P.Q. 642 (7th Cir. 1979) (affirming cancellation of LITE registration for beer).

Because the additional claim RC seeks to add is both valid under settled law, and because RC's proposed Amended Notices of Opposition include the appropriate allegations necessary to make out a claim for the added ground, the proposed amendment would not be futile and should be permitted.

D. Proceedings Should Be Suspended Pending Disposition of RC's Motion to Amend

RC requests that the proceedings be suspended until the Board issues a decision on RC's Motion to Amend. The Board's decision to permit or deny RC's request to add a genericness defense may affect discovery in this case, including expert discovery, and will clearly affect both RC's and TCCC's trial strategy, preparation and presentation. Therefore, suspension of these proceedings is appropriate pending disposition of RC's Motion to Amend.

CONCLUSION

For the reasons set forth herein, RC respectfully requests that it be granted leave to amend its Notices of Opposition in these consolidated proceedings, and that the proceedings be suspended until such time as the Board issues a decision on RC's Motion to Amend.

Dated: New York, New York
March 25, 2009

Respectfully submitted,

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

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Attorneys for RC Royal Crown Company, Inc.

EXHIBIT 1

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

In the Matter of Application Serial No. 78/580,598
Mark: COCA-COLA ZERO
Published in the *Official Gazette* on April 17, 2007

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ROYAL CROWN COMPANY, INC., :
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 Opposer, :
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 - against - :
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 THE COCA-COLA COMPANY, :
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 Applicant. :
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Opposition No. 91178927

AMENDED 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 a registration for the mark COCA-COLA ZERO as shown in Application Serial No. 78/580,598 for “beverages, namely soft drinks; syrups and concentrates for the making of the same” 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. In addition, 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 pioneered the use of SLENDA in 2000 to become the first major aspartame-free diet cola in the United States.

4. Since at least 2003 Opposer has been continuously using the term ZERO in connection with its diet beverages. The term ZERO is descriptive of characteristics of the product, namely that the product has zero carbs and calories.

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

6. On August 9, 2005, a non-final office action issued requiring Opposer to disclaim zero because it is descriptive of one or more features of Opposer’s product. The office action also identified as a possible bar to registration the mark herein opposed.

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.

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 soft drinks that have zero calories, zero sugar or zero carbohydrates.

10. Upon information and belief, Opposer is not the only entity that uses the term ZERO to describe characteristics of soft drinks. Rather, the term ZERO is commonly used in the

trade to inform consumers that the soft drink product at issue has 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, Atlanta, Georgia 30313.

12. On March 4, 2005, Applicant filed Application Serial No. 78/580,598 to register the mark COCA-COLA ZERO for “beverages, namely soft drinks; syrups and concentrates for the making of the same” in International Class 32. Applicant originally filed its application on the basis of an intent to use but later amended to allege use since June 13, 2005. At the time Applicant filed the application herein opposed, the term ZERO was being used in the beverage industry to describe a characteristic of diet soft drinks namely zero calories and zero carbs. In fact, Opposer had been using ZERO on packaging for Diet Rite for more than one year before Applicant filed the application herein opposed for just this purpose.

13. On March 30, 2005, the PTO issued an office action noting that ZERO is merely descriptive of a feature of Applicant’s goods, namely calorie or carbohydrate content and requiring Applicant to disclaim the descriptive wording. Since that time, the PTO has issued similar findings in connection with several other applications filed by Applicant including COCA-COLA CHERRY ZERO, CHERRY COKE ZERO, COCA-COLA VANILLA ZERO, VANILLA COKE ZERO, CHERRY COCA-COLA ZERO, COKE CHERRY ZERO and PIBB ZERO.

14. In a submission dated June 20, 2006, Applicant requested reconsideration of the disclaimer requirement. The PTO, find the arguments for registration “unpersuasive,” continued its refusal to register on the basis that ZERO is descriptive (and is understood to mean that soft drinks sold under such mark have no calories or carbohydrates) and must be disclaimed.

15. On January 25, 2007, Applicant submitted arguments to the PTO claiming that the term ZERO had acquired distinctiveness under Section 2(f) and that its primary meaning was to identify source, not to describe characteristics of Applicant's zero calorie soft drink. At the time the claim of acquired distinctiveness was submitted, Opposer had been using ZERO or PURE ZERO continuously since 2003.

FIRST CLAIM FOR RELIEF (SECTION 2(e))

16. Opposer repeats and realleges paragraphs 1 through 15 above as is fully set forth herein.

17. Applicant's claim that the term ZERO is registrable under Section 2(f) of the Lanham Act 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.

18. In arguing that the term ZERO has acquired distinctiveness the evidence submitted by Applicant refers repeatedly to the "no-cal," "no-sugar," "no-calorie," or zero-calorie" attributes of COCA-COLA ZERO showing that as used by Applicant, the term ZERO it is merely descriptive.

19. Registration to Applicant of the mark COCA-COLA ZERO without a disclaimer of the word ZERO is currently harming and will continue to 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.

20. By reason of the foregoing, Opposer is likely to be harmed by registration of Application Serial No. 78/580,598 for the mark COCA-COLA ZERO.

SECOND CLAIM FOR RELIEF (FRAUD)

21. Opposer repeats and realleges paragraphs 1 through 20 above as if fully set forth herein.

22. In connection with its claim that the term ZERO need not be disclaimed and had acquired distinctiveness under Section 2(f) of the Lanham Act 15 U.S.C. §1052(f), Applicant was required to prove “substantially exclusive and continuous use” of ZERO as a mark for the “five years before the date on which the claim of distinctiveness was made.”

23. As of the date Applicant made the claim of acquired distinctiveness, January 25, 2007, Opposer had been using the term ZERO to describe the fact that its diet soda had zero carbs and zero calories since 2003. As such, Applicant could not have shown and cannot prove “substantially exclusive” use of ZERO for the five years preceding its claim of distinctiveness. In addition, on information and belief, third parties in the beverage industry were making use of the term ZERO to describe fundamental characteristics of their diet sodas during the five year preceding Applicant’s claim of acquired distinctiveness.

24. As a result of the use by Opposer and third parties of the term ZERO prior to January 25, 2007, Applicant could not have shown proof of substantially exclusive use of the term ZERO nor that the term has become vested with secondary meaning and has become distinctive exclusively of Applicant’s products.

25. Applicant’s claim of substantially exclusive use of ZERO in connection with its products for the five years preceding January 2007 was false and was known to be false at the time it was made and was made for the purpose of inducing the Patent and Trademark Office to approve publication of the mark herein opposed without acquiring a disclaimer of the term ZERO.

26. Applicant's statements to the Patent and Trademark Office concerning its exclusive rights in and use of the term ZERO were false and were known to be false when made.

27. Applicant's conduct constitutes fraud on the Patent and Trademark Office.

28. As a result of Applicant's false statements, Applicant's mark has been passed to publication without a disclaimer of the word ZERO. Registration to Applicant of the mark COCA-COLA ZERO without a disclaimer of the word ZERO is harming and will continue to harm Opposer.

29. By reason of the foregoing, Opposer is likely to be harmed by registration of Applicant Serial No. 78/580,598 for the mark COCA-COLA ZERO.

THIRD CLAIM FOR RELIEF (SECTION 2 AND/OR SECTION 2(e))

30. Opposer repeats and realleges paragraphs 1 through 29 above as if fully set forth herein.

31. The term "zero" or number zero (0) names distinctive characteristics and/or the most important attributes of certain beverage products, including all or some of the beverage products for which the COCA-COLA ZERO mark is sought to be registered and for which the mark is used.

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

33. Registration of the mark COCA-COLA ZERO without a disclaimer of the generic term "zero" is contrary to Section 2 of the Lanham Act, which permits registration only to marks capable of distinguishing the goods of the applicant from those of others, and/or Section 2(e) of the Lanham Act, which prohibits registration of merely descriptive marks.

34. Because “zero” is generic and unregistrable, Applicant cannot be permitted to register the COCA-COLA ZERO mark without disclaiming the term “zero.”

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

36. By reason of the foregoing, Opposer is likely to be harmed by registration of Application Serial No. 78/580,598 for the mark COCA-COLA ZERO.

WHEREFORE, it is respectfully requested that Opposer’s opposition be sustained and that the registration sought by Applicant in Application Serial No. 78/580,589 for the mark COCA-COLA ZERO be denied absent the entry of a disclaimer of the term “zero.”

Dated: New York, New York
_____, 2009

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: _____
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Attorneys for Opposer Royal Crown Company, Inc.

EXHIBIT 1a

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

In the Matter of Application Serial No. 78/580,598
Mark: COCA-COLA ZERO
Published in the *Official Gazette* on April 17, 2007

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 THE COCA-COLA COMPANY, :
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 Applicant. :
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Opposition No. 91178927

~~Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451~~

~~BOX TTAB-FEE~~

AMENDED NOTICE OF OPPOSITION

Royal Crown Company, Inc., a Delaware corporation located and doing business at ~~900 King Street, Rye Brook, New York 10573~~5301 Legacy Drive, Plano, Texas 75024 (“Opposer”), believes that it will be damaged by the issuance of a registration for the mark COCA-COLA ZERO as shown in Application Serial No. 78/580,598 for “beverages, namely soft drinks; syrups and concentrates for the making of the same” 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:

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3. Opposer and its predecessors have continued to lead in innovations in the diet soft drink category by introducing unique flavor extensions. In addition, 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 pioneered the use of SLENDA in 2000 to become the first major aspartame-free diet cola in the United States.

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6. On August 9, 2005, a non-final office action issued requiring Opposer to disclaim zero because it is descriptive of one or more features of Opposer’s product. The office action also identified as a possible bar to registration the mark herein opposed. ~~Subsequently, on August 2, 2006, the application was suspended.~~

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.

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. ~~The PTO also suspended action on the application on the~~

carbs. In fact, Opposer had been using ZERO on packaging for Diet Rite for more than one year before Applicant filed the application herein opposed for just this purpose.

13. ~~14.~~ On March 30, 2005, the PTO issued an office action noting that ZERO is merely descriptive of a feature of Applicant's goods, namely calorie or carbohydrate content and requiring Applicant to disclaim the descriptive wording. Since that time, the PTO has issued similar findings in connection with several other applications filed by Applicant including COCA-COLA CHERRY ZERO, CHERRY COKE ZERO, COCA-COLA VANILLA ZERO, VANILLA COKE ZERO, CHERRY COCA-COLA ZERO, COKE CHERRY ZERO and PIBB ZERO.

14. ~~15.~~ In a submission dated June 20, 2006, Applicant requested reconsideration of the disclaimer requirement. The PTO, find the arguments for registration "unpersuasive," continued its refusal to register on the basis that ZERO is descriptive (and is understood to mean that soft drinks sold under such mark have no calories or carbohydrates) and must be disclaimed.

15. ~~16.~~ On January 25, 2007, Applicant submitted arguments to the PTO claiming that the term ZERO had acquired distinctiveness under Section 2(f) and that its primary meaning was to identify source, not to describe characteristics of Applicant's zero calorie soft drink. At the time the claim of acquired distinctiveness was submitted, Opposer had been using ZERO or PURE ZERO continuously since 2003.

FIRST CLAIM FOR RELIEF UNDER (SECTION 2(e))

16. ~~17.~~ Opposer repeats and realleges paragraphs 1 through ~~16~~15 above as is fully set forth herein.

17. ~~18.~~ Applicant's claim that the term ZERO is registrable under Section 2(f) of the Lanham Act 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.

18. ~~19.~~ In arguing that the term ZERO has acquired distinctiveness the evidence submitted by Applicant refers repeatedly to the “no-cal,” “no-sugar,” “no-calorie,” or zero-calorie” attributes of COCA-COLA ZERO showing that as used by Applicant, the term ZERO it is merely descriptive.

19. ~~20.~~ Registration to Applicant of the mark COCA-COLA ZERO without a disclaimer of the word ZERO is currently harming ~~Opposer since Applicant’s opposed application has prevented Opposer from obtaining registration of its DIET RITE ZERO and PURE ZERO marks. Further, registration to Applicant of the mark COCA COLA ZERO without a disclaimer of the term ZERO~~ and will continue to 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.

20. ~~21.~~ By reason of the foregoing, Opposer is likely to be harmed by registration of Application Serial No. 78/580,598 for the mark COCA-COLA ZERO.

~~COUNT TWO~~ SECOND CLAIM FOR RELIEF (FRAUD)

21. ~~22.~~ Opposer repeats and realleges paragraphs 1 through ~~21~~20 above as if fully set forth herein.

22. ~~23.~~ In connection with its claim that the term ZERO need not be disclaimed and had acquired distinctiveness under Section 2(f) of the Lanham Act 15 U.S.C. §1052(f), Applicant was required to prove “substantially exclusive and continuous use” of ZERO as a mark for the “five years before the date on which the claim of distinctiveness was made.”

23. ~~24.~~ As of the date Applicant made the claim of acquired distinctiveness, January 25, 2007, Opposer had been using the term ZERO to describe the fact that its diet soda had zero

carbs and zero calories since 2003. As such, Applicant could not have shown and cannot prove “substantially exclusive” use of ZERO for the five years preceding its claim of distinctiveness. In addition, on information and belief, third parties in the beverage industry were making use of the term ZERO to describe fundamental characteristics of their diet sodas during the five year preceding Applicant’s claim of acquired distinctiveness.

24. ~~25.~~ As a result of the use by Opposer and third parties of the term ZERO prior to January 25, 2007, Applicant could not have shown proof of substantially exclusive use of the term ZERO nor that the term has become vested with secondary meaning and has become distinctive exclusively of Applicant’s products.

25. ~~26.~~ Applicant’s claim of substantially exclusive use of ZERO in connection with its products for the five years preceding January 2007 was false and was known to be false at the time it was made and was made for the purpose of inducing the Patent and Trademark Office to approve publication of the mark herein opposed without acquiring a disclaimer of the term ZERO.

26. ~~27.~~ Applicant’s statements to the Patent and Trademark Office concerning its exclusive rights in and use of the term ZERO were false and were known to be false when made.

27. ~~28.~~ Applicant’s conduct constitutes fraud on the Patent and Trademark Office.

28. ~~29.~~ As a result of Applicant’s false statements, Applicant’s mark has been passed to publication without a disclaimer of the word ZERO. Registration to Applicant of the mark COCA-COLA ZERO without a disclaimer of the word ZERO is harming and will continue to harm Opposer.

29. ~~30.~~ By reason of the foregoing, Opposer is likely to be harmed by registration of Applicant Serial No. 78/580,598 for the mark COCA-COLA ZERO.

THIRD CLAIM FOR RELIEF (SECTION 2 AND/OR SECTION 2(e))

30. Opposer repeats and realleges paragraphs 1 through 29 above as if fully set forth herein.

31. The term “zero” or number zero (0) names distinctive characteristics and/or the most important attributes of certain beverage products, including all or some of the beverage products for which the COCA-COLA ZERO mark is sought to be registered and for which the mark is used.

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

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

34. Because “zero” is generic and unregistrable, Applicant cannot be permitted to register the COCA-COLA ZERO mark without disclaiming the term “zero.”

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

36. By reason of the foregoing, Opposer is likely to be harmed by registration of Application Serial No. 78/580,598 for the mark COCA-COLA ZERO.

WHEREFORE, it is respectfully requested that Opposer's opposition be sustained and that the registration sought by Applicant in Application Serial No. 78/580,589 for the mark COCA-COLA ZERO be denied absent the entry of a disclaimer of the ~~descriptive~~ term ~~ZERO~~. "zero."

~~The Trademark Trial and Appeal Board is hereby authorized to charge the opposition filing fee of \$300 to Opposer's counsel's deposit Account Number 23-0825-0576900.~~

Dated: New York, New York
~~August~~ _____,
20072009

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: _____
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Document comparison done by DeltaView on Wednesday, March 25, 2009 6:10:45 PM

Input:	
Document 1	file://M:/Wdox/Docs/Clients/DPSU/0705053/F0088210.DOC
Document 2	WORLDOX://M:\Wdox\Docs\Clients\DPSU\0705053\F0433421.DOC
Rendering set	Standard

Legend:	
<u>Insertion</u>	
Deletion	
Moved from	
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Style change	
Format change	
Moved deletion	
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Deleted cell	
Moved cell	
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Deletions	42
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Style change	0
Format changed	0
Total changes	76

EXHIBIT 2

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

In the Matter of Application Serial No. 78/316,078
Mark: SPRITE ZERO
Published in the *Official Gazette* on April 17, 2007

-----X		
ROYAL CROWN COMPANY, INC.,	:	
	:	
Opposer,	:	
	:	Opposition No. 91180771
- against -	:	
	:	
THE COCA-COLA COMPANY,	:	
	:	
Applicant.	:	
-----X		

AMENDED 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 a registration for the mark SPRITE ZERO as shown in Application Serial No.78/316,078 for “beverages, namely soft drinks; syrups and concentrates for the making of the same” 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. In addition, Diet Rite Cola was the first diet drink to be salt/sodium free; was the first sodium-free, caffeine-free and calorie-free soft

drink made with Nutrasweet; and pioneered the use of SPLENDA in 2000 to become the first major aspartame-free diet cola in the United States.

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 the product, namely that the product has zero carbohydrates and zero calories.

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

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

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.

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. The PTO also suspended action on the application on the grounds that the mark herein opposed was filed prior to the filing date of the PURE ZERO application and should the SPRITE ZERO mark register, registration of Opposer’s PURE ZERO mark could be refused on the grounds of likelihood of confusion.

9. Upon information and belief, the PTO cited the SPRITE ZERO application against Opposer’s PURE ZERO application only because both marks use the descriptive term “zero” to describe characteristics of the soda on which the marks are used.

10. 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 soft drinks that have zero calories, zero sugar and/or zero carbohydrates.

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

12. 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.

13. On October 20, 2003, Applicant filed Application Serial No. 78/316,078 to register the mark SPRITE ZERO for “beverages, namely carbonated soft drinks; syrups, concentrates and powders for making same” in International Class 32. Applicant originally filed its application on the basis of an intent to use but later amended to allege use since September 13, 2004. At the time Applicant filed the application herein opposed, the term “zero” was being used in the beverage industry to describe a characteristic of diet soft drinks, namely, zero calories and zero carbohydrates.

14. On May 3, 2004, the PTO issued an office action in respect of the application herein opposed, noting that the term “zero” is merely descriptive of a feature of Applicant’s goods, namely calorie or carbohydrate content, and therefore requiring Applicant to disclaim the descriptive wording. Since that time, the PTO has issued similar findings in connection with several other applications filed by Applicant, including for the marks COCA-COLA ZERO, COCA-COLA CHERRY ZERO, CHERRY COKE ZERO, COCA-COLA VANILLA ZERO,

VANILLA COKE ZERO, CHERRY COCA-COLA ZERO, COKE CHERRY ZERO and PIBB ZERO.

15. The PTO's refusal to register the SPRITE ZERO mark without a disclaimer of the term "zero" was continued on June 3, 2005.

16. In a submission dated February 28, 2006, Applicant submitted arguments to the PTO claiming that the term "zero" had acquired distinctiveness under Section 2(f) such that its primary meaning was to identify source, not to describe characteristics of Applicant's zero calorie and zero carbohydrate soft drink. At the time Applicant's claim of acquired distinctiveness was submitted, Opposer had been using ZERO or PURE ZERO continuously since 2003. On July 15, 2006, the PTO rejected Applicant's claim of acquired distinctiveness as not having been properly supported.

17. On January 17, 2007, Applicant proffered to the PTO various evidence purportedly supporting its claim that the term "zero" had acquired distinctiveness. The PTO apparently accepted this evidence and approved the application for publication prior to registration.

18. If the application herein opposed is allowed to mature to registration without a disclaimer of the term "zero," Applicant will be granted rights in a descriptive or generic term that should be freely available for use throughout the beverage industry, and Opposer will be prejudiced and harmed thereby.

FIRST CLAIM FOR RELIEF (SECTION 2(e))

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

20. Applicant's claim that the term "zero" is registrable under Section 2(f) of the Lanham Act 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.

21. In arguing that the term “zero” has acquired distinctiveness the evidence submitted by Applicant refers repeatedly to the “no-cal,” “no-sugar,” “no-calorie,” or “zero-calorie” attributes of SPRITE ZERO, thereby showing that as used by Applicant the term “zero” is merely descriptive.

22. Registration to Applicant of the mark SPRITE ZERO without a disclaimer of the term “zero” is currently harming Opposer since Applicant’s opposed application has prevented Opposer from obtaining registration of its PURE ZERO mark. Further, registration to Applicant of the mark SPRITE ZERO without a disclaimer of the term “zero” will continue to 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.

23. By reason of the foregoing, Opposer is likely to be harmed by registration of Application Serial No. 78/316,078 for the mark SPRITE ZERO.

SECOND CLAIM FOR RELIEF (FRAUD)

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

25. In connection with its claim that the term “zero” need not be disclaimed and had acquired distinctiveness under Section 2(f) of the Lanham Act 15 U.S.C. §1052(f), Applicant was required to prove “substantially exclusive and continuous use” of ZERO as a mark for the “five years before the date on which the claim of distinctiveness was made.”

26. As of the date Applicant made the claim of acquired distinctiveness, February 28, 2006, Opposer had been using the term “zero” to describe the fact that its diet soda had zero carbs and zero calories since 2003. As such, Applicant could not have shown and cannot prove “substantially exclusive” use of ZERO for the five years preceding its claim of distinctiveness. In addition, on information and belief, third parties in the beverage industry were making use of the term “zero” to describe fundamental characteristics of their diet sodas during the five year preceding Applicant’s claim of acquired distinctiveness.

27. As a result of the use by Opposer and third parties of the term “zero” prior to February 28, 2006, Applicant could not have shown proof of substantially exclusive use of the term “zero” nor that the term has become distinctive exclusively of Applicant’s products.

28. Applicant’s claim of substantially exclusive use of ZERO in connection with its products for the five years preceding February 2006 was false and was known to be false at the time it was made and was made for the purpose of inducing the Patent and Trademark Office to approve publication of the mark herein opposed without requiring a disclaimer of the term “zero.”

29. Applicant’s statements to the Patent and Trademark Office concerning its exclusive rights in and use of the term “zero” were false and were known to be false when made.

30. Applicant’s conduct constitutes fraud on the Patent and Trademark Office.

31. As a result of Applicant’s false statements, Applicant’s mark has been passed to publication without a disclaimer of the term “zero”. Registration to Applicant of the mark SPRITE ZERO without a disclaimer of the term “zero” is harming and will continue to harm Opposer.

32. By reason of the foregoing, Opposer is likely to be harmed by registration of Applicant Serial No. 78/316,078 for the mark SPRITE ZERO.

THIRD CLAIM FOR RELIEF (SECTION 2 AND/OR SECTION 2(e))

33. Opposer repeats and realleges paragraphs 1 through 32 above as if fully set forth herein.

34. The term “zero” or number zero (0) names distinctive characteristics and/or the most important attributes of certain beverage products, including all or some of the beverage products for which the SPRITE ZERO mark is sought to be registered and for which the mark is used.

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

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

37. Because “zero” is generic and unregistrable, Applicant cannot be permitted to register the SPRITE ZERO mark without disclaiming the term “zero.”

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

39. By reason of the foregoing, Opposer is likely to be harmed by registration of Application Serial No. 78/316,078 for the mark SPRITE ZERO.

WHEREFORE, it is respectfully requested that Opposer's opposition be sustained and that the registration sought by Applicant in Application Serial No. 78/580,589 for the mark SPRITE ZERO be denied absent the entry of a disclaimer of the term "zero."

Dated: New York, New York
_____, 2009

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: _____
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New York, New York 10017
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Email: bsolomon@frosszelnick.com
lpopp-rosenberg@frosszelnick.com

Attorneys for Opposer Royal Crown Company, Inc.

EXHIBIT 2a

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

In the Matter of Application Serial No. 78/316,078
Mark: SPRITE ZERO
Published in the *Official Gazette* on April 17, 2007

-----X
ROYAL CROWN COMPANY, INC., :
 :
 :
 Opposer, :
 :
 :
 - against - : Opposition No. 91180771
 :
 :
 THE COCA-COLA COMPANY, :
 :
 :
 Applicant. :
-----X

AMENDED NOTICE OF OPPOSITION

Royal Crown Company, Inc., a Delaware corporation located and doing business at ~~900 King Street, Rye Brook, New York 10573~~ 5301 Legacy Drive, Plano, Texas 75024 (“Opposer”), believes that it will be damaged by the issuance of a registration for the mark SPRITE ZERO as shown in Application Serial No.78/316,078 for “beverages, namely soft drinks; syrups and concentrates for the making of the same” 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. In addition, Diet Rite Cola was the first

diet drink to be salt/sodium free; was the first sodium-free, caffeine-free and calorie-free soft drink made with Nutrasweet; and pioneered the use of SLENDA in 2000 to become the first major aspartame-free diet cola in the United States.

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 the product, namely that the product has zero carbohydrates and zero calories.

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

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

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.

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. The PTO also suspended action on the application on the grounds that the mark herein opposed was filed prior to the filing date of the PURE ZERO application and should the SPRITE ZERO mark register, registration of Opposer’s PURE ZERO mark could be refused on the grounds of likelihood of confusion.

9. Upon information and belief, the PTO cited the SPRITE ZERO application against Opposer’s PURE ZERO application only because both marks use the descriptive term “zero” to describe characteristics of the soda on which the marks are used.

10. 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 soft drinks that have zero calories, zero sugar and/or zero carbohydrates.

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

12. 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.

13. On October 20, 2003, Applicant filed Application Serial No. 78/316,078 to register the mark SPRITE ZERO for “beverages, namely carbonated soft drinks; syrups, concentrates and powders for making same” in International Class 32. Applicant originally filed its application on the basis of an intent to use but later amended to allege use since September 13, 2004. At the time Applicant filed the application herein opposed, the term “zero” was being used in the beverage industry to describe a characteristic of diet soft drinks, namely, zero calories and zero carbohydrates.

14. On May 3, 2004, the PTO issued an office action in respect of the application herein opposed, noting that the term “zero” is merely descriptive of a feature of Applicant’s goods, namely calorie or carbohydrate content, and therefore requiring Applicant to disclaim the descriptive wording. Since that time, the PTO has issued similar findings in connection with several other applications filed by Applicant, including for the marks COCA-COLA ZERO, COCA-COLA CHERRY ZERO, CHERRY COKE ZERO, COCA-COLA VANILLA ZERO,

VANILLA COKE ZERO, CHERRY COCA-COLA ZERO, COKE CHERRY ZERO and PIBB ZERO.

15. The PTO's refusal to register the SPRITE ZERO mark without a disclaimer of the term "zero" was continued on June 3, 2005.

16. In a submission dated February 28, 2006, Applicant submitted arguments to the PTO claiming that the term "zero" had acquired distinctiveness under Section 2(f) such that its primary meaning was to identify source, not to describe characteristics of Applicant's zero calorie and zero carbohydrate soft drink. At the time Applicant's claim of acquired distinctiveness was submitted, Opposer had been using ZERO or PURE ZERO continuously since 2003. On July 15, 2006, the PTO rejected Applicant's claim of acquired distinctiveness as not having been properly supported.

17. On January 17, 2007, Applicant proffered to the PTO various evidence purportedly supporting its claim that the term "zero" had acquired distinctiveness. The PTO apparently accepted this evidence and approved the application for publication prior to registration.

18. If the application herein opposed is allowed to mature to registration without a disclaimer of the term "zero," Applicant will be granted rights in a descriptive or generic term that should be freely available for use throughout the beverage industry, and Opposer will be prejudiced and harmed thereby.

FIRST CLAIM FOR RELIEF UNDER (SECTION 2(e))

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

20. Applicant's claim that the term "zero" is registrable under Section 2(f) of the Lanham Act 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.

21. In arguing that the term “zero” has acquired distinctiveness the evidence submitted by Applicant refers repeatedly to the “no-cal,” “no-sugar,” “no-calorie,” or “zero-calorie” attributes of SPRITE ZERO, thereby showing that as used by Applicant the term “zero” is merely descriptive.

22. Registration to Applicant of the mark SPRITE ZERO without a disclaimer of the term “zero” is currently harming Opposer since Applicant’s opposed application has prevented Opposer from obtaining registration of its PURE ZERO mark. Further, registration to Applicant of the mark SPRITE ZERO without a disclaimer of the term “zero” will continue to 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.

23. By reason of the foregoing, Opposer is likely to be harmed by registration of Application Serial No. 78/316,078 for the mark SPRITE ZERO.

COUNT TWO—SECOND CLAIM FOR RELIEF (FRAUD)

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

25. In connection with its claim that the term “zero” need not be disclaimed and had acquired distinctiveness under Section 2(f) of the Lanham Act 15 U.S.C. §1052(f), Applicant was required to prove “substantially exclusive and continuous use” of ZERO as a mark for the “five years before the date on which the claim of distinctiveness was made.”

26. As of the date Applicant made the claim of acquired distinctiveness, February 28, 2006, Opposer had been using the term “zero” to describe the fact that its diet soda had zero carbs and zero calories since 2003. As such, Applicant could not have shown and cannot prove “substantially exclusive” use of ZERO for the five years preceding its claim of distinctiveness. In addition, on information and belief, third parties in the beverage industry were making use of the term “zero” to describe fundamental characteristics of their diet sodas during the five year preceding Applicant’s claim of acquired distinctiveness.

27. As a result of the use by Opposer and third parties of the term “zero” prior to February 28, 2006, Applicant could not have shown proof of substantially exclusive use of the term “zero” nor that the term has become distinctive exclusively of Applicant’s products.

28. Applicant’s claim of substantially exclusive use of ZERO in connection with its products for the five years preceding February 2006 was false and was known to be false at the time it was made and was made for the purpose of inducing the Patent and Trademark Office to approve publication of the mark herein opposed without requiring a disclaimer of the term “zero.”

29. Applicant’s statements to the Patent and Trademark Office concerning its exclusive rights in and use of the term “zero” were false and were known to be false when made.

30. Applicant’s conduct constitutes fraud on the Patent and Trademark Office.

31. As a result of Applicant’s false statements, Applicant’s mark has been passed to publication without a disclaimer of the term “zero”. Registration to Applicant of the mark SPRITE ZERO without a disclaimer of the term “zero” is harming and will continue to harm Opposer.

32. By reason of the foregoing, Opposer is likely to be harmed by registration of Applicant Serial No. 78/316,078 for the mark SPRITE ZERO.

THIRD CLAIM FOR RELIEF (SECTION 2 AND/OR SECTION 2(e))

33. Opposer repeats and realleges paragraphs 1 through 32 above as if fully set forth herein.

34. The term “zero” or number zero (0) names distinctive characteristics and/or the most important attributes of certain beverage products, including all or some of the beverage products for which the SPRITE ZERO mark is sought to be registered and for which the mark is used.

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

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

37. Because “zero” is generic and unregistrable, Applicant cannot be permitted to register the SPRITE ZERO mark without disclaiming the term “zero.”

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

39. By reason of the foregoing, Opposer is likely to be harmed by registration of Application Serial No. 78/316,078 for the mark SPRITE ZERO.

WHEREFORE, it is respectfully requested that Opposer's opposition be sustained and that the registration sought by Applicant in Application Serial No. 78/580,589 for the mark SPRITE ZERO be denied absent the entry of a disclaimer of the ~~descriptive~~ term "zero."

Dated: New York, New York
~~November 15,~~
~~2007~~, 2009

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: _____
Barbara A. Solomon
Laura Popp-Rosenberg
866 United Nations Plaza
New York, New York 10017
Telephone: (212) 813-5900
Email: bsolomon@frosszelnick.com
lpopp-rosenberg@frosszelnick.com

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 15th day of November, 2007 by prepaid first class mail to Registrant's correspondent of record:

~~Caroline K. Pearlstein, Esq.
The Coca-Cola Company
One Coca-Cola Plaza NW
Atlanta, GA 30313-2499,~~

~~with a courtesy copy to~~

~~Bruce Baber, Esq.
King & Spalding LLP
1180 Peachtree Street
Atlanta, GA 30309.~~

~~_____
Laura Popp Rosenberg~~

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EXHIBIT 3

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

In the Matter of Application Serial No. 78/664,176
Mark: COKE ZERO
Published in the *Official Gazette* on April 17, 2007

-----X		
ROYAL CROWN COMPANY, INC.,	:	
	:	
Opposer,	:	
	:	Opposition No. 91180772
- against -	:	
	:	
THE COCA-COLA COMPANY,	:	
	:	
Applicant.	:	
-----X		

AMENDED 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 a registration for the mark COKE ZERO as shown in Application Serial No.78/664,176 for “beverages, namely soft drinks; syrups and concentrates for the making of the same” 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. In addition, Diet Rite Cola was the first diet drink to be salt/sodium free; was the first sodium-free, caffeine-free and calorie-free soft

drink made with Nutrasweet; and pioneered the use of SLENDA in 2000 to become the first major aspartame-free diet cola in the United States.

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 the product, namely that the product has zero carbohydrates and zero calories.

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

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

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 soft drinks that have zero calories, zero sugar and/or zero carbohydrates.

10. Upon information and belief, Opposer is not the only entity that uses the term “zero” to describe characteristics of soft drinks. Rather, the term “zero” is commonly used in the trade to inform consumers that the soft drink product at issue has 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. On July 6, 2005, Applicant filed Application Serial No. 78/664,176 to register the mark COKE ZERO for “beverages, namely soft drinks; syrups and concentrates for the making of the same” in International Class 32. In connection with the application, Applicant alleged use of the mark in commerce since June 13, 2005. At the time Applicant allegedly began using the COKE ZERO mark, the term “zero” was being used in the beverage industry to describe a characteristic of diet soft drinks, namely, zero calories and/or zero carbohydrates. In fact, Opposer had been using the term “zero” on packaging for Diet Rite prior to the filing date of the application herein opposed.

13. On November 2, 2005, the PTO issued an office action in respect of the application herein opposed, noting that the term “zero” is merely descriptive of a feature of Applicant’s goods, namely calorie content, and therefore requiring Applicant to disclaim the descriptive wording. Prior to and since that time, the PTO has issued similar findings in connection with several other applications filed by Applicant, including for the marks COCA-COLA ZERO, COCA-COLA CHERRY ZERO, CHERRY COKE ZERO, COCA-COLA VANILLA ZERO, VANILLA COKE ZERO, CHERRY COCA-COLA ZERO, COKE CHERRY ZERO and PIBB ZERO.

14. The PTO’s refusal to register the COKE ZERO mark without a disclaimer of the term “zero” was continued on January 27, 2006, with the PTO noting that ZERO is descriptive (and is understood to mean that soft drinks sold under such mark have no calories) and must be disclaimed.

15. On July 27, 2006, Applicant submitted arguments to the PTO claiming that the term “zero” had acquired distinctiveness under Section 2(f) such that its primary meaning was to identify source, not to describe characteristics of Applicant’s zero calorie soft drink. At the time Applicant’s claim of acquired distinctiveness was submitted, Opposer had been using ZERO or PURE ZERO continuously since 2003. On August 31, 2006, the PTO rejected Applicant’s claim of acquired distinctiveness as not having been supported.

16. On February 28, 2007, Applicant proffered to the PTO various evidence purportedly supporting its claim that the term “zero” had acquired distinctiveness. The PTO apparently accepted this evidence and approved the application for publication prior to registration.

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

FIRST CLAIM FOR RELIEF (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 term “zero” is registrable under Section 2(f) of the Lanham Act is inconsistent with the use by Opposer and others in the beverage industry to describe fundamental characteristics of their beverage products. In view of such use, the term “zero” cannot be source-indicating as denoting goods emanating substantially exclusively from Applicant.

20. In arguing that the term “zero” has acquired distinctiveness the evidence submitted by Applicant refers repeatedly to the “no-cal,” “no-sugar,” “no-calorie,” or “zero-

calorie” attributes of COKE ZERO, thereby showing that as used by Applicant the term “zero” is merely descriptive.

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

22. By reason of the foregoing, Opposer is likely to be harmed by registration of Application Serial No. 78/664,176 for the mark COKE ZERO.

SECOND CLAIM FOR RELIEF (FRAUD)

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

24. In connection with its claim that the term “zero” need not be disclaimed and had acquired distinctiveness under Section 2(f) of the Lanham Act, 15 U.S.C. § 1052(f), Applicant was required to prove “substantially exclusive and continuous use” of ZERO as a mark for the “five years before the date on which the claim of distinctiveness was made.”

25. As of the date Applicant made the claim of acquired distinctiveness, July 27, 2006, Opposer had been using the term “zero” to describe the fact that its diet soda had zero carbohydrates and zero calories for at least three years. As such, Applicant could not have shown and cannot prove “substantially exclusive” use of ZERO for the five years preceding its claim of distinctiveness. In addition, on information and belief, third parties in the beverage industry were making use of the term “zero” to describe fundamental characteristics of their diet sodas during the five year preceding Applicant’s claim of acquired distinctiveness.

26. As a result of the use by Opposer and third parties of the term “zero” prior to July 27, 2006, Applicant could not have shown proof of substantially exclusive use of the term “zero” nor that the term has become distinctive exclusively of Applicant’s products.

27. Applicant’s claim of substantially exclusive use of ZERO in connection with its products for the five years preceding July 2006 was false and was known to be false at the time it was made and was made for the purpose of inducing the Patent and Trademark Office to approve publication of the mark herein opposed without requiring a disclaimer of the term “zero.”

28. Applicant’s statements to the Patent and Trademark Office concerning its exclusive rights in and use of the term “zero” were false and were known to be false when made.

29. Applicant’s conduct constitutes fraud on the Patent and Trademark Office.

30. As a result of Applicant’s false statements, Applicant’s mark has been passed to publication without a disclaimer of the term “zero.” Registration to Applicant of the mark COKE ZERO without a disclaimer of the term “zero” is harming and will continue to harm Opposer.

31. By reason of the foregoing, Opposer is likely to be harmed by registration of Applicant Serial No. 78/664,176 for the mark COKE ZERO.

THIRD CLAIM FOR RELIEF (SECTION 2 AND/OR SECTION 2(e))

32. Opposer repeats and realleges paragraphs 1 through 31 above as if fully set forth herein.

33. The term “zero” or number zero (0) names distinctive characteristics and/or the most important attributes of certain beverage products, including all or some of the beverage products for which the COKE ZERO mark is sought to be registered and for which the mark is used.

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

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

36. Because “zero” is generic and unregistrable, Applicant cannot be permitted to register the COKE ZERO mark without disclaiming the term “zero.”

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

38. By reason of the foregoing, Opposer is likely to be harmed by registration of Application Serial No. 78/664,176 for the mark COKE ZERO.

WHEREFORE, it is respectfully requested that Opposer’s opposition be sustained and that the registration sought by Applicant in Application Serial No. 78/580,589 for the mark COKE ZERO be denied absent the entry of a disclaimer of the term “zero.”

Dated: New York, New York
_____, 2009

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: _____
Barbara A. Solomon
Laura Popp-Rosenberg
866 United Nations Plaza
New York, New York 10017
Telephone: (212) 813-5900
Email: bsolomon@frosszelnick.com
lpopp-rosenberg@frosszelnick.com

Attorneys for Opposer Royal Crown Company, Inc.

EXHIBIT 3a

diet drink to be salt/sodium free; was the first sodium-free, caffeine-free and calorie-free soft drink made with Nutrasweet; and pioneered the use of SLENDA in 2000 to become the first major aspartame-free diet cola in the United States.

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 the product, namely that the product has zero carbohydrates and zero calories.

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

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

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 soft drinks that have zero calories, zero sugar and/or zero carbohydrates.

10. Upon information and belief, Opposer is not the only entity that uses the term “zero” to describe characteristics of soft drinks. Rather, the term “zero” is commonly used in the

trade to inform consumers that the soft drink product at issue has 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. On July 6, 2005, Applicant filed Application Serial No. 78/664,176 to register the mark COKE ZERO for “beverages, namely soft drinks; syrups and concentrates for the making of the same” in International Class 32. In connection with the application, Applicant alleged use of the mark in commerce since June 13, 2005. At the time Applicant allegedly began using the COKE ZERO mark, the term “zero” was being used in the beverage industry to describe a characteristic of diet soft drinks, namely, zero calories and/or zero carbohydrates. In fact, Opposer had been using the term “zero” on packaging for Diet Rite prior to the filing date of the application herein opposed.

13. On November 2, 2005, the PTO issued an office action in respect of the application herein opposed, noting that the term “zero” is merely descriptive of a feature of Applicant’s goods, namely calorie content, and therefore requiring Applicant to disclaim the descriptive wording. Prior to and since that time, the PTO has issued similar findings in connection with several other applications filed by Applicant, including for the marks COCA-COLA ZERO, COCA-COLA CHERRY ZERO, CHERRY COKE ZERO, COCA-COLA VANILLA ZERO, VANILLA COKE ZERO, CHERRY COCA-COLA ZERO, COKE CHERRY ZERO and PIBB ZERO.

14. The PTO’s refusal to register the COKE ZERO mark without a disclaimer of the term “zero” was continued on January 27, 2006, with the PTO noting that ZERO is descriptive

(and is understood to mean that soft drinks sold under such mark have no calories) and must be disclaimed.

15. On July 27, 2006, Applicant submitted arguments to the PTO claiming that the term “zero” had acquired distinctiveness under Section 2(f) such that its primary meaning was to identify source, not to describe characteristics of Applicant’s zero calorie soft drink. At the time Applicant’s claim of acquired distinctiveness was submitted, Opposer had been using ZERO or PURE ZERO continuously since 2003. On August 31, 2006, the PTO rejected Applicant’s claim of acquired distinctiveness as not having been supported.

16. On February 28, 2007, Applicant proffered to the PTO various evidence purportedly supporting its claim that the term “zero” had acquired distinctiveness. The PTO apparently accepted this evidence and approved the application for publication prior to registration.

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

FIRST CLAIM FOR RELIEF ~~UNDER~~ (SECTION 2(e))

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

19. Applicant’s claim that the term “zero” is registrable under Section 2(f) of the Lanham Act is inconsistent with the use by Opposer and others in the beverage industry to describe fundamental characteristics of their beverage products. In view of such use, the term

“zero” cannot be source-indicating as denoting goods emanating substantially exclusively from Applicant.

20. In arguing that the term “zero” has acquired distinctiveness the evidence submitted by Applicant refers repeatedly to the “no-cal,” “no-sugar,” “no-calorie,” or “zero-calorie” attributes of COKE ZERO, thereby showing that as used by Applicant the term “zero” is merely descriptive.

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

22. By reason of the foregoing, Opposer is likely to be harmed by registration of Application Serial No. 78/664,176 for the mark COKE ZERO.

~~COUNT TWO~~ SECOND CLAIM FOR RELIEF (FRAUD)

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

24. In connection with its claim that the term “zero” need not be disclaimed and had acquired distinctiveness under Section 2(f) of the Lanham Act, 15 U.S.C. § 1052(f), Applicant was required to prove “substantially exclusive and continuous use” of ZERO as a mark for the “five years before the date on which the claim of distinctiveness was made.”

25. As of the date Applicant made the claim of acquired distinctiveness, July 27, 2006, Opposer had been using the term “zero” to describe the fact that its diet soda had zero carbohydrates and zero calories for at least three years. As such, Applicant could not have shown and cannot prove “substantially exclusive” use of ZERO for the five years preceding its

claim of distinctiveness. In addition, on information and belief, third parties in the beverage industry were making use of the term “zero” to describe fundamental characteristics of their diet sodas during the five year preceding Applicant’s claim of acquired distinctiveness.

26. As a result of the use by Opposer and third parties of the term “zero” prior to July 27, 2006, Applicant could not have shown proof of substantially exclusive use of the term “zero” nor that the term has become distinctive exclusively of Applicant’s products.

27. Applicant’s claim of substantially exclusive use of ZERO in connection with its products for the five years preceding July 2006 was false and was known to be false at the time it was made and was made for the purpose of inducing the Patent and Trademark Office to approve publication of the mark herein opposed without requiring a disclaimer of the term “zero.”

28. Applicant’s statements to the Patent and Trademark Office concerning its exclusive rights in and use of the term “zero” were false and were known to be false when made.

29. Applicant’s conduct constitutes fraud on the Patent and Trademark Office.

30. As a result of Applicant’s false statements, Applicant’s mark has been passed to publication without a disclaimer of the term “zero.” Registration to Applicant of the mark COKE ZERO without a disclaimer of the term “zero” is harming and will continue to harm Opposer.

31. By reason of the foregoing, Opposer is likely to be harmed by registration of Applicant Serial No. 78/664,176 for the mark COKE ZERO.

THIRD CLAIM FOR RELIEF (SECTION 2 AND/OR SECTION 2(e))

32. Opposer repeats and realleges paragraphs 1 through 31 above as if fully set forth herein.

33. The term “zero” or number zero (0) names distinctive characteristics and/or the most important attributes of certain beverage products, including all or some of the beverage products for which the COKE ZERO mark is sought to be registered and for which the mark is used.

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

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

36. Because “zero” is generic and unregistrable, Applicant cannot be permitted to register the COKE ZERO mark without disclaiming the term “zero.”

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

38. By reason of the foregoing, Opposer is likely to be harmed by registration of Application Serial No. 78/664,176 for the mark COKE ZERO.

WHEREFORE, it is respectfully requested that Opposer’s opposition be sustained and that the registration sought by Applicant in Application Serial No. 78/580,589 for the mark COKE ZERO be denied absent the entry of a disclaimer of the ~~descriptive~~ term “zero.”

Dated: New York, New York
~~November 15,~~

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

2007 _____, 2009

By: _____

Barbara A. Solomon

Laura Popp-Rosenberg

866 United Nations Plaza

New York, New York 10017

Telephone: (212) 813-5900

Email: bsolomon@frosszelnick.com

lpopp-rosenberg@frosszelnick.com

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 15th day of November, 2007 by prepaid first class mail to Registrant's correspondent of record:

~~Caroline K. Pearlstein, Esq.
The Coca-Cola Company
One Coca-Cola Plaza NW
Atlanta, GA 30313-2499,~~

~~with a courtesy copy to~~

~~Bruce Baber, Esq.
King & Spalding LLP
1180 Peachtree Street
Atlanta, GA 30309.~~

~~_____

— Laura Popp Rosenberg~~

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Format changed	0
Total changes	50

EXHIBIT 4

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, namely that the products have zero calories.

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

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

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

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

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

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

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

12. Upon information and belief and according to the records of the United States Patent and Trademark Office ("PTO"), during the period from February 2, 2007 through May 9, 2007, Applicant applied to register with the PTO the following marks for beverages, all incorporating the term "zero":

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

- (b) Application Serial No. 77/176,127, filed May 9, 2007, for the mark CHERRY COKE ZERO for “non-alcoholic beverages, namely, soft drinks; concentrates for making non-alcoholic beverages, namely, soft drinks” in International Class 32;
- (c) Application Serial No. 77/176,108, filed May 9, 2007, for the mark COCA-COLA VANILLA ZERO for “Non-alcoholic beverages, namely, soft drinks” in International Class 32;
- (d) Application Serial No. 77/175,127, filed May 8, 2007, for the mark CHERRY COCA-COLA ZERO for “Non-alcoholic beverages, namely, soft drinks” in International Class 32;
- (e) Application Serial No. 77/175,066, filed May 8, 2007, for the mark COKE CHERRY ZERO for “Non-alcoholic beverages, namely, soft drinks” in International Class 32; and;
- (f) Application Serial No. 77/097,644, filed February 2, 2007, for the mark PIBB ZERO for “non-alcoholic beverages, namely soft drinks and concentrates for the making of the same” in International Class 32.

13. In connection with Application Serial No. 77/176,279 for the mark COCA-COLA CHERRY ZERO and Application Serial No. 77/175,066 for the mark COKE CHERRY ZERO, Applicant alleged use of the respective applied-for marks in commerce since January 29, 2007; and, in connection with Application Serial No. 77/097,644 for the mark PIBB ZERO, alleged use in commerce since July 2005 (collectively, the “Opposed Use-Based Applications”).

14. Applicant’s Application Serial No. 77/176,127 for the mark CHERRY COKE ZERO, Application Serial No. 77/176,108 for the mark COCA-COLA VANILLA ZERO, and Application Serial No. 77/175,127 for the mark CHERRY COCA-COLA ZERO were filed on an intent-to-use basis (collectively, the “Opposed ITU Applications”).

15. At the time Applicant allegedly began using the marks shown in the Opposed Use-Based Applications, and at the time Applicant filed the Opposed ITU Applications, the term “zero” was being used in the beverage industry to describe a characteristic of beverages, namely, beverages with zero calories and/or zero carbohydrates. In fact, Opposer had been using the term “zero” on packaging for DIET RITE cola prior to the filing and use dates of each of the opposed applications.

16. 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 calorie content or, in the case of PIBB ZERO, sugar content, and therefore requiring Applicant to disclaim the descriptive wording.

17. 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 zero calorie soft drinks 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.

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

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

FIRST CLAIM FOR RELIEF UNDER SECTION 2(e)

20. Opposer repeats and realleges paragraphs 1 through 19 above as if fully set forth herein.

21. 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.

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

23. 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.

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

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

25. Opposer repeats and realleges paragraphs 1 through 24 above as if fully set forth herein.

26. The term "zero" or number zero (0) names distinctive characteristics and/or the most important attributes of certain beverage products, including all or some of the beverage

products for which the opposed marks are sought to be registered and for which the marks are or are intended to be used.

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

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

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

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

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

WHEREFORE, it is respectfully requested that Opposer’s opposition be sustained and that the registrations sought by Applicant in COCA-COLA CHERRY ZERO as shown in Application Serial No. 77/176,279; CHERRY COKE ZERO as shown in Application Serial No. 77/176,127; COCA-COLA VANILLA ZERO as shown in Application Serial No. 77/176,108; CHERRY COCA-COLA ZERO as shown in Application Serial No. 77/175,127; COKE CHERRY ZERO

as shown in Application Serial No. 77/175,066; and PIBB ZERO as shown in Application Serial No. 77/097,644 all be denied absent the entry of a disclaimer of the term “zero.”

Dated: New York, New York
_____, 2009

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: _____

Barbara A. Solomon

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lpopp-rosenberg@frosszelnick.com

Attorneys for Opposer Royal Crown Company, Inc.

EXHIBIT 4a

No. 77/097,644, 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, namely that the products have zero calories.

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

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

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

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

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

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

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

12. Upon information and belief and according to the records of the United States Patent and Trademark Office ("PTO"), during the period from February 2, 2007 through May 9, 2007, Applicant applied to register with the PTO the following marks for beverages, all incorporating the term "zero":

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

- (b) Application Serial No. 77/176,127, filed May 9, 2007, for the mark CHERRY COKE ZERO for “non-alcoholic beverages, namely, soft drinks; concentrates for making non-alcoholic beverages, namely, soft drinks” in International Class 32;
- (c) Application Serial No. 77/176,108, filed May 9, 2007, for the mark COCA-COLA VANILLA ZERO for “Non-alcoholic beverages, namely, soft drinks” in International Class 32;
- (d) Application Serial No. 77/175,127, filed May 8, 2007, for the mark CHERRY COCA-COLA ZERO for “Non-alcoholic beverages, namely, soft drinks” in International Class 32;
- (e) Application Serial No. 77/175,066, filed May 8, 2007, for the mark COKE CHERRY ZERO for “Non-alcoholic beverages, namely, soft drinks” in International Class 32; and;
- (f) Application Serial No. 77/097,644, filed February 2, 2007, for the mark PIBB ZERO for “non-alcoholic beverages, namely soft drinks and concentrates for the making of the same” in International Class 32.

13. In connection with Application Serial No. 77/176,279 for the mark COCA-COLA CHERRY ZERO and Application Serial No. 77/175,066 for the mark COKE CHERRY ZERO, Applicant alleged use of the respective applied-for marks in commerce since January 29, 2007; and, in connection with Application Serial No. 77/097,644 for the mark PIBB ZERO, alleged use in commerce since July 2005 (collectively, the “Opposed Use-Based Applications”).

14. Applicant’s Application Serial No. 77/176,127 for the mark CHERRY COKE ZERO, Application Serial No. 77/176,108 for the mark COCA-COLA VANILLA ZERO, and Application Serial No. 77/175,127 for the mark CHERRY COCA-COLA ZERO were filed on an intent-to-use basis (collectively, the “Opposed ITU Applications”).

15. At the time Applicant allegedly began using the marks shown in the Opposed Use-Based Applications, and at the time Applicant filed the Opposed ITU Applications, the term “zero” was being used in the beverage industry to describe a characteristic of beverages, namely, beverages with zero calories and/or zero carbohydrates. In fact, Opposer had been using the term “zero” on packaging for DIET RITE cola prior to the filing and use dates of each of the opposed applications.

16. 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 calorie content or, in the case of PIBB ZERO, sugar content, and therefore requiring Applicant to disclaim the descriptive wording.

17. 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 zero calorie soft drinks 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.

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

19. Applicant already has attempted to assert its claimed rights in the descriptive or generic term “zero” against Opposer ~~and recently has filed for extensions of time to oppose.~~

[including by opposing](#) Opposer's applications to register the DIET RITE PURE ZERO and PURE ZERO marks.

FIRST CLAIM FOR RELIEF UNDER SECTION 2(e)

20. Opposer repeats and realleges paragraphs 1 through 19 above as if fully set forth herein.

21. 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.

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

23. 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.

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

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

25. Opposer repeats and realleges paragraphs 1 through 24 above as if fully set forth herein.

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

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

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

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

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

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

WHEREFORE, it is respectfully requested that Opposer’s opposition be sustained and that the registrations sought by Applicant in COCA-COLA CHERRY ZERO as shown in Application Serial No. 77/176,279; CHERRY COKE ZERO as shown in Application Serial No. 77/176,127; COCA-COLA VANILLA ZERO as shown in Application Serial No. 77/176,108;

CHERRY COCA-COLA ZERO as shown in Application Serial No. 77/175,127; COKE
CHERRY ZERO as shown in Application Serial No. 77/175,066; and PIBB ZERO as shown in
Application Serial No. 77/097,644 all be denied absent the entry of a disclaimer of the
~~descriptive~~ term “zero.”

Dated: New York, New York
~~April 10, 2008~~
2009

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: _____
Barbara A. Solomon
Laura Popp-Rosenberg
866 United Nations Plaza
New York, New York 10017
Telephone: (212) 813-5900
Email: bsolomon@frosszelnick.com
lpopp-rosenberg@frosszelnick.com

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 10th day of April 2008 by prepaid first class mail to Applicant's correspondent of record as follows:

~~Caroline K. Pearlstein, Esq.
The Coca-Cola Company
One Coca-Cola Plaza NW
Atlanta, GA 30313-2499,~~

~~with a courtesy copy to~~

~~Bruce Baber, Esq.
King & Spalding LLP
1180 Peachtree Street
Atlanta, GA 30309.~~

~~_____

Laura Popp Rosenberg~~

Document comparison done by DeltaView on Wednesday, March 25, 2009 6:18:43 PM

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Padding cell	

Statistics:	
	Count
Insertions	27
Deletions	19
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	46

EXHIBIT 5

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

In the Matter of:

Application S.N. 77/176,099 (VANILLA COKE ZERO)
Published in the *Official Gazette* on April 15, 2008

-and-

Application S.N. 76/674,382 (COKE ZERO ENERGY)
Application S.N. 76/674,383 (COKE ZERO BOLD)
Published in the *Official Gazette* on April 29, 2008

-----X
ROYAL CROWN COMPANY, INC., :
 :
 :
 Opposer, :
 :
 - against - :
 :
 THE COCA-COLA COMPANY, :
 :
 :
 Applicant. :
-----X

Consolidated Opposition No. 91185755

AMENDED 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 COKE ZERO as shown in Application Serial No. 77/176,099; COKE ZERO ENERGY as shown in Application Serial No. 76/674,382; and COKE ZERO BOLD as shown in Application Serial No. 76/674,383, 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, namely that the products have zero calories.

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

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

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

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

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

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

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

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

- (a) Application Serial No. 77/176,099, filed May 9, 2007, for the mark VANILLA COKE ZERO for “[n]on-alcoholic beverages, namely soft drinks; syrups and concentrates for making non-alcoholic beverages, namely, soft drinks” in International Class 32;
- (b) Application Serial No. 76/674,382, filed March 22, 2007, for the mark COKE ZERO ENERGY for “[n]on-alcoholic beverages, namely, soft drinks and energy drinks; syrups and concentrates for soft drinks and energy drinks” in International Class 32; and
- (c) Application Serial No. 76/674,383, filed March 22, 2007, for the mark COKE ZERO BOLD for “[n]on-alcoholic beverages, namely, soft drinks and energy

drinks; syrups and concentrates for soft drinks and energy drinks” in International Class 32

(collectively, the “Opposed Applications”).

13. At the time Applicant filed the Opposed ITU Applications, the term “zero” was being used in the beverage industry to describe a characteristic of beverages, namely, beverages with zero calories and/or zero carbohydrates.

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 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 or generic term that should be freely available for use throughout the beverage industry, and Opposer will be prejudiced and harmed thereby.

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

FIRST CLAIM FOR RELIEF UNDER SECTION 2(e)

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

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

20. 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.

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

22. Opposer repeats and realleges paragraphs 1 through 21 above as if fully set forth herein.

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

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

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

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

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

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

WHEREFORE, it is respectfully requested that Opposer’s opposition be sustained and that the registrations sought by Applicant in VANILLA COKE ZERO as shown in Application Serial No. 77/176,099; COKE ZERO ENERGY as shown in Application Serial No. 76/674,382; and COKE ZERO BOLD as shown in Application Serial No. 76/674,383 all be denied absent the entry of a disclaimer of the term “zero.”

Dated: New York, New York
_____, 2009

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: _____
Barbara A. Solomon
Laura Popp-Rosenberg
866 United Nations Plaza
New York, New York 10017
Telephone: (212) 813-5900
Email: bsolomon@frosszelnick.com
lpopp-rosenberg@frosszelnick.com

Attorneys for Opposer Royal Crown Company, Inc.

EXHIBIT 5a

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, namely that the products have zero calories.

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

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

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

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

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

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

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

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

- (a) Application Serial No. 77/176,099, filed May 9, 2007, for the mark VANILLA COKE ZERO for “[n]on-alcoholic beverages, namely soft drinks; syrups and concentrates for making non-alcoholic beverages, namely, soft drinks” in International Class 32;
- (b) Application Serial No. 76/674,382, filed March 22, 2007, for the mark COKE ZERO ENERGY for “[n]on-alcoholic beverages, namely, soft drinks and energy drinks; syrups and concentrates for soft drinks and energy drinks” in International Class 32; and
- (c) Application Serial No. 76/674,383, filed March 22, 2007, for the mark COKE ZERO BOLD for “[n]on-alcoholic beverages, namely, soft drinks and energy

drinks; syrups and concentrates for soft drinks and energy drinks” in International Class 32

(collectively, the “Opposed Applications”).

13. At the time Applicant filed the Opposed ITU Applications, the term “zero” was being used in the beverage industry to describe a characteristic of beverages, namely, beverages with zero calories and/or zero carbohydrates.

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 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 [or generic](#) term that should be freely available for use throughout the beverage industry, and Opposer will be prejudiced and harmed thereby.

17. Applicant already has attempted to assert its claimed rights in the descriptive [or generic](#) term “zero” against Opposer, including by filing Notices of Opposition against Opposer’s applications to register the DIET RITE PURE ZERO and PURE ZERO marks.

FIRST CLAIM FOR RELIEF UNDER SECTION 2(e)

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

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

20. 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.

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

22. Opposer repeats and realleges paragraphs 1 through 21 above as if fully set forth herein.

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

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

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

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

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

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

WHEREFORE, it is respectfully requested that Opposer’s opposition be sustained and that the registrations sought by Applicant in VANILLA COKE ZERO as shown in Application Serial No. 77/176,099; COKE ZERO ENERGY as shown in Application Serial No. 76/674,382; and COKE ZERO BOLD as shown in Application Serial No. 76/674,383 all be denied absent the entry of a disclaimer of the ~~descriptive~~-term “zero.”

Dated: New York, New York
~~August 13, 2008~~ _____
2009

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: _____
Barbara A. Solomon
Laura Popp-Rosenberg

866 United Nations Plaza
New York, New York 10017
Telephone: (212) 813-5900
Email: bsolomon@frosszelnick.com
lpopp-rosenberg@frosszelnick.com

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 13th day of August 2008 by prepaid first class mail to Applicant's correspondent of record as follows:~~

~~Caroline K. Pearlstein, Esq.
The Coca-Cola Company
USA 1112B
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~~

~~with a courtesy copy to~~

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

~~_____
—Laura Popp Rosenberg~~

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EXHIBIT 6

**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

-----X
ROYAL CROWN COMPANY, INC., :
 :
 Opposer, :
 :
 - against - : Consolidated Opposition No. 91186579
 :
 :
 THE COCA-COLA COMPANY, :
 :
 Applicant. :
-----X

AMENDED 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 or generic term that should be freely available for use throughout the beverage industry, and Opposer will be prejudiced and harmed thereby.

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

FIRST CLAIM FOR RELIEF UNDER SECTION 2(e)

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

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

20. 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.

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

22. Opposer repeats and realleges paragraphs 1 through 21 above as if fully set forth herein.

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

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

25. Registration of the opposed marks without a disclaimer of the generic term "zero" is contrary to Section 2 of the Lanham Act, which permits registration only to marks capable of

distinguishing the goods of the applicant from those of others, and/or Section 2(e) of the Lanham Act, which prohibits registration of merely descriptive marks.

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

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

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

WHEREFORE, it is respectfully requested that Opposer’s opposition be sustained and that the registrations sought by Applicant 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 term “zero.”

Dated: New York, New York
_____, 2009

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: _____

Barbara A. Solomon
Laura Popp-Rosenberg
866 United Nations Plaza
New York, New York 10017
Telephone: (212) 813-5900
Email: bsolomon@frosszelnick.com
lpopp-rosenberg@frosszelnick.com

Attorneys for Opposer Royal Crown Company, Inc.

EXHIBIT 6a

**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., :
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 :
 Opposer, :
 : Consolidated Opposition No.
 91186579 :
 - against - :
 :
 THE COCA-COLA COMPANY, :
 :
 :
 Applicant. :
-----X

AMENDED 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 or generic term that should be freely available for use throughout the beverage industry, and Opposer will be prejudiced and harmed thereby.

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

FIRST CLAIM FOR RELIEF UNDER SECTION 2(e)

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

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

20. 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.

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

22. Opposer repeats and realleges paragraphs 1 through 21 above as if fully set forth herein.

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

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

25. Registration of the opposed marks without a disclaimer of the generic term "zero" is contrary to Section 2 of the Lanham Act, which permits registration only to marks capable of

distinguishing the goods of the applicant from those of others, and/or Section 2(e) of the Lanham Act, which prohibits registration of merely descriptive marks.

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

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

WHEREFORE, it is respectfully requested that Opposer’s opposition be sustained and that the registrations sought by Applicant 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, 2009

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: _____

Barbara A. Solomon
Laura Popp-Rosenberg
866 United Nations Plaza
New York, New York 10017
Telephone: (212) 813-5900
Email: bsolomon@frosszelnick.com
lpopp-rosenberg@frosszelnick.com

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~~

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Moved to	0
Style change	0
Format changed	0
Total changes	54

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing ROYAL CROWN COMPANY INC.'S MOTIONS FOR LEAVE TO AMEND ITS NOTICES OF OPPOSITION AND TO SUSPEND, AND MEMORANDUM IN SUPPORT THEREOF to be sent by first class mail, postage pre-paid, to attorney for TCCC, Bruce Baber, Esq., King & Spalding LLP, 1185 Avenue of the Americas, New York, NY 10036-4003, this 25th day of March 2009.



Laura Popp-Rosenberg