

ESTTA Tracking number: **ESTTA549782**

Filing date: **07/22/2013**

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

**Notice of Opposition**

Notice is hereby given that the following party opposes registration of the indicated application.

**Opposer Information**

Name	Cott Beverages Inc.
Granted to Date of previous extension	07/21/2013
Address	5519 West Idlewild Avenue Tampa, FL 33634 UNITED STATES

Attorney information	Brian A. Coleman DRINKER BIDDLE & REATH LLP 1500 K ST NW STE 1100 WASHINGTON, DC 20005 UNITED STATES brian.coleman@dbr.com, tmlitdocket@dbr.com
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**Applicant Information**

Application No	85476952	Publication date	01/22/2013
Opposition Filing Date	07/22/2013	Opposition Period Ends	07/21/2013
Applicant	Talking Rain Beverage Company, Inc. PO Box 549 Preston, WA 98050 UNITED STATES		

**Goods/Services Affected by Opposition**

Class 032. First Use: 2009/06/30 First Use In Commerce: 2009/06/30 All goods and services in the class are opposed, namely: Flavored bottled water; Fruit flavored soft drinks; Fruit flavoured carbonated drinks; Fruit-based soft drinks flavored with tea; Non-alcoholic beverages, namely, carbonated beverages
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**Grounds for Opposition**

The mark comprises matter that, as a whole, is functional	Trademark Act section 2(e)(5)
Other	design is non-distinctiveness and therefore not entitled to protection

Attachments	Notice of Opposition.pdf(108730 bytes )
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**Certificate of Service**

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

Signature	/Brian A. Coleman/
Name	Brian A. Coleman
Date	07/22/2013

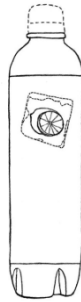
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

**In re Ser. No. 85/476,952 – Bottle Design**  
**Published: January 22, 2013**

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COTT BEVERAGES INC., :  
: Opposer, :  
v. : Opposition No. \_\_\_\_\_  
TALKING RAIN BEVERAGE COMPANY, INC., :  
\_\_\_\_\_  
Applicant. :

**NOTICE OF OPPOSITION**

Cott Beverages Inc., a Georgia corporation, having a principal place of business at 5519 W. Idlewild Avenue, Tampa, Florida 33634 (“Opposer”), believes that it will be damaged by the



registration of Ser. No. 85/476,952 – - for “Flavored bottled water; Fruit flavored soft drinks; Fruit flavoured carbonated drinks; Fruit-based soft drinks flavored with tea; Non-alcoholic beverages, namely, carbonated beverages” in class 32 (the “Application”), described therein as a “trade dress consisting of a transparent half-liter to 17 fluid ounce straightwall bottle with a pedalooid base, adorned with a transparent wrap-around label that leaves the colored contents of the bottle visible and contains the design of a citrus fruit cut in half leaning against another citrus fruit” (the “Bottle Design”); filed November 18, 2011 by Talking Rain Beverage Company, Inc., a Washington corporation having an a mailing address of P.O. Box 549, Preston,

Washington 98050 (“Applicant”), and hereby opposes the same pursuant to Section 13 of the Trademark Act of 1946 (15 U.S.C. § 1063).

As grounds for its opposition, Opposer states:

1. Opposer is one of the largest beverage manufacturers and sellers in the United States, and produces and sells a wide variety of carbonated and non-carbonated beverages. These beverages consist of, among other beverage types, a wide variety of fruit-flavored and fruit-based beverages, including but not limited to soft drinks, carbonated drinks and waters, and are produced in a wide variety of containers and sizes.

2. Opposer’s fruit-based and fruit-flavored beverage products frequently are produced and sold in bottles containing depictions of fruit, particularly the side view of sliced fruit of the variety that corresponds to the fruit flavor of the beverage in question.

3. Some of the containers used by Opposer for its beverages include straightwall bottles and a pedaloid base. Additionally, the label used in connection with some of Opposer’s beverage bottles is at least partially transparent, particularly when used in connection with fruit-flavored or fruit-based beverages so as to enable the consumer to view the color of the beverage corresponding to the fruit flavor or type.

4. Applicant also is a beverage manufacturer and is a competitor of Opposer in connection with the goods and services claimed in the Application.

#### **COUNT I – FUNCTIONALITY**

5. The Bottle Design for which Applicant seeks registration is functional within the meaning of Section 2(e)(5) of the Trademark Act and therefore not entitled to protection.

6. Taken as a whole, the Bottle Design is essential to the use or purpose of – or otherwise affects the cost or quality of – the product in connection with which it is used, namely, as a container for, *inter alia*, fruit-flavored and fruit-based drinks.

7. By way of example only, the use of a bottle container is essential to its purpose, namely, to store a beverage for oral consumption. The particular shape of the bottle is designed to fit more easily in a consumer's hand relative to the size of the container, and the petaloid base increases the stability of the bottle. The transparent wrap-around label allows the consumer to better see the liquid contained in the bottle, and to discern the fruit flavor of the product. Additionally, the fruit cross-section depicted on the front enables depiction of the flavor and/or content of the fruit-flavored and fruit-based drinks that are encompassed within the Application.

8. Overall, each of the features comprising the Bottle Design are functional individually and, as a composite, are functional as a whole. As such the Bottle Design does not primarily serve to designate the producer of the beverage products within the Application.

9. There is a competitive need for the functional features embodied within the Bottle Design, both by Opposer and in the fruit-flavored and fruit-based beverage manufacturing and production industry in general. By seeking registration of the subject Application, Applicant improperly seeks to usurp for itself the exclusive use of those competitively useful and beneficial product qualities comprising and encompassed within the Bottle Design.

10. Even if the Bottle Design were not essential to the use or purpose of the goods in connection with which registration is sought and did not affect the cost or quality of those goods, the Bottle Design nonetheless is functional because it cannot be shown by Applicant not to have a significant effect on competition.

11. If registration of Application Ser. No. 85/476,952 were permitted, it would grant Applicant *prima facie* rights in a purported trade dress which would reduce the universe of functional options available to Opposer in selecting and utilizing product packaging appropriate to use in connection with fruit flavored and fruit based beverages, and thereby inhibit Opposer's ability to compete in the marketplace.

## **COUNT II – NON-DISTINCTIVENESS**

12. The Bottle Design for which Applicant seeks registration is non-distinctive and therefore not entitled to protection.

13. The Bottle Design, viewed as a whole, is a common, basic shape and/or design in connection with the applied for goods and services. The shape of the bottle itself is typical, standard and commonplace in the beverage industry. The transparent wrap-around label likewise is a common and basic element of a beverage container, and is particularly common in connection with fruit-flavored or fruit-based beverages. The image of a fruit cross-section contained on such label is also common and basic when used in connection with fruit flavored and fruit based drinks, such as the drinks encompassed within the Application.

14. The Bottle Design consists of no unusual or novel components. The bottle shape is not atypical. The pedaloid base also contains no unusual elements, nor does the stated description of the transparent label and depicted sliced fruit.

15. To the extent that there are any less common elements within the Bottle Design, they are at most mere refinements of commonly adopted and well known bottle designs used by Opposer and in the beverage manufacturing industry in general in connection with the production and sale of containers of fruit-flavored and fruit-based beverages.

16. The Bottle Design is, by itself, incapable of creating a distinct commercial impression.

17. Even if the Bottle Design were capable of creating a distinct commercial impression, it has not acquired distinctiveness. Applicant has not achieved sufficient consumer association of its Bottle Design to satisfy Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). Additionally, Applicant has not engaged in substantially exclusive use of the Bottle Design, nor has Applicant used Bottle Design continuously for five years.

18. The evidence submitted by Applicant to the Examiner to demonstrate acquired distinctiveness fails to do so. That evidence consists only of a declaration as to the hearsay statements of eight consumers, none of whom appeared to be commenting on the Bottle Design specifically as opposed to the entirety of Applicant's sparkling water products. Moreover, none of the purported consumer testimony reflected that the customer perceived Applicant's Bottle Design as an indicator of source.

19. If registration of Application Ser. No. 85/476,952 were permitted, it would grant Applicant *prima facie* rights in a non-distinctive trade dress and would improperly subject Opposer to claims of infringement by using identical or similar nondistinctive bottle designs.

For the reasons set forth above, Opposer believes based upon this belief asserts that it will be damaged by the registration of Application Ser. No. 85/476,952. Accordingly, Opposer prays that this opposition be sustained, and that Applicant be refused registration.

The \$300.00 filing fee is submitted herewith electronically. Should additional fees be required, please charge them the deposit account of Opposer's counsel, No. 50-0573.

Respectfully submitted,

COTT BEVERAGES INC.

By:           /Brian A. Coleman/            
Brian A. Coleman  
Drinker Biddle & Reath LLP  
1500 K Street, N.W., Suite 1100  
Washington, D.C. 20005  
Tel: (202) 842-8800  
Fax: (202) 842-8465  
*Attorneys for Opposer*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **NOTICE OF OPPOSITION** was served on counsel for applicant at his address of record, by first class mail, postage prepaid this 22nd day of July 2013:

Jennifer M. Lantz, Esq.  
Hogan Lovells US LLP  
525 University Avenue 4th Floor  
Palo Alto, CA 94301

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/Brian A. Coleman/