

ESTTA Tracking number: **ESTTA786213**

Filing date: **11/30/2016**

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	PepsiCo, Inc.
Granted to Date of previous extension	11/30/2016
Address	700 Anderson Hill Road Purchase, NY 10577 UNITED STATES

Attorney information	Lauren Beth Emerson Baker Botts L.L.P. 30 Rockefeller Plaza New York, NY 10112-4498 UNITED STATES paul.reilly@bakerbotts.com, lauren.emerson@bakerbotts.com, tyler.beas@bakerbotts.com, nytmdept@bakerbotts.com, daltm- dept@bakerbotts.com Phone:212.408.2500
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Applicant Information

Application No	86762399	Publication date	08/02/2016
Opposition Filing Date	11/30/2016	Opposition Period Ends	11/30/2016
Applicant	Ole Smoky Distillery, LLC 236 E MAIN ST # 136 SEVIERVILLE, TN 37862 UNITED STATES		

Goods/Services Affected by Opposition

Class 033. First Use: 0 First Use In Commerce: 0
All goods and services in the class are opposed, namely: Distilled Spirits

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act Section 2(d)
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Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	820362	Application Date	04/15/1966
Registration Date	12/13/1966	Foreign Priority Date	NONE
Word Mark	MOUNTAIN DEW		
Design Mark			

Description of Mark	NONE
Goods/Services	Class 032. First use: First Use: 1948/09/24 First Use In Commerce: 1948/10/10 SOFT DRINKS, AND CONCENTRATES USED IN THE PREPARATION THEREOF

U.S. Registration No.	3674349	Application Date	10/06/2008
Registration Date	08/25/2009	Foreign Priority Date	NONE

Word Mark	MTN DEW
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Design Mark	
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Description of Mark	NONE
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Goods/Services	Class 032. First use: First Use: 2009/01/00 First Use In Commerce: 2009/01/00 Concentrates, syrups or powders used in the preparation of soft drinks; Soft drinks
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U.S. Registration No.	4814423	Application Date	07/31/2014
Registration Date	09/15/2015	Foreign Priority Date	NONE

Word Mark	MTN DEW DEW SHINE
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Design Mark	
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Description of Mark	NONE
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Goods/Services	Class 032. First use: First Use: 2015/03/30 First Use In Commerce: 2015/03/30 Concentrates, syrups or powders used in the preparation of soft drinks; Soft drinks
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U.S. Registration No.	4161395	Application Date	11/21/2011
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Registration Date	06/19/2012	Foreign Priority	NONE
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		Date	
Word Mark	MTN DEW CODE RED		
Design Mark	<p style="text-align: center;">MTN DEW CODE RED</p>		
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 2011/04/00 First Use In Commerce: 2011/04/00 Concentrates, syrups or powders used in the preparation of soft drinks; Soft drinks		

U.S. Registration No.	2950372	Application Date	02/26/2004
Registration Date	05/10/2005	Foreign Priority Date	NONE
Word Mark	MOUNTAIN DEW BAJA BLAST		
Design Mark	<p style="text-align: center;">MOUNTAIN DEW BAJA BLAST</p>		
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 2004/07/00 First Use In Commerce: 2004/07/00 SOFT DRINKS, AND SYRUPS AND CONCENTRATES FOR MAKING THE SAME		

U.S. Registration No.	2803790	Application Date	12/12/2002
Registration Date	01/06/2004	Foreign Priority Date	NONE
Word Mark	MOUNTAIN DEW LIVEWIRE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 2003/05/01 First Use In Commerce: 2003/05/01 SOFT DRINKS, AND SYRUPS AND CONCENTRATES FOR MAKING THE		

	SAME		
U.S. Registration No.	3664996	Application Date	11/11/2008
Registration Date	08/04/2009	Foreign Priority Date	NONE
Word Mark	MOUNTAIN DEW THROWBACK		
Design Mark	<p style="text-align: center;">MOUNTAIN DEW THROWBACK</p>		
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 2009/04/20 First Use In Commerce: 2009/04/20 Concentrates, syrups or powders used inthe preparation of soft drinks; Soft drinks		
U.S. Registration No.	3673766	Application Date	11/21/2007
Registration Date	08/25/2009	Foreign Priority Date	NONE
Word Mark	MOUNTAIN DEW BLUE SHOCK FREEZE		
Design Mark	<p style="text-align: center;">MOUNTAIN DEW BLUE SHOCK FREEZE</p>		
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 2008/00/00 First Use In Commerce: 2008/00/00 SEMI-FROZEN SOFT DRINKS		
U.S. Registration No.	2732061	Application Date	02/13/2002
Registration Date	07/01/2003	Foreign Priority Date	NONE
Word Mark	MOUNTAIN DEW VERTICAL CHALLENGE		
Design Mark			
Description of	NONE		

Mark	
Goods/Services	Class 041. First use: First Use: 1989/11/00 First Use In Commerce: 1989/11/00 ORGANIZING SPORTING EVENTS, NAMELY, SKIAND SNOWBOARD RACES

U.S. Registration No.	3426588	Application Date	09/12/2007
Registration Date	05/13/2008	Foreign Priority Date	NONE

Word Mark	MOUNTAIN DEW
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Design Mark	
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Description of Mark	NONE
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Goods/Services	Class 021. First use: First Use: 2006/02/00 First Use In Commerce: 2006/02/00 Drinking glasses
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U.S. Registration No.	2986575	Application Date	02/19/2004
Registration Date	08/16/2005	Foreign Priority Date	NONE

Word Mark	MOUNTAIN DEW
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Design Mark	
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Description of Mark	NONE
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Goods/Services	Class 025. First use: First Use: 2004/07/00 First Use In Commerce: 2004/07/00 CLOTHING, NAMELY, T-SHIRTS [, SWEATSHIRTS]
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U.S. Registration	4938117	Application Date	02/23/2015
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No.			
Registration Date	04/12/2016	Foreign Priority Date	NONE
Word Mark	MOUNTAIN DEW		
Design Mark	MOUNTAIN DEW		
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 2015/12/16 First Use In Commerce: 2015/12/16 Barbeque sauce; Cooking sauces; Dippingsauces; Grilling sauces; Marinades; Sauces		

Attachments	77586029#TMSN.png(bytes) 86354174#TMSN.png(bytes) 85477992#TMSN.png(bytes) 78374863#TMSN.png(bytes) 77611655#TMSN.png(bytes) 77334936#TMSN.png(bytes) 77277551#TMSN.png(bytes) 78976202#TMSN.png(bytes) 86543174#TMSN.png(bytes) OLE SMOKY MOUNTAIN DEW MOONSHINE - Notice of Opposition.pdf(47350 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 Overnight Courier on this date.

Signature	/Lauren Beth Emerson/
Name	Lauren Beth Emerson
Date	11/30/2016

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

IN THE MATTER OF APPLICATION

Mark : OLE SMOKY MOUNTAIN DEW MOONSHINE
Applicant : Ole Smoky Distillery, LLC
Serial No. : 86/762,399
Filed : September 21, 2015
Published in
the Official Gazette : August 2, 2016

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PEPSICO, INC.,	:	
	:	
Opposer,	:	Opposition No.
	:	
v.	:	
	:	
OLE SMOKY DISTILLERY, LLC,	:	
	:	
Applicant.	:	
_____	X	

NOTICE OF OPPOSITION

Opposer, PepsiCo, Inc. (“PepsiCo” or “Opposer”), a North Carolina corporation having a place of business at 700 Anderson Hill Road, Purchase, New York 10577 believes that it will be damaged by the registration of United States Trademark Application Serial No. 86/762,399, filed on September 21, 2015, in the name of Ole Smoky Distillery, LLC (hereinafter “Applicant”) for the alleged mark OLE SMOKY MOUNTAIN DEW MOONSHINE based on an intention to use the mark on or in connection with goods in International Class 33, and having been previously granted an extension of time to oppose, hereby opposes the foregoing application.

The specific grounds for this opposition are as follows:

1. PepsiCo, through its predecessors-in-interest, has been engaged in the beverage business for well over 100 years and has become well and favorably known to members of the

public, as well as to members of the beverage industry, for quality beverage products and related services. It owns a portfolio of brands that identify carbonated soft drinks, juices and juice drinks, ready-to-drink teas and coffee drinks, isotonic sports drinks, bottled water and enhanced waters, and related products and services.

2. Commencing at least as early as 1948 and 2009, respectively, and continuing through to the present, PepsiCo, through its predecessors-in-interest, has used the marks MOUNTAIN DEW and MTN DEW in connection with various beverages and other products, as well as advertising, marketing, sales and promotional services to authorized bottlers, independent distributors and retailers.

3. Since long prior to the filing date of the application-at-issue, the marks MOUNTAIN DEW and MTN DEW have been identified with Opposer and have appeared on a tremendous amount of product packaging, advertising, in-store display racks, signage, point-of-purchase material, etc.

4. Opposer's products sold under its marks MOUNTAIN DEW, MTN DEW and variants are marketed and sold in tremendous quantities on a nationwide basis, supported by many millions of dollars of advertising and promotion each year. Opposer's products are sold in almost every supermarket in the United States as well as in mass merchandise stores, numerous convenience stores, vending machines, and other outlets.

5. The vast commercial acceptance and success of many of Opposer's products bearing the MOUNTAIN DEW and MTN DEW marks for well over 60 years and 7 years, respectively, is due in large measure to substantial advertising and marketing efforts by PepsiCo. Opposer has, by virtue of such extensive usage, advertising and promotion, built up a very high level of consumer and trade recognition symbolized by its MOUNTAIN DEW and MTN DEW

marks. Domestic retail sales of beverage products marketed under the MOUNTAIN DEW and MTN DEW marks have exceeded five billion dollars annually since 2004 and 2009, respectively.

6. PepsiCo's use of the marks MOUNTAIN DEW, MTN DEW and variants thereof also extends beyond beverages, per se, to include other products and services. For example, for several years now, PepsiCo has been marketing and selling clothing, sauces, drinking vessels and lip care products under the marks MOUNTAIN DEW and/or MTN DEW. Since 1989 and continuing to the present, PepsiCo has also been organizing, marketing and promoting sporting events, such as ski and snowboarding races, in connection with its MOUNTAIN DEW marks such as MOUNTAIN DEW VERTICAL CHALLENGE. Likewise, PepsiCo, under its MOUNTAIN DEW marks, including MOUNTAIN DEW, MTN DEW and variants, has been a sponsor of NASCAR racing teams and events for well over 20 years.

7. Notably, PepsiCo has used, and has established strong common law rights in, its MOUNTAIN DEW and MTN DEW marks on or in connection with beverages and other products for many years, long prior to the filing date and/or use, if any, of the mark in the application-at-issue.

8. PepsiCo also owns and operates a website at MOUNTAINDEW.COM, which is operational twenty-four hours a day, seven days a week, through which PepsiCo advertises, markets and promotes its beverage products under the MOUNTAIN DEW and MTN DEW marks, or variants thereof. PepsiCo also operates social media accounts on Twitter, YouTube, Facebook and Instagram for the brand.

9. As a result of such extensive and continuous advertising, sale, use and promotion of soft drinks and other products and services under or in connection with Opposer's MOUNTAIN DEW and MTN DEW marks for over 60 years and 7 years, respectively, said

marks have not only acquired substantial public and consumer recognition throughout the United States, but also enjoy valuable goodwill, and have become famous, solely signifying Opposer as the source of products and services of high quality.

10. In addition to its prior common law rights in the marks MOUNTAIN DEW, MTN DEW and variants, Opposer is also the owner of numerous live United States trademark and service mark applications and registrations, each of which incorporate the designation MOUNTAIN DEW, MTN DEW or variants, including, but not limited to, the following:

MARK	REG. NO.	REG. DATE	FIRST USE DATE	IDENTIFICATION OF GOODS
MOUNTAIN DEW	820,362	Dec. 13, 1966	09/24/1948	Soft drinks, and concentrates used in the preparation thereof, in Class 32
MTN DEW	3,674,349	Aug. 25, 2009	01/00/2009	Concentrates, syrups or powders used in the preparation of soft drinks; Soft drinks in Class 32
MTN DEW DEW SHINE	4,814,423	Sept. 15, 2015	03/30/2015	Concentrates, syrups or powders used in the preparation of soft drinks; Soft drinks, in Class 32
MTN DEW CODE RED	4,161,395	June 19, 2012	04/00/2011	Concentrates, syrups or powders used in the preparation of soft drinks; Soft drinks, in Class 32
MOUNTAIN DEW BAJA BLAST	2,950,372	May 10, 2005	07/00/2004	Soft drinks, and syrups and concentrates for making the same, in Class 32
MOUNTAIN DEW LIVEWIRE	2,803,790	Jan. 6, 2004	05/01/2003	Soft drinks, and syrups and concentrates for making the same, in Class 32
MOUNTAIN DEW THROWBACK	3,664,996	Aug. 4, 2009	04/20/2009	Concentrates, syrups or powders used in the preparation of soft drinks;

				Soft drinks, in Class 32
MOUNTAIN DEW BLUE SHOCK FREEZE	3,673,766	Aug. 25, 2009	00/00/2008	Semi-frozen soft drinks, in Class 32
MOUNTAIN DEW VERTICAL CHALLENGE	2,732,061	July 1, 2003	11/00/1989	Organizing sporting events, namely, ski and snowboard races, in Class 41
MOUNTAIN DEW	3,426,588	May 13, 2008	2/00/2006	Drinking glasses, in Class 21
MOUNTAIN DEW	2,986,575	Aug. 16, 2005	7/00/2004	Clothing, namely, t-shirts, in Class 25
MOUNTAIN DEW	4,938,117	April 12, 2016	12/16/2015	Barbeque sauce; Cooking sauces; Dipping sauces; Grilling sauces; Marinades; Sauces, in Class 30

11. Opposer’s registrations for these marks are valid, subsisting, in full force and effect, uncanceled and unrevoked, and serve as evidence of Opposer’s exclusive right to use such marks in commerce on or in connection with the goods or services identified in the registrations, as provided by Section 33(a) of the United States Trademark (Lanham) Act, 15 U.S.C. § 1115(a). Further, many of Opposer’s registrations for the aforesaid marks have become incontestable pursuant to Section 15 of the Lanham Act, 15 U.S.C. § 1065. Hereinafter PepsiCo’s foregoing marks, including those registered and/or used in commerce, are referred to individually and/or collectively as the “MOUNTAIN DEW Marks.”

12. Use of the MOUNTAIN DEW Marks has been continuous and they have not been abandoned. As a result of the long, extensive and widespread use, advertising, promotion and registration of the MOUNTAIN DEW Marks on and in association with PepsiCo’s various goods and services, including, but not limited to, beverages, cups, clothing, organizing, marketing and promoting sporting events, sponsoring sporting events and live musical performances, and other

marketing efforts, consumers have become accustomed to associating marks consisting of or containing the terms MOUNTAIN DEW and/or MTN DEW with a single source, that is, PepsiCo.

13. In view of such substantial usage, the MOUNTAIN DEW Marks have become famous, representing assets of enormous goodwill and of inestimable value to PepsiCo; indeed, the MOUNTAIN DEW brand is one of the most renowned brands in the United States.

14. On information and belief, on September 21, 2015, Applicant, Ole Smoky Distillery, LLC, having an address at 236 E Main St. #136 Sevierville, Tennessee 37862, filed Application Serial No. 86/762,399 to register OLE SMOKY MOUNTAIN DEW MOONSHINE, based on an intent to use the alleged mark in connection with “distilled spirits” in International Class 33. Upon information and belief, at the time Applicant filed its application for the OLE SMOKY MOUNTAIN DEW MOONSHINE mark, it was or should have been fully aware of Opposer’s MOUNTAIN DEW Marks and its rights therein.

15. Registration of Applicant’s alleged mark, which is the subject of the application-in-opposition, is barred by the provisions of Section 2(d) of the Trademark Act of 1946 because the said mark consists of or comprises a mark which so resembles Opposer’s MOUNTAIN DEW Marks, in particular, MOUNTAIN DEW and MTN DEW, which have been in use and are also the subject of prior registrations or previously filed applications to register marks in the United States Patent and Trademark Office, as to be likely, when used in connection with the alleged goods of the Applicant to cause confusion, mistake or deception.

16. PepsiCo has priority over Applicant because PepsiCo’s use, application filing dates and/or registration dates for the MOUNTAIN DEW Marks, including MOUNTAIN DEW and MTN DEW, precede the Applicant’s filing date for its application at issue and/or any alleged

date of first use in commerce of Applicant's purported OLE SMOKY MOUNTAIN DEW MOONSHINE mark which is the subject of the application-in-opposition.

17. Applicant's alleged OLE SMOKY MOUNTAIN DEW MOONSHINE mark, which is the subject of the application-in-opposition, and PepsiCo's MOUNTAIN DEW Marks are similar. Indeed, Applicant's mark incorporates Opposer's famous mark MOUNTAIN DEW in its entirety. Furthermore, the goods in connection with which Applicant's alleged mark is intended to be used or applied for and the goods in connection with which Opposer's MOUNTAIN DEW Marks are registered and/or used are related or complementary. Indeed, the original MOUNTAIN DEW beverage was developed by PepsiCo's predecessors-in-interest as a chaser for whiskey, and consumers today are known to combine Opposer's MOUNTAIN DEW soft drinks together with alcoholic beverages, including distilled spirits. Merely by way of example, the website barnonedrinks.com lists 130 recipes for mixed drinks containing PepsiCo's MOUNTAIN DEW soft drink. Likewise, the website bartenderapp.com lists 76 such recipes.

18. Accordingly, Applicant's alleged mark OLE SMOKY MOUNTAIN DEW MOONSHINE shown in the application-in-opposition so resembles PepsiCo's foregoing and previously used and/or registered MOUNTAIN DEW Marks, particularly, MOUNTAIN DEW and MTN DEW, as to be likely to cause confusion, to cause mistake or to deceive with consequent injury to Opposer. The likelihood of confusion, mistake or deception that would also arise from concurrent use and registration of the applied for mark with Opposer's use and registration of its MOUNTAIN DEW Marks is that (a) persons are likely to believe that Applicant's goods have their source in PepsiCo, or (b) that Applicant and its goods are a version of Opposer's marks or are in some way legitimately associated, connected or affiliated with, sponsored, approved, endorsed or licensed by Opposer when, in fact, they are not.

19. In view of the foregoing, registration of Applicant's alleged mark OLE SMOKY MOUNTAIN DEW MOONSHINE is barred by the provisions of Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), because said mark consists of or comprises a mark which, when used in connection with the alleged goods of Applicant, is likely to cause confusion, mistake or deception.


20. Further, PepsiCo's distinctive MOUNTAIN DEW Marks, particularly, MOUNTAIN DEW, MTN DEW and DEW, became famous prior to the filing date of Applicant's application-in-opposition and/or any claimed date of first use in commerce by Applicant of the alleged mark OLE SMOKY MOUNTAIN DEW MOONSHINE shown in U.S. Application Serial No. 86/762,399. Registration and use of Applicant's alleged mark would likely dilute Opposer's famous and distinctive MOUNTAIN DEW Marks in violation of 15 U.S.C. § 1125(c). Accordingly, Applicant's alleged mark OLE SMOKY MOUNTAIN DEW MOONSHINE is not entitled to registration under 15 U.S.C. § 1052(f) and Section 13 of the Lanham Act, 15 U.S.C. § 1063.

21. PepsiCo will be damaged by the issuance of a registration sought by Applicant within the meaning of 15 U.S.C. §1063 because such registration would support and assist Applicant in the confusing, misleading, deceptive and/or dilutive use of Applicant's alleged OLE SMOKY MOUNTAIN DEW MOONSHINE mark, and would give color of exclusive statutory rights to Applicant in violation and derogation of the prior and superior rights of Opposer, PepsiCo.

WHEREFORE, Opposer prays that this opposition be sustained in its favor, that registration be denied to Applicant on its Application Serial No. 86/762,399 and that the Board grant all further and favorable relief to Opposer that is necessary and just in these circumstances.

Respectfully submitted,

BAKER BOTTS L.L.P.



Dated: November 30, 2016

By:

Paul J. Reilly
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(212) 408-2500


Attorneys for Opposer,
PepsiCo, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, NOTICE OF OPPOSITION, was served on the attorney for Applicant via overnight courier, in an envelope with sufficient postage addressed to:

MICHAEL E. ROBINSON
Robinson IP Law PLLC
9724 Kingston Pike Ste 1403
Knoxville, TN 37922-6907

on November 30, 2016

By: 
Tyler M. Beas