

ESTTA Tracking number: **ESTTA1142285**

Filing date: **06/23/2021**

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	06/23/2021
Address	700 ANDERSON HILL ROAD PURCHASE, NY 10577 UNITED STATES

Correspondence information	PAUL A. LEE SENIOR TRADEMARK COUNSEL PEPSICO, INC. 700 ANDERSON HILL ROAD PURCHASE, NY 10577 UNITED STATES Primary Email: trademarks@pepsico.com Secondary Email(s): Paul.lee@pepsico.com, donna.j.sanders@pepsico.com No phone number provided.
----------------------------	--

Applicant Information

Application No.	90144519	Publication date	02/23/2021
Opposition Filing Date	06/23/2021	Opposition Period Ends	06/23/2021
Applicant	Zachary Gwin 3441 TOM GARRISON LANE TIMMONSVILLE, SC 29161 UNITED STATES		

Goods/Services Affected by Opposition

Class 035. First Use: 0 First Use In Commerce: 0 All goods and services in the class are opposed, namely: Providing business information concerning the sale of beverage and soft drink
--


Grounds for Opposition

Priority and likelihood of confusion	Trademark Act Section 2(d)
Dilution by blurring	Trademark Act Sections 2 and 43(c)

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		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 2009/01/00 First Use In Commerce: 2009/01/00 Concentrates, syrups or powders used inthe preparation of soft drinks; Soft drinks		

U.S. Registration No.	1200615	Application Date	04/06/1981
Registration Date	07/06/1982	Foreign Priority Date	NONE
Word Mark	DEW		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 1980/11/12 First Use In Commerce: 1980/11/12 Soft Drinks		

U.S. Registration No.	1932027	Application Date	08/23/1993
Registration Date	10/31/1995	Foreign Priority Date	NONE
Word Mark	DO THE DEW		
Design Mark			
Description of Mark	NONE		

Goods/Services	Class 032. First use: First Use: 1995/03/00 First Use In Commerce: 1995/03/00 soft drinks		
----------------	---	--	--

U.S. Registration No.	3687364	Application Date	11/12/2008
-----------------------	---------	------------------	------------

Registration Date	09/22/2009	Foreign Priority Date	NONE
-------------------	------------	-----------------------	------

Word Mark	DEW		
-----------	-----	--	--

Design Mark			
-------------	---	--	--


Description of Mark	The mark consists of the word "DEW" in stylized slanted red letters.		
---------------------	--	--	--


Goods/Services	Class 032. First use: First Use: 2009/01/01 First Use In Commerce: 2009/01/01 Soft drinks		
----------------	---	--	--

U.S. Registration No.	3674407	Application Date	11/12/2008
-----------------------	---------	------------------	------------

Registration Date	08/25/2009	Foreign Priority Date	NONE
-------------------	------------	-----------------------	------

Word Mark	MTN DEW		
-----------	---------	--	--

Design Mark	
Description of Mark	The mark consists of the word "MTN" in stylized slanted dark green letters stacked on top of the word "DEW" in stylized slanted red letters, which words are then outlined in white, further outlined in light green and further outlined in dark green.
Goods/Services	Class 032. First use: First Use: 2009/01/00 First Use In Commerce: 2009/01/00 Soft drinks

U.S. Registration No.	4146652	Application Date	10/06/2011
Registration Date	05/22/2012	Foreign Priority Date	NONE
Word Mark	DEW		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 035. First use: First Use: 2005/06/30 First Use In Commerce: 2005/06/30 Promotional sponsorship of sporting events and competitions		

U.S. Registration No.	4993451	Application Date	12/14/2015
Registration Date	07/05/2016	Foreign Priority Date	NONE

Word Mark	DEW TOUR
Design Mark	DEW TOUR
Description of Mark	NONE
Goods/Services	Class 041. First use: First Use: 2005/06/09 First Use In Commerce: 2005/06/09 Entertainment services, namely, organizing and conducting a wide variety of sports exhibitions and competitions; Entertainment services in the nature of an ongoing television series featuring a wide variety of sports exhibitions and competitions

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 Mark	NONE		
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.	2986575	Application Date	02/19/2004
Registration Date	08/16/2005	Foreign Priority Date	NONE
Word Mark	MOUNTAIN DEW		
Design Mark	MOUNTAIN DEW		
Description of Mark	NONE		
Goods/Services	Class 025. First use: First Use: 2004/07/00 First Use In Commerce: 2004/07/00 CLOTHING, NAMELY, T-SHIRTS [, SWEATSHIRTS]		

Attachments	77586029#TMSN.png(bytes) 77612532#TMSN.png(bytes) 77612574#TMSN.png(bytes) 85441015#TMSN.png(bytes) 86848705#TMSN.png(bytes) 78976202#TMSN.png(bytes) Notice of Opposition v. WITH ALL DEW RESPECT pl sig.pdf(382166 bytes)
-------------	--

Signature	/Paul A. Lee/
Name	PAUL A. LEE
Date	06/23/2021

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

IN THE MATTER OF APPLICATION

Mark : WITH ALL DEW RESPECT
Applicant : Zachary Gwin
Serial No. : 90/144,519
Filed : August 28, 2020
Published in
the Official Gazette : February 23, 2021

<hr/>	X
	:
PEPSICO, INC.,	:
	:
Opposer,	:
	:
v.	:
	:
ZACHARY GWIN,	:
	:
Applicant.	:
<hr/>	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 Application Serial No. 90/144,519, filed on August 28, 2020, in the name of Zachary Gwin (hereinafter “Applicant”), based on an intent-to-use the alleged mark WITH ALL DEW RESPECT for “Providing business information concerning the sale of beverage and soft drink” in International Class 35, 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 over 100 years and has become well and favorably known to members of the public, plus members of the beverage industry, for quality beverage products and related goods and

services. It owns a portfolio of brands that identify carbonated soft drinks, juices and juice drinks, ready-to-drink teas, isotonic sports drinks, energy drinks, bottled water and enhanced waters, and related products and services.

2. Since at least as early as 1948, 1980 and 2009, respectively, and continuing through to the present, PepsiCo has used, on its own or through predecessors in interest, the marks MOUNTAIN DEW, DEW and MTN DEW in connection with marketing, advertising, promoting, distributing and selling various beverages and other products and services. The marks are also used in connection with advertising, marketing, sales and promotional services to authorized bottlers, independent distributors and retailers. Such marketing, promotion, and advertising includes some of the most-recognized commercials and ads, e.g., the “DO THE DEW” nationwide advertising campaign.

3. Since long prior to the filing date of the application-at-issue for WITH ALL DEW RESPECT, DEW, MTN DEW and MOUNTAIN 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 DEW, MTN DEW and MOUNTAIN DEW products are marketed and sold in enormous 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 DEW, MTN DEW and MOUNTAIN DEW products for well over 70 years is due in large measure to substantial advertising and marketing efforts by PepsiCo. Opposer has, by virtue of extensive

usage, advertising and promotion, built up a very high level of consumer and trade recognition symbolized by its marks DEW, MTN DEW, MOUNTAIN DEW and variants. Opposer's sales of its beverage products marketed under the DEW, MTN DEW and MOUNTAIN DEW marks, have exceeded hundreds of millions of dollars each year, over the past several years alone.

6. PepsiCo's use of the marks DEW, MTN DEW and MOUNTAIN DEW also extends beyond beverages, per se, to include other products and services. For example, over the years, PepsiCo has been marketing and selling clothing, drinking vessels, sauces, and entertainment services under the marks. 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 marks DEW, MTN DEW, MOUNTAIN DEW and variants such as MOUNTAIN DEW VERTICAL CHALLENGE and the DEW TOUR. Likewise, PepsiCo, under its marks MOUNTAIN DEW, MTN DEW and/or DEW, has been a sponsor of NASCAR racing teams and events for well over 20 years.

7. 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 marks DEW, MTN DEW, MOUNTAIN DEW and variants. PepsiCo also promotes its beverages products through such programs as DEW TOUR for action sports tour and MTN DEW DEWnited States collectible editions.

8. 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 PepsiCo's marks DEW, MTN DEW and MOUNTAIN DEW for over 70 years, these 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.

9. In addition to its prior common law rights in the marks DEW, MTN DEW, MOUNTAIN 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 DEW, MTN DEW, MOUNTAIN 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
DEW	1,200,615	July 6, 1982	11/12/1980	Soft drinks, in Class 32
DO THE DEW	1,932,027	Oct. 31, 1995	03/00/1995	Soft drinks, in Class 32
DEW (stylized)	3,687,364	Sept. 22, 2009	01/01/2009	Soft drinks, in Class 32
MTN DEW (stylized)	3,674,407	Aug. 25, 2009	01/00/2009	Soft drinks, in Class 32
DEW	4,146,652	May 22, 2012	06/30/2005	Promotional sponsorship of sporting events and competitions, in Class 35
DEW TOUR	4,993,451	July 5, 2016	06/09/2005	Entertainment services, namely, organizing and conducting a wide variety of sports exhibitions and competitions; Entertainment services in the nature of an ongoing television series featuring a wide variety of sports exhibitions and competitions, in Class 41

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	2,986,575	Aug. 16, 2005	7/00/2004	Clothing, namely, t-shirts, in Class 25

10. Opposer’s registrations for these marks are valid, subsisting, in full force and effect, uncanceled and unrevoked, and serve as evidence of PepsiCo’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 “DEW Marks”.

11. Use of the 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 DEW Marks on and in association with PepsiCo’s various goods and services, including, but not limited to, beverages, soft drinks, energy drinks, clothing, organizing, marketing and promoting sporting events, sponsoring sporting events, entertainment services and live musical performances, and other marketing efforts, consumers have become accustomed to associating marks consisting of or containing the term “DEW” or variants with a single source, that is, PepsiCo.

12. In view of such usage, the DEW Marks, including DEW, MTN DEW and MOUNTAIN DEW, have become famous and one of the most renowned brands in the United States, representing assets of inestimable value to PepsiCo.

13. On information and belief, on August 28, 2020, Applicant, having an address at 3441 Tom Garrison Lane, Timmonsville, South Carolina 29161, filed U.S. Application Serial No. 90/144,519 for the mark WITH ALL DEW RESPECT for “Providing business information concerning the sale of beverage and soft drink” in International Class 35, (hereinafter, the “Application-in-Opposition” or the “WITH ALL DEW RESPECT Mark”, unless otherwise specified).

14. Upon information and belief, at the time Applicant filed its application for the WITH ALL DEW RESPECT Mark, it was or should have been fully aware of Opposer’s well-known and famous DEW Marks and its rights therein. Applicant was at least on constructive notice of Opposer’s rights in and to the DEW Marks by its prior federal registrations therefor.

15. Registration of Applicant’s alleged mark WITH ALL DEW RESPECT, 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 elements that so resemble Opposer’s DEW Marks, including, but not limited to, DEW and variants, which have been in prior use and are also the subject of prior registrations and 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 DEW Marks precede the Applicant’s filing date for its Application-in-Opposition, any alleged date of first use in commerce, and/or any other purported filing date of applications or registrations for Applicant’s alleged WITH ALL DEW RESPECT Mark.

17. Applicant's alleged WITH ALL DEW RESPECT Mark, which is the subject of the Application-in-Opposition, and PepsiCo's DEW Marks, including, but not limited to, DEW and variants, are similar. Indeed, the element "DEW" in Applicant's purported mark is identical to PepsiCo's mark DEW. On information and belief, the services in connection with which Applicant's alleged mark is used, intended to be used or applied for and the goods and services in connection with which Opposer's DEW Marks are registered and/or used are similar and/or related. Further, the Application-in-Opposition contains no limitations on marketing channels or customers such that the channels of trade and target markets for Applicant's services will overlap with those for PepsiCo's goods and services that are marketed and sold in connection with the DEW Marks.

18. Accordingly, Applicant's claimed WITH ALL DEW RESPECT Mark, which is the subject of the Application-in-Opposition, so resembles PepsiCo's foregoing and previously used and/or registered DEW Marks 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 DEW Marks, including but not limited to DEW and variants, is that (a) persons are likely to believe that Applicant's services have their source in PepsiCo, or (b) that Applicant and its services are a version of Opposer's marks or are in some way legitimately connected, associated 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 WITH ALL DEW RESPECT Mark is barred by the provisions of Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), because the said Application-in-Opposition consists of a mark which, when

used in connection with the alleged services of Applicant, are likely to cause confusion, mistake or deception.

20. Further and as detailed above, PepsiCo has invested considerable effort and resources in developing, using, advertising, and promoting beverages and other products and services in connection with its inherently distinctive DEW Marks, including, DEW, MTN DEW and MOUNTAIN DEW, in the United States, and over an extensive period of time, which has resulted in tremendous volumes of commercial impressions. Sales of and revenue generated by such products and services under or in connection with the DEW Marks due to such marketing efforts have been several billions of dollars annually over each of the last five years alone. In view of such substantial usage, exposure and sales, the DEW Marks have become famous, widely recognized by the general consuming public of the United States as a designation of source of the goods of PepsiCo and became famous long prior to the filing date of Applicant's Application-in-Opposition and/or any claimed priority date by Applicant of the alleged WITH ALL DEW RESPECT Mark shown in U.S. Application Serial No. 90/144,519. Registration and use of Applicant's claimed WITH ALL DEW RESPECT Mark would likely dilute Opposer's famous and inherently distinctive DEW Marks, including DEW, MTN DEW and MOUNTAIN DEW, in violation of 15 U.S.C. § 1125(c). Accordingly, the applied-for WITH ALL DEW RESPECT Mark 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 the 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, false association and/or dilutive use of WITH ALL DEW RESPECT, and would give color of exclusive statutory rights to Applicant, over

which PepsiCo has no control, in violation and derogation of the prior and superior rights of Opposer.

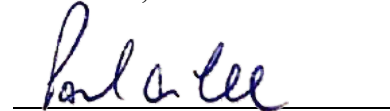
WHEREFORE, Opposer prays that this opposition be sustained in its favor, that registration be denied to Applicant on its Application Serial No. 90/144,519 and that the Board grant all further relief to Opposer that is necessary and just in these circumstances.

Respectfully submitted,

PEPSICO, INC.

Dated: June 23, 2021

By:

A handwritten signature in blue ink, appearing to read "Paul A. Lee", is written over a horizontal line.

Paul A. Lee
Attorney for Opposer
700 Anderson Hill Road
Purchase, NY 10577
(914) 253-3443