

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

DR PEPPER/SEVEN UP, INC.,

Plaintiff,

v.

DR PEPPER BOTTLING COMPANY OF
DUBLIN, TEXAS,

Defendant.

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Case No. 4:11cv398
(JURY DEMANDED)

DUBLIN DR PEPPER’S ANSWER AND COUNTERCLAIMS

Dr Pepper Bottling Company of Dublin, Inc.¹ d/b/a Dublin Dr Pepper, Dublin Dr Pepper Bottling Company, Dr Pepper Bottling Company of Dublin, Texas (referred to hereinafter, including its predecessors, as “Dublin Dr Pepper”) files this Answer and Counterclaims against Dr Pepper/Seven Up, Inc. (referred to hereinafter, including its predecessors, as “Corporate Dr Pepper”).

I. INTRODUCTION

As an introductory statement of facts that sets forth, in part, the factual basis for defenses and counterclaims asserted herein as well as in opposition to preliminary injunction, Dublin Dr Pepper submits the following:

1. Corporate Dr Pepper has initiated this lawsuit against Dublin Dr Pepper, the very first and oldest bottler of Dr Pepper in the entire world — a fact repeatedly acknowledged by Corporate Dr Pepper in the past and by the Texas Historical Commission. Exs. 1-4. With a

¹ As explained herein, the formal, corporate name of Dublin Dr Pepper is Dr Pepper Bottling Company of Dublin, Inc., not Dr Pepper Bottling Company of Dublin, Texas, Inc., as stated in Dr Pepper/Seven Up, Inc.’s complaint.

history stretching back to 1891, Dublin Dr Pepper is one of the oldest bottlers of soft drinks of any kind anywhere in the world.

2. Incredibly, Corporate Dr Pepper in its Complaint has chosen to omit any reference to the prior history of Dublin Dr Pepper and its relationship with Corporate Dr Pepper for more than a century. More importantly, Corporate Dr Pepper's Complaint fails to even mention any of its own prior actions and conduct by which it has endorsed and approved the use of Dublin Dr Pepper, as both the name of a business and as a brand, and the manner in which Dublin Dr Pepper has conducted business. Believing in justice and that this case should be decided based on all the facts, Dublin Dr Pepper will fill in that which Corporate Dr Pepper has conveniently ignored.

History of Dublin Dr Pepper

3. Sam Houston Prim, a Texan with a classic name and the founder of Dublin Dr Pepper, discovered Dr Pepper soft drinks in 1891, while visiting Waco, Texas. At the time, Dr Pepper soft drinks were being made and sold at an old fashioned soda fountain in Wade Morrison's Old Corner Drug Store, in Waco, Texas. There, a local pharmacist, Charles Alderton, had invented the drink five years earlier. For a time, the drink was called a "Waco" by the local patrons, but Charles Alderton later decided to name his new drink "Dr Pepper" after the father of a lost love back in his home state of Virginia. Being a visionary, Sam Houston Prim, recognized the soft drink's potential, particularly if packaged in bottles which allowed the drink to be consumed away from a soda fountain. Shortly thereafter, he arranged to take the concentrate back to Dublin, Texas and start bottling Dr Pepper. Sam Houston Prim promoted the Dr Pepper brand throughout his life until his death in 1946, when the torch was passed to his

daughter, Grace Prim Lyon and a remarkable gentleman named William P. Kloster (“Mr. Kloster”), who went by the name of “Billie.”

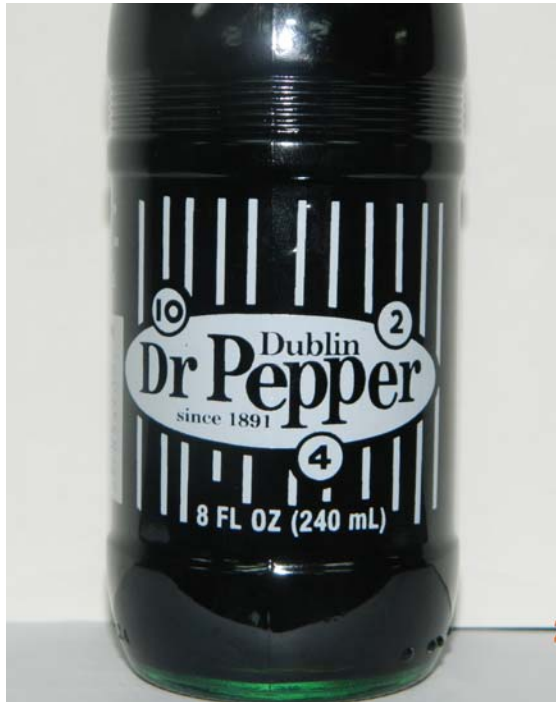
4. Mr. Kloster started working at the Dublin bottling plant for Sam Houston Prim, as a bottle sorter for 10¢/hour in 1933 when he was a mere 14 years old, to support his mother and four siblings, after the death of his father. Except for several tours of duty in Europe during World War II, Mr. Kloster worked continuously at Dublin Dr Pepper for the next 67 years, up to and including the day of his death in 1999. Mr. Kloster worked up through the ranks to a production manager and general manager, first for Sam Houston Prim and later for his daughter, Grace Prim Lyon. Grace Prim Lyon owned and operated the business, along with Mr. Kloster up to her death in 1991, which occurred on the morning of Dublin Dr Pepper’s 100th birthday celebration. Upon her death, Grace Prim Lyon passed ownership and operation of Dublin Dr Pepper to Mr. Kloster.

5. Mr. Kloster worked tirelessly throughout his life to develop and further Dr Pepper in the marketplace. This dedication was aptly demonstrated by the fact that he was known throughout his life as “Mister Dr Pepper.” Indeed, Mr. Kloster’s tombstone contains two emblems of bottles of Dr Pepper and is inscribed with the name “Mister Dr Pepper.” Ex. 5. Corporate Dr Pepper, in its corporate monthly publication *ClockDial* commemorated the extraordinary life of Mr. Kloster, noting he had turned Dublin Dr Pepper “into a highly marketable commodity” and, as a result, its reputation extended “way beyond” its franchise territory. Ex. 6.

6. Upon Mr. Kloster’s death in 1999, his son William E. Kloster (“Bill Kloster”) and grandsons, Jeff and Mark Kloster, took over the reins of Dublin Dr. Pepper and, today, Bill and Jeff Kloster continue the family tradition at Dublin Dr Pepper.

7. In sum, Dublin Dr Pepper has continuously bottled, marketed, distributed, and sold Dr Pepper beverages, particularly Dublin Dr Pepper beverages, for over 120 years. In fact, just 17 days before being sued by Corporate Dr Pepper, Dublin Dr Pepper celebrated its 120th anniversary, during which time the town of Dublin, Texas, was renamed (as it is every year on the anniversary) to “Dr Pepper, Texas.”

8. During this time, Dublin Dr Pepper has exclusively and continuously used the name Dublin Dr Pepper or Dublin as the trade name of a business as well as a trademark and service mark in direct connection with its soft drinks and services. This activity has included affixing its marks to its products, as shown below, and using its name in promotional materials. This use has created an association between Dublin Dr Pepper and its business, its products and its services.



Sweet Pure Cane Sugar

9. A major difference between the soft drinks labeled Dr Pepper sold commonly in stores around the country, and soft drinks labeled DUBLIN DR PEPPER or DUBLIN, is that Dublin Dr Pepper beverages have remained true to the original Dr Pepper formula originated by Charles Alderton in 1895. Unlike the corn syrup varieties found elsewhere, Dublin Dr Pepper sodas bearing the marks DUBLIN DR PEPPER² or DUBLIN use pure cane sugar and, in particular, Imperial Pure Cane Sugar.

10. Remaining on the pure cane sugar path has not been easy for Dublin Dr Pepper. For example, during World War II, when other Dr Pepper bottlers substituted sweeteners for cane sugar, given the scarcity and high price of sugar during war time, Dublin Dr Pepper continued to use the rare (and more expensive) ingredient. Then, in the 1970's, when other beverage manufacturers, including Corporate Dr Pepper, switched to alternative sweeteners, such as corn syrup (a less expensive sweetener allowing higher profits), Dublin Dr Pepper, particularly Mr. Kloster, the manager and subsequent owner, and Grace Prim Lyon, the daughter of Sam Houston Prim, stood tall and stubbornly refused to stop using pure cane sugar, to stay true to the original formula. *They made this decision even though it meant that Dublin Dr Pepper would make less money for each bottle or can of Dublin Dr Pepper that it sold.* By doing so, Dublin Dr Pepper chose principle over profits and taste over tender, believing quality was the better business practice.

11. Thus, Dublin Dr Pepper for decades was the only company that made Dr Pepper with pure cane sugar. As a result, Dr Pepper connoisseurs and aficionados began flocking to

² As used herein, references to the DUBLIN DR PEPPER mark refers to the use of Dublin in conjunction or combined with Dr Pepper, including DUBLIN DR PEPPER, DUBLIN DR PEPPER BOTTLING COMPANY, DR PEPPER BOTTLING COMPANY OF DUBLIN, TEXAS, and DR PEPPER BOTTLING CO., DUBLIN, TEXAS which have been used in connection with Dublin Dr Pepper's products and services.

Dublin, Texas, to enjoy the true and original taste of Dr Pepper and to purchase eight ounces of nostalgia. Much like 125 years ago, when the patrons referred to Mr. Alderton's creation as a "Waco," patrons today request Dublin Dr Pepper products by name or, sometimes, simply as Dublin. The press and media, both local and national, have consistently celebrated Dublin Dr Pepper's decision and dogged determination to stay true to the authentic formula and have repeatedly trekked to the little town of Dublin, Texas to interview the Kloster Family and to enjoy the true taste of an extra cold Dublin Dr Pepper beverage. As an indication of this widespread name recognition, the well read publication in Texas and around the world, *Texas Monthly*, recently published an article in March 2010 entitled "The Bucket List, 63 things all Texans should do before they die." Shown on the cover below was a picture of a father, fishing with his son, alongside with two Dublin Dr Pepper bottles on a boat dock. The caption reads "#10 DRINK a bottle of this heavenly elixir." Inside, as shown below, the article contained the headline "Sip a Dublin Dr Pepper." It is hard to imagine a product and brand so much a part of Texana, and so ingrained in the Texas imagination and tradition. It is clearly "A Texas Original."

HOUSTON HAS TWO MOMMIES
by MIMI SWARTZ

ALEX JONES CAN'T SAY THAT, CAN HE?
by NATE BLAKESLEE

THE TWO BURIALS OF MY GRANDFATHER
by JOHN PHILLIP SANTOS

Plus
SPONSOR'S
FOOTBALLS
NAT'L CHAMPIONSHIP
(see page 118)

Texas Monthly

The Bucket List

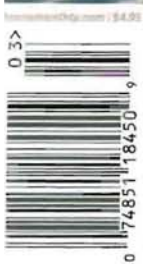
63 things all Texans should do before they die, including...

#20: GO FISHING in this lake

#10: DRINK a bottle of this heavenly elixir

#34: READ this book

and #63: Be on the cover of this magazine (see page 22)



Sip a Dublin Dr Pepper

IT IS TEN O'CLOCK IN THE MORNING, AND I WON'T LIE TO YOU: I am drinking one right now. The ice-cold eight-ounce bottle proudly proclaims the signature ingredient, Imperial Pure Cane Sugar. No need for the high-fructose corn syrup that has become part of the standard formula for Dr Peppers elsewhere. That simple tweak makes a Dublin—named for the city whose bottling plant has been producing the Texas-born refreshment since 1891—a throwback indeed. I drank my first one in elementary school. After I returned home from a hard day of spelling tests and multiplication tables, Mom poured a small amount in my Billy Joe Dupree mug as part of my snack. I've been hooked ever since. And with two more left in my refrigerator today, you can guess what I'll be doing at two and four. *BRIAN D. SWEANY*

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THE BUCKET LIST

LIFE IS TOO SHORT NOT TO LIVE IT IN TEXAS.

But recently we asked ourselves an uncomfortable question: If we had only one year left on earth, what would we do in the Lone Star State? A spirited conversation ensued, we tore and edited and retitled their picks, and soon had two hundred ideas poured forth. We involved our magazine's fine dining (the kitchen is going to the Capitol because we assumed that everyone has already done those things, right?), DFW-based, prize-worthy arguments were made for who makes the best barbecue, which book to read, and where to see Willie Nelson perform. In the end, we asked the staff—and a few friends—to write about the 50 most interesting ideas in the bunch, which were combined into this round-up. Of course, we fully expect you to have more than twelve months to complete this list, but that doesn't mean you shouldn't get started right away.

ILLUSTRATIONS BY DAN COSGROVE

- Pg
- Tom Brinkman
- Justin Arora
- Phil Baska
- Garza Castro-Right
- Francis Collier
- David Conroy
- Don DeLorenzo
- St. C. DeLoach
- Michael Ford
- Thomas G. Gagnier
- Julia Gendron
- Christy G. Gentry
- Patrick Ryan McCann
- Katherine Robinson
- Jeff Seaman
- Patrick Steyer
- Neil Strickland
- John Stribling
- Paul Tamm
- Blair J. Tarry
- Robert Thibodeau
- and Eric Vito

12. Dublin Dr Pepper's emphasis on the original formula, using pure cane sugar, has been acknowledged, well recognized, endorsed and repeatedly celebrated by Corporate Dr Pepper for decades. Indeed, Corporate Dr Pepper has for decades supported Dublin Dr Pepper's efforts to market itself as manufacturing and selling the true and original taste of Dr Pepper in conjunction with and in association with Dublin Dr Pepper's use of the marks DUBLIN DR PEPPER or DUBLIN, creating an association there between. Higher level Corporate Dr Pepper's officers, past and present, have also acknowledged the distinctive taste of a Dr Pepper made by Dublin Dr Pepper:

a) "Dr Pepper with cane sugar in the 6 1/2 ounce bottle is the **standard.**"

(John Albers, President and CEO);

b) "Dr Pepper that you make with pure cane sugar is my **very, very**

favorite." (W.W. Clements, Chairman Emeritus);

c) "Thank you so much for the six packs of that **special** 'sugar-blended' Dr

Pepper from Dublin, Texas ... we are looking forward to...when this pure Dr Pepper will be recognized for its **unique** quality and endurance." (John Albers, President and CEO);

d) "I really enjoyed the **true** taste of Dr Pepper with cane sugar." (John

Tomescko, Vice President);

e) "There is no doubt that your product is **distinct** in the industry." (John

Albers, CEO and President); and

f) "The amazing thing with Dublin is they still have pure cane sugar..."

"**There's nothing tastes better than Dublin Dr Pepper when it is ice cold.**" (Larry Young, current President and CEO.)


See, e.g. Exs. 7-11.

**Corporate Dr Pepper Directs
Customers Worldwide to Dublin**

13. Over the past decades, Corporate Dr Pepper has also revealed and openly welcomed the free exposure and increased name recognition, provided by Dublin Dr Pepper. For instance, a Corporate Dr Pepper spokesman stated publicly, in September 2009, that Dublin Dr Pepper has “done a good job of tapping into consumer nostalgia” and “They’re a good partner and *we believe anything that fuels the passion of Dr Pepper fans is great for the brand.*”


14. Not surprisingly, Corporate Dr Pepper has actively referred consumers from around the world to Dublin Dr Pepper to purchase soda bearing the marks DUBLIN DR PEPPER or DUBLIN, as the Dr Pepper soft drink manufactured according to the true, original formula, with pure cane sugar. For instance, as shown below, in Fall/September 2000, Corporate Dr Pepper’s very own magazine *ClockDial* published an article entitled “Dublin Dr Pepper Celebrates Sweet Success,” describing Dublin Dr Pepper’s weeklong 110th birthday celebration in Dublin. In the article, Corporate Dr Pepper promoted both Dublin Dr Pepper and its website, www.dublindrpepper.com, writing that Dublin Dr Pepper’s “unofficial market is literally worldwide” and that “consumers may now order the original recipe of Dr Pepper, including 8-ounce non-returnable bottles and 12-ounce cans, via the bottler’s new online store,” and then providing Dublin Dr Pepper’s Web address, www.dublindrpepper.com, which is still Dublin Dr Pepper’s web address today.

DUBLIN DR PEPPER CELEBRATES SWEET SUCCESS



June 4 signaled the start of Dr Pepper Days, the weeklong Dublin, Texas, celebration of Dublin Dr Pepper Bottling Company's birthday. The bottler celebrated its 110th anniversary as the oldest Dr Pepper bottling plant in the world. More than 5,000 people attended the week's events. The crowning of the 2001 Pretty Peggy Pepper was one of the highlights. Shawna Cabbage of Comanche, Texas, replaces Brittany Frost, who reigned as Pretty Peggy Pepper in 1999-2000. Cabbage received a \$500 scholarship as well as the right to represent Dublin Dr Pepper. The bottler's franchise area is small — a mere 45-mile radius around Dublin — but its unofficial market is literally worldwide. In fact, consumers may now order the original recipe of Dr Pepper, including 8-ounce non-returnable bottles and 12-ounce cans, via the bottler's new online store. The Web address is www.dublindrpepper.com.

Brittany Frost, Dublin's Pretty Peggy Pepper since 1999, embraces the new 2001 winner, Shawna Cabbage.



SPECIAL EVENTS

15. As recently as earlier this year, 2011, and as shown below, Corporate Dr Pepper, on its very own website, www.drpepper.com, contained a direct link between its website and Dublin Dr Pepper's website, www.dublindrpepper.com. This link displayed the name "Dublin Dr Pepper" and the bottles with that mark. Corporate Dr Pepper has recently removed this link, presumably in anticipation of this lawsuit.



The screenshot shows a navigation menu with the following items:

- DR PEPPER INFORMATION**
 - Corporate Information
 - FAQ
 - Dr Pepper Museum Challenge Grant
 - Donate today and Dr Pepper
- DR PEPPER HERITAGE**
 - Retro Gallery
 - Timeline
 - Dr Pepper Museum
 - Dublin Dr Pepper
- FEATURED CONTENT**

16. And as recently as earlier this year, 2011, Corporate Dr Pepper's website in a Fact and Question section instructed consumers to contact Dublin Dr Pepper directly if they wanted the original, true taste of Dr Pepper with pure cane sugar. Specifically, Corporate Dr Pepper referred these consumers to www.dublindrpepper.com or the toll free telephone number, 1-888-398-10-2-4 to place orders. Indeed, with Corporate Dr Pepper's approval, the same toll free telephone number has been included on Dublin Dr Pepper bottles and cans for decades. Interestingly enough, Dublin Dr Pepper's website actually predates Corporate Dr Pepper's website by several years and was used by Corporate Dr Pepper as the model for the original creation and development of Corporate Dr Pepper's website in the late 1990's.

17. The enthusiastic and warm references, endorsements and the referrals made by Corporate Dr Pepper on its website are consistent with the actions of Corporate Dr Pepper itself, which has for decades referred people from around the country to Dublin Dr Pepper to purchase Dublin Dr Pepper products, both soft drinks and merchandise. For example as shown below, Corporate Dr Pepper recently referred an individual in Ohio who posted a comment on Corporate Dr Pepper's Facebook page, requesting information about purchasing the Dr Pepper drink made with pure cane sugar. Corporate Dr Pepper posted a response to the individual on Facebook, (which is thereby accessible to anyone with an internet connection) and directed this individual from Ohio to Dublin Dr Pepper and even went so far as to provide Dublin Dr Pepper's toll free number and internet website.

Thank you for contacting us about Dr Pepper Pure Cane Sugar. Your comments and inquiries are appreciated because they provide valuable feedback about our brands.

Dr Pepper Heritage (made with cane sugar) was indeed introduced as a limited edition in some parts of the country. Unfortunately, this product is only available where Dr Pepper is bottled/canned by Pepsi-affiliated bottlers, and your area is covered by a Coca Cola

bottler. Therefore, it is unlikely that Dr Pepper Heritage will be available in your area. We do apologize for any inconvenience.

However, we would like to refer you to Dublin Dr Pepper, which is also a Dr Pepper product sweetened with pure cane sugar, but which is made on a permanent basis at the Dublin, TX plant. You may order cases of this product by visiting www.dublindrpepper.com<<http://www.dublindrpepper.com>>, or calling (888) 398-1024.

* * *

CEO Larry Young's Endorsement of "Dublin Dr Pepper"

18. Corporate Dr Pepper has actively embraced and used the story of Dublin Dr Pepper and its products bearing the marks DUBLIN DR PEPPER or DUBLIN in its own promotional campaigns in order to open new markets and new channels-to-market for all Dr Pepper products. By way of example, in November 2009, a television station named KERA that is located in the Dallas-Ft. Worth metroplex, the same area in which Corporate Dr Pepper is headquartered, broadcast a show about the history and current operation of Corporate Dr Pepper. The show included an interview with the Corporate Dr Pepper's current President and Chief Executive Officer, Larry Young ("Mr. Young"). (The interview can be found at <http://video.pbs.org/video/1346204769?starttime=1200000>, approximately at minute 25.) On public display during the interview on a table right in front of Mr. Young was a six pack of "Dublin Dr Pepper." During the interview, the interviewer, Lee Cullum, asked Mr. Young about Dublin Dr Pepper:

Lee Cullum: What about Dublin Dr Pepper? Wasn't that the first?

Larry Young: Dublin is, you know, everybody in the United States, I don't care where, if I am in Boston, if I am in Seattle, people ask me about **Dublin Dr Pepper**. And the pack we have right here on the table is from Dublin. The amazing thing with Dublin is they still have the pure cane sugar. It's the original

Dr Pepper formula with the imperial sugar in it and their following is unbelievable. The 8 ounce glass bottle....There's nothing tastes better than a **Dublin Dr Pepper** when it is ice cold.

When shown this video at a meeting three weeks before this suit was filed, another Corporate Dr Pepper executive expressed disgust, knowing full well that the recent laudatory statements of his own CEO (and boss) were completely inconsistent with the lawsuit about to be filed.

Corporate Approval of Use of “Dublin Dr Pepper” and Bottle/Can Designs

19. At the time, and over the years and until very recently, through its actions and overt statements, Corporate Dr Pepper (as represented by the current and all of the past ownership/management teams) acknowledged, celebrated, admired, endorsed and actively encouraged Dublin Dr Pepper's allegiance to the original formula, product decisions, and subsequent management and marketing strategies. Corporate Dr Pepper has referred to Dublin Dr Pepper by name, both as the name of a business (which it has been for more than 120 years) and as a distinct soda brand. It did this repeatedly in corporate publications, public speeches, public gatherings and televised shows.

20. Dublin Dr Pepper also submitted all bottle and can designs to Corporate Dr Pepper, prior to using the marks DUBLIN DR PEPPER or DUBLIN on any goods sold by Dublin Dr Pepper. In response, over the decades, Corporate Dr Pepper approved every single design, including bottle and can designs incorporating the marks DUBLIN DR PEPPER or DUBLIN. For, at least a decade, Corporate Dr. Pepper has approved bottle and can designs with “DUBLIN DR PEPPER,” including as recently as late 2010. (Examples of some of the corporate approval documents are attached as Exs. 12-18).

Corporate Distribution of “Dublin Dr Pepper”

21. Until within the past few years, Corporate Dr Pepper’s affiliate company, a major Dr Pepper distributor in the Dallas Metroplex, even went so far as to purchase Dublin Dr Pepper products, including products bearing the marks DUBLIN DR PEPPER or DUBLIN, directly from Dublin Dr Pepper for resale and reshipment to other accounts within and outside their own corporate distributorships—all the time referring to Dublin Dr Pepper products as a Dublin Dr Pepper. Over the past several decades and up to and including this year, numerous employees and top executives of Corporate Dr. Pepper have purchased Dublin Dr Pepper products directly from Dublin Dr Pepper for consumption at their Corporate Dr Pepper’s corporate headquarters and in their homes.

Corporate Use of Dublin Bottle and Can Designs

22. Over time, a number of bottle and can designs were prepared and submitted by Mr. Kloster in connection with the marketing of Dublin Dr Pepper made with cane sugar. Recently, Corporate Dr Pepper has sought to take advantage of the association of these designs with drinks made with sugar. In this regard, Corporate Dr Pepper, in the year 2010 and in response to the growing demand for sugar drinks, marketed an “Anniversary” version of Dr Pepper made with a blended beet (not cane) sugar and used designs on the cans for these drinks that were similar to those submitted by Mr. Kloster.

Dublin Dr Pepper Can Design (1998)



Anniversary Dr Pepper Can Design (2010)



Dublin Dr Pepper Can Design (1988)



Anniversary Dr Pepper Can Design (2010)



Dublin Dr Pepper Can Design (1999)



Anniversary Dr Pepper Can Design (2010)



23. In short, Corporate Dr Pepper has attempted to reap the benefit of Dublin Dr Pepper's hard work over the past several decades.

24. More importantly, and given Corporate Dr Pepper's recent foray into making Dr Pepper with sugar (albeit a blended beet sugar), it is apparent that this suit was not brought to protect the public (who is not confused about anything Dublin Dr Pepper has done) or independent bottlers. Rather, it is likely that Corporate Dr Pepper simply wants to eliminate Dublin Dr Pepper from, or severally limit its ability to be in the market for Dr Pepper made with sugar, a market that Dublin Dr Pepper has created and maintained for the past several decades.

Inconsistent Actions of Corporate with Other Distributors

25. It is common practice in the soft drink bottling industry for licensed bottling companies to incorporate and use the name of the brand(s) in conjunction with additional

word(s), either as the name of the business entity or the name associated with a particular service or product. Such practice has continued for decades. Indeed, there are numerous other licensed Dr Pepper bottlers that have incorporated the words Dr Pepper into the company name and/or used the resulting name in connection with their goods and services, such as West Jefferson Dr Pepper or North Carolina Dr Pepper. Some of these Dr Pepper bottlers have even gone so far as to combine corporate logos of Dr Pepper with the logos or brands of competitors, such as Ozarks Coca-Cola/Dr Pepper Bottling Company, in Missouri. These same bottlers have used names that incorporate the words “Dr Pepper” in their websites as well, as shown below:



Upon information and belief, Corporate Dr. Pepper has not demanded that these other bottlers cease using the words “Dr Pepper” in the name of its business entity or cease using the websites nor filed suit against any of these other bottlers or otherwise terminated their agreements.

26. Thus, even assuming *arguendo* that “Dublin” is not a “mark,” there is nothing improper about including such name on cans or bottles with a Dr Pepper mark so as to identify the distributor of the beverage, who is licensed by Corporate Dr Pepper and is making the genuine beverage in accordance with the original formula using pure cane sugar.

27. Further, PepsiCo, Inc., (“Pepsi”) is one of the largest distributors of Dr Pepper products. (In fact, approximately 91% of Dr Pepper is distributed by Pepsi, Coca-Cola, and affiliates of Corporate Dr Pepper, with the remaining 9% distributed by the few independent bottlers, like Dublin Dr Pepper, left in business.) Pepsi, in 2010, also marketed another Dr Pepper product, entitled Heritage Dr Pepper, made with blended beet (not cane) sugar. The Heritage can design is shown below.

Heritage Dr Pepper



This can design has the name “Heritage” in the oval with Dr Pepper similar to the current Dublin Dr Pepper bottle which has Dublin in the oval with Dr Pepper. Corporate Dr Pepper has never claimed that the Pepsi Heritage Dr Pepper can created confusion, diluted other Dr Pepper brands, or was improper. Apparently, size does matter to Corporate Dr Pepper, given that Pepsi is a large conglomerate and Dublin Dr Pepper is a small family owned business.

28. Further, it also was apparent that Pepsi followed aspects of Dublin Dr Pepper designs as shown below by a comparison with an earlier Dublin Dr Pepper bottle.

Dublin Dr Pepper Bottle Design



Heritage Dr Pepper Design



Pepsi's Heritage can incorporates the candy stripe design found on the Dublin Dr Pepper bottle and places the sugar notice in the same proximate location as on the Dublin Dr Pepper bottle.

29. Finally, of significance, both Corporate Dr Pepper and Pepsi have used the terms "Anniversary" and "Heritage" respectively to denote a drink made with sugar (albeit blended beet). Certainly, there is nothing wrong with Dublin Dr Pepper doing the same thing, namely putting "Dublin" on its can to signify its distinction from other brands.

Corporate Approved Sales of Merchandise by Dublin

30. Dublin Dr Pepper's efforts to market Dublin Dr Pepper did not stop with the manufacture, distribution, marketing and sale of soft drinks, but also included the commercialization of the DR PEPPER and DUBLIN DR PEPPER brands through the sale of merchandise and setting up of a museum in Dublin, Texas. Specifically, in addition to being the manager and owner of the oldest Dr Pepper Bottling Company in the world, Mr. Kloster loved to collect Dr Pepper memorabilia gathered over the course of six decades. And, in the mid 1990's, in response to the growing and reoccurring number of Pepper pilgrimages to Dublin, Texas to purchase Dublin Dr Pepper products and to take a tour of Dublin Dr Pepper's manufacturing facility, Mr. Kloster was encouraged to make his collection of Dr Pepper memorabilia available to the public. Mr. Kloster then contacted Corporate Dr Pepper with the idea of opening a museum and gift shop and Corporate Dr Pepper agreed to allow Dublin Dr Pepper the rights to sell merchandise. The parties entered into a licensing agreement related to merchandise, a point completely omitted by Corporate Dr Pepper in its Complaint. In connection with the foregoing, Corporate Dr Pepper acknowledged and agreed that merchandise with its trademark as well as the Dublin Dr Pepper's "trademarks" (e.g., DUBLIN) could be sold. In short, Corporate Dr Pepper acknowledged in writing, at least, that the word DUBLIN as used in conjunction with DR PEPPER is a trademark or service mark of Dublin Dr Pepper.

31. In reliance on these representations and agreement, Dublin Dr Pepper purchased property, refurbished older buildings, hired employees, hired a museum curator, and opened Old Doc's Soda Shop, to display one of the largest (if not the largest) Dr Pepper memorabilia collections in the entire world. The success of this venture cannot be questioned, as more than 80,000 people per year (twice the population of Erath County, Texas—the county in which

Dublin resides) travel to the town of Dublin, Texas, to visit Dublin Dr Pepper and Old Doc's Soda Shop. Some people travel thousands of miles to Old Doc's Soda Shop. So recognized is Dublin Dr Pepper and Old Doc's Soda Shop that even Corporate Dr Pepper's affiliate museum located in Waco, Texas, as of the date Corporate Dr Pepper filed its lawsuit (and, even now, on the date Dublin Dr Pepper responds to this lawsuit) still refers the public and Pepper aficionados to Dublin Dr Pepper with links to its internet website to www.dublindrpepper.com, as shown below.



SEARCH: GO

SHOP OUR STORE

FEATURED ITEM



I'm a Pepper Snack Bowl

The I'm a Pepper Snack Bowl is so versatile! Use it for popcorn, chips, or the start of a fabulous gift basket for a friend! \$9.95 plus tax. Prices subject to change without notification.

[MORE](#)

LINKS



[The Dr Pepper Company](#)



[Dr Pepper Collectors' Club](#)



[Texas Association of Museums](#)



[The Horatio Alger Association](#)



[The Dr Pepper Bottling Plant of Dublin, TX](#)



[American Association of Museums](#)



[Dr Pepper Snapple Group](#)



[Museum Association of Waco](#)



In short, the link displays the same name and logo about which Corporate Dr Pepper is now complaining.

32. In addition, or in the alternative to the foregoing, the 2009 License Agreement also contemplates that Dublin Dr Pepper can sell certain merchandise with Corporate Dr Pepper's approval and other merchandise without Corporate Dr Pepper's approval. In any event and, as stated above, Corporate Dr Pepper has approved the sale by Dublin Dr Pepper of merchandise with the marks DUBLIN DR PEPPER or DUBLIN and Dr. Pepper. Its allegations to the contrary, like its other claims, are nothing short of outrageous.

33. In the past few months, Corporate Dr Pepper has continued to approve the vast majority of Dublin Dr Pepper's sales of merchandise incorporating the use of the numerous marks and logos that have the words "Dr Pepper," "Dublin Dr Pepper," and/or "Dublin." One notable and inexplicable exception was Corporate Dr Pepper's March 24, 2011 directive to Dublin Dr Pepper: "Do not use 'In God We Trust' on certain merchandise," although "In God We Trust" had been previously "permitted."

34. In short, the "actions" of Corporate Dr Pepper over the past decades speak louder than its newly created lawsuit "words." Virtually everything Corporate Dr Pepper has previously said and done are inconsistent with its lawsuit.

35. The promises, representations and related conduct by Corporate Dr Pepper have been relied on by Dublin Dr Pepper to the development of its business years and especially over the past forty years, when Dublin Dr Pepper decided to remain true to the original formula and emphasized the marks DUBLIN DR PEPPER or DUBLIN even more. Obviously, in reliance on the foregoing, Dublin Dr Pepper has expended substantial funds and time in connection with its business.

36. Allowing Dr Pepper to renege on its long-standing, prior conduct and representations would have dramatic and far reaching consequences. By its suit, Corporate Dr Pepper seeks to eliminate Dublin Dr Pepper, a company that has been in business for 120 years and is a Texas institution. Certainly, this lawsuit and any injunctive relief sought is not in the public interest.

a) First, the Texas Legislature, as well as Governor Perry, have repeatedly given recognition to Dublin Dr Pepper as a business that “exemplifies the strength and value of our state’s family business” and “for its exceptional contributions in carrying on a Texas tradition.” *See* Exs. 19–20.

b) The public outcry against Corporate Dr Pepper’s decision to bring this suit has been immense and belies Dr Pepper’s alleged concern about the public’s alleged confusion over Dublin Dr Pepper, which is nonexistent. In fact, Corporate Dr Pepper received so many complaints from the public on its Facebook page that it removed all critical posts, presumably because they were damaging to its misguided lawsuit.

c) It is also difficult to conceive how the actions by Dublin Dr Pepper can irreparably injure Corporate Dr Pepper, in view of the fact that Dublin Dr Pepper’s annual sales, before costs and expenses are removed, are less than 1/10th of 1% of the total sales of Corporate Dr Pepper and are less than the annual compensation of its current President and CEO.

d) Finally, and not the least, there is the small town of Dublin, Texas (Pop. 3,887) whose economy largely depends on Dublin Dr Pepper, which is the town’s largest private employer and is the cornerstone of its promotional and tourist activities. *See* Exs. 21–24. Certainly, the loss of Dublin Dr Pepper would have a negative impact on the lives of its citizens.

Accordingly, the Dublin City Council recently passed a resolution in support of Dublin Dr Pepper and its efforts to have this unfounded lawsuit dismissed. Exs. 25–26.

II. ANSWER

In response to Corporate Dr Pepper’s Complaint, Dublin Dr. Pepper responds as follows:

For the ease of the Court, Dublin Dr. Pepper has adopted the headings utilized by Corporate Dr Pepper in its Complaint. Use of such headings, however, is not an admission that they are correct. As to any response that states Dublin Dr Pepper lacks sufficient knowledge or information to form a belief as to the truth of certain allegations, such statement has the effect of a denial under Fed. R. Civ. P. 8.

Response to Nature of the Action

37. In response to the allegations of Paragraph 1 of the Complaint, Dublin Dr Pepper admits that Corporate Dr Pepper has filed this lawsuit seeking, among other things, certain injunctive relief, but denies that Corporate Dr Pepper is entitled to any relief and otherwise Dublin Dr Pepper denies the allegations of Paragraph 1 of the Complaint.

38. In response to the allegations of Paragraph 2 of the Complaint, Dublin Dr Pepper admits that the Dr Pepper drink is the oldest and one of the most famous major soft drinks in the United States. Dublin Dr Pepper admits that beginning in 1885, the Dr Pepper drink was invented and sold at the Old Corner Drugstore in Waco, Texas and has been presumably sold in the Waco, Texas area since that time. Dublin Dr Pepper further admits that today, the Dr Pepper Museum is listed on the National Register of Historic Places. Dublin Dr Pepper admits that today, Corporate Dr Pepper has its corporate headquarters in Plano, Collin County, Texas. Given, among other things, the argumentative or vague nature of the other allegations and except

as so admitted above, Dublin Dr Pepper is otherwise without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 2.

39. In response to the allegations of Paragraph 3 of the Complaint, Dublin Dr Pepper admits that under the terms of certain license agreements, licensed bottlers have the right to purchase Dr Pepper concentrate from Corporate Dr Pepper. Dublin Dr Pepper further admits that using the licensed concentrate purchased under such agreements, certain bottlers then make and sell Dr Pepper beverages using approved bottles and cans, labeled with authorized trademarks and logos. Dublin Dr Pepper is without sufficient knowledge or information to form a belief as to the truth of the allegations in the first two sentences of Paragraph 3 as phrased or as to all bottlers. Dublin Dr Pepper denies the remaining allegations of Paragraph 3 of the Complaint or lacks sufficient knowledge or information to form a belief as to the truth of such allegations.

40. In response to the allegations of Paragraph 4 of the Complaint, Dublin Dr Pepper admits it is a licensed bottler of Plaintiff and a written license agreement grants Dublin Dr Pepper the exclusive right to sell and distribute Dr Pepper beverages in, among other things, bottles, cans and pre-mix containers in the counties, or portions thereof, specified in Paragraph 4, and more specifically referred to in the written license agreement (the “Territory”) and also grants it a non-exclusive right to manufacture Dr Pepper in such Territory but denies that its “license” is limited to such agreement and, except as admitted above, Dublin Dr Pepper otherwise denies the allegations of Paragraph 4 of the Complaint.

41. In response to the allegations of Paragraph 5 of the Complaint, Dublin Dr Pepper admits that Defendant and those individuals and entities who preceded it have sold products made with Dr Pepper concentrate since 1891 and pursuant to various license agreements (both written and oral and as supplemented by course of dealing and performance) since 1925 with

Plaintiff or individuals and persons who preceded it but is otherwise without sufficient knowledge or information to form a belief as to the truth of the allegations in the first sentence of this Paragraph 5. Dublin Dr Pepper denies the remaining allegations of Paragraph 5 of the Complaint.

42. In response to the allegations of Paragraph 6 of the Complaint, Dublin Dr Pepper admits that it is the oldest (not just the oldest independent) bottler of Dr Pepper in the entire world. Dublin Dr Pepper admits the 2009 License Agreement, among other things, allows Dublin Dr Pepper to purchase concentrate from Corporate Dr Pepper, to mix the concentrate with additional ingredients, and to sell the resulting beverage in the six counties, and such Agreement, among other things, allows Dublin Dr Pepper to take the purchased Dr Pepper concentrate and add pure cane sugar as sweetener and sell the resulting beverage in the six counties and it has used this original, permitted formulation but, based on, among other things, course of dealing or performance between the parties or modifications to such agreement or other agreements, denies it is only allowed to sell the beverage in the six counties. Given that the term “contract” is not defined and whether it is referring to only the 2009 License Agreement or includes other contracts (written or oral) or as modified or supplemented by course of dealing or performances, Dublin Dr Pepper is without sufficient knowledge or information to form a belief as to the truth of the allegations in the third sentence of Paragraph 6. To the extent not expressly admitted, Dublin Dr Pepper otherwise denies the allegations of Paragraph 6 of Corporate Dr Pepper’s Complaint.

43. In response to the allegations in Paragraph 7 of the Complaint, Dublin Dr Pepper admits that it has used pure cane sugar in its formulation of the Dr Pepper soft drink for more than 120 years. Dublin Dr Pepper further admits that it has represented itself as the oldest bottler

of Dr Pepper in the world, not just the oldest independent bottler of Dr Pepper products in the world. Dublin Dr Pepper also admits that for decades it has used certain labels, which includes the marks DUBLIN DR PEPPER or DUBLIN, all of which have been specifically approved by Corporate Dr Pepper. Dublin Dr Pepper specifically denies that any such activity violates the parties' 2009 License Agreement and applicable trademark law. To the extent not expressly admitted, Dublin Dr Pepper otherwise denies the allegations of Paragraph 7 of Corporate Dr Pepper's Complaint.

44. In response to the allegations in the first sentence of Paragraph 8 of the Complaint, Dublin Dr Pepper denies such allegations, because, among other things, any alleged right is subject to its prior license agreements, conduct, representations and acquiescence. Dublin Dr Pepper denies the remaining allegations of Paragraph 8 of Corporate Dr Pepper's Complaint.

45. In response to the allegations in Paragraph 9 of the Complaint, Dublin Dr Pepper admits that it used the name Dublin Dr Pepper and has and is selling products with the marks DUBLIN DR PEPPER or DUBLIN and since March 2011, Corporate Dr Pepper has requested it not do either. Dublin Dr Pepper further admits that it has used the mark or marks DUBLIN DR PEPPER or DUBLIN in connection with its products and services that use pure cane sugar, consistent with the original formulation of Dr Pepper. Dublin Dr Pepper admits that the 2009 License Agreement generally requires it to make the drink in strict accordance with the instructions and formula provided under the Agreement (which instructions and formula allow certain tolerances and variances) and Dublin Dr Pepper has not changed the recipe as originally formulated for the drink using pure cane sugar within certain tolerances and variances allowed. Dublin Dr Pepper admits that certain bottles of Dublin Dr Pepper have been produced in

accordance with its instructions pursuant to an agreement or arrangement with a bottler in Temple, Texas, and with the approval of Corporate Dr Pepper. To the extent not expressly admitted, Dublin Dr Pepper otherwise denies or, given their vague and argumentative nature, is without sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 9 of Corporate Dr Pepper's Complaint.

46. In response to the allegations in the fourth sentence of Paragraph 10 of the Complaint, Dublin Dr Pepper admits that, under its various license agreements with Corporate Dr Pepper, there are provisions that grant exclusive rights to sell within a geographic region and certain other bottlers have license agreements with provisions that grant exclusive rights to sell within a geographic region, but is without sufficient knowledge or information to form a belief as to whether all bottlers have these provisions in their agreement. Dublin Dr Pepper otherwise denies the allegations in Paragraph 10 of the Complaint.

47. In response to the allegations in Paragraph 11 of the Complaint, Dublin Dr Pepper admits it sells clothing and other merchandise bearing Dr Pepper and the marks DUBLIN DR PEPPER or DUBLIN names and labels, and third parties make merchandise with Dr Pepper labels, and such merchandise has been displayed on Dublin Dr Pepper's web site. Regarding the allegations about jewelry in the last sentence in Paragraph 11 of the Complaint, Dublin Dr Pepper admits Corporate Dr Pepper instructed Dublin Dr Pepper to represent that jewelry with the Dr Pepper likeness was exclusively offered by Dublin Dr Pepper. To the extent not expressly admitted, Dublin Dr Pepper denies the allegations of Paragraph 11 of Corporate Dr Pepper's Complaint.

48. Dublin Dr Pepper denies the allegations in Paragraph 12 of the Complaint.

Response to Parties

49. In response to the allegations in Paragraph 13 of the Complaint, Dublin Dr Pepper admits that Corporate Dr Pepper is a Delaware corporation located in and doing business at 5301 Legacy Drive, Plano, Texas 75024. Dublin Dr Pepper also admits that Corporate Dr Pepper purports to be the owner of various federal trademark registrations for the DR PEPPER Mark in the United States. Dublin Dr Pepper has no knowledge or information to ascertain whether, after merging with Dr Pepper Company on January 1, 2010, Dr Pepper/Seven Up, Inc. became the legitimate owner of the alleged mark DR PEPPER and licensor under the License Agreement with Dublin Dr Pepper and, thus, is without sufficient knowledge or information to form a belief as to the truth of such allegation.

50. In response to the allegations in Paragraph 14 of the Complaint, Dublin Dr Pepper admits that Dr Pepper Bottling Company of Dublin, Inc. d/b/a Dublin Dr Pepper, Dublin Dr Pepper Bottling Company, Dr Pepper Bottling Company of Dublin, Texas (not Dr Pepper Bottling Company of Dublin, Texas, as stated in Corporate Dr Pepper's Complaint) is a Texas corporation with its principal place of business at 221 South Patrick Street, Dublin, Texas 76446. Dublin Dr Pepper admits the remaining allegations of this Paragraph 14.

Response to Jurisdiction and Venue

51. In response to the allegations in Paragraph 15 of the Complaint, Dublin Dr Pepper denies that Corporate Dr Pepper has asserted a valid federal claim and, therefore, denies the allegations in this Paragraph 15.

52. In response to the allegations in Paragraph 16 of the Complaint, Dublin Dr Pepper admits that this Court has personal jurisdiction over Dublin Dr Pepper because Dublin Dr Pepper resides in this State and conducts business in this State. Given its potential vagueness, Dublin Dr Pepper is without sufficient knowledge to form a belief as to the truth of the "continuously and

systematically...transacts, solicits” allegation. Dublin Dr Pepper otherwise denies the allegations in Paragraph 16.

53. In response to the allegations in Paragraph 17 of the Complaint, Dublin Dr Pepper admits venue is proper under 28 U.S.C. § 1391(a) and (c) because Dublin Dr Pepper has contacts with this district that would be sufficient to establish personal jurisdiction if this District were a separate state. Dublin Dr Pepper admits that it has entered into numerous license agreements, including the 2009 License Agreement, has participated in business meetings at Dr Pepper’s Plano, Texas headquarters, and makes payments to Dr Pepper in Plano, Texas. To the extent not expressly admitted, Dublin Dr Pepper denies the remaining allegations of Paragraph 17 of Corporate Dr Pepper’s Complaint.

Response to Facts Common to All Claims for Relief

A. Response to THE DR PEPPER MARK

54. In response to the allegations in Paragraph 18 of the Complaint, Dublin Dr Pepper admits that Dr Pepper is one of the most famous soft drinks in the United States. Dublin Dr Pepper also admits that the Dr Pepper soft drink is the No. 2 flavored (i.e., non-cola) carbonated soft drink in the United States. With respect to the alleged fame and nature of the brand, it is unclear as to which marks Corporate Dr Pepper is referring by its reference to “DR PEPPER” and famous is a term of art, requiring a legal conclusion, to which no response is required. Except as so admitted, Dublin Dr Pepper denies the allegations of Paragraph 18 of Corporate Dr Pepper’s Complaint or is without sufficient knowledge or belief to form a belief as to the truth of such allegations.

55. In response to the allegations in Paragraph 19 of the Complaint, it is unclear what is meant by Corporate Dr Pepper’s statement that it is has “long presented,” particularly in light

of the fact that no dates have been provided. Further, Dublin Dr Pepper notes that while the stylized logo shown in Paragraph 19 indicates that the stylized logo has been registered by the United States Patent and Trademark Office via the use of the symbol ®, Dublin Dr Pepper notes that no federal registration for the stylized logo has been attached and, upon information and belief, believes that such registration does not exist. As such, Dublin Dr Pepper denies the allegations of Paragraph 19 of Corporate Dr Pepper's Complaint or is without sufficient knowledge or information to form a belief as to the truth of such allegations.

56. In response to the allegations in Paragraph 20 of the Complaint, Dublin Dr Pepper notes that it is unclear as to which alleged "famous trademark, trade name and collection of logos" that Corporate Dr Pepper is referring to and that certain terms, such as "famous" are terms of art that are a legal conclusion to which no response is required. Given the foregoing and the vague and argumentative terms used, such as "substantial," "one of the most famous," etc., Dublin Dr Pepper is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 20.

57. In response to the allegations in Paragraph 21 of the Complaint, Dublin Dr Pepper lacks sufficient knowledge or information to form a belief as to the truth of such allegations.

58. In response to the allegations in Paragraph 22 of the Complaint, Dublin Dr Pepper admits that the Dr Pepper concentrate provided by Corporate Dr Pepper may be sweetened by the pure cane sugar or with high fructose corn syrup, known as corn syrup, but denies it is known as corn sugar. Dublin Dr Pepper admits that it produces Dr Pepper beverages with cane sugar in accordance with Plaintiff's specifications (subject to certain tolerances or variances allowed by such specifications). Dublin Dr Pepper otherwise denies the allegations in this Paragraph 22 or is without sufficient knowledge or information to form a belief as to the truth of such allegations.

59. In response to the allegations in Paragraph 23 of the Complaint, Dublin Dr Pepper admits that Corporate Dr Pepper purports to own several registrations listed in Paragraph 23 and that Dr Pepper/Seven Up., Inc. is listed on the reports provided in Exhibit A of Corporate Dr Pepper's Complaint under the caption "Last Applicant(s)/Owner(s) of Record," but is without sufficient knowledge or information to form a belief as to whether Corporate Dr Pepper, in fact, owns the registrations or the "unidentified others" and the truth of the allegations of this Paragraph 23.

60. In response to the allegations in the first sentence in Paragraph 24 of the Complaint, Dublin Dr Pepper lacks sufficient knowledge or information to form a belief as to the truth of such allegations. The allegations in the second sentence of Paragraph 24 are denied.

61. In response to the allegations in Paragraph 25 of the Complaint, Dublin Dr Pepper admits that its had license agreements for the use of the Dr Pepper mark at various times, including currently, but is without sufficient knowledge or information to form a belief as to the truth as to whether they are within the meaning of the undefined terms "all relevant times" or are for "specific permitted" uses. Dublin Dr Pepper admits that it had knowledge of Corporate Dr Pepper's claims to certain marks incorporating the words "Dr Pepper" as well as to various other logos, and slogans and that Corporate Dr Pepper has licensed such use of all such marks to Dublin Dr Pepper. To the extent not expressly admitted, Dublin Dr Pepper denies the allegations in Paragraph 25.

62. In response to the allegations in Paragraph 26 of the Complaint, Dublin Dr Pepper admits that Corporate Dr Pepper has modified various marks incorporating the phrase Dr Pepper, adopted new slogans and logos, but is without sufficient knowledge or information to form a belief as to whether such constitutes "updates, refines and refreshes" within the meaning of those

terms and denies that this is provided under the 2009 License Agreement. Dublin Dr Pepper denies the remaining allegations in this Paragraph 26.

B. RESPONSE TO DUBLIN DR PEPPER'S VIOLATIONS OF THE LICENSE AGREEMENT

63. In response to the allegations of Paragraph 27 of Corporate Dr Pepper's Complaint, Dublin Dr Pepper admits that both previously and pursuant to the License Agreement, effective as of June 8, 2009 it was expressly granted the exclusive license or right to manufacture, sell and distribute Dr Pepper soft drink in bottles, cans and pre-mix containers in a six county territory defined in the 2009 License Agreement, but denies any license or rights were solely pursuant to such 2009 License Agreement and, based on the course of dealing or performance between the parties or modifications to such agreement or other agreements, denies it was only allowed to manufacture, sell or distribute within such territory. To the extent not expressly admitted, Dublin Dr Pepper otherwise denies the allegations in Paragraph 27.

64. Dublin Dr Pepper denies the allegations in Paragraph 28 of Corporate Dr Pepper's Complaint.

1. Use of Unauthorized and Altered Form of the DR PEPPER Mark

65. In response to Paragraph 29 of the Complaint, Dublin Dr Pepper admits this Paragraph 29 contains language in quotes that appears, in part, in the License Agreement. Except as so admitted, the allegations in this Paragraph 29 are denied.

66. In response to the allegations in Paragraph 30 of the Complaint, Dublin Dr Pepper admits the Paragraph 8 of the 2009 License Agreement is quoted in part but, given, among other things, that such Paragraph was subject to modification, and course of dealing or performance between the parties, the remainder of this Paragraph 30 is denied.

67. In response to the allegations in Paragraph 31 of the Complaint, Dublin Dr Pepper admits the Paragraph 20 of the 2009 License Agreement is quoted in part but, given, among other things, that such Paragraph was subject to modification, and course of dealing or performance between the parties, the remainder of this Paragraph 31 is denied.

68. In response to Paragraph 32 of the Complaint, Dublin Dr Pepper admits that it may be appropriate for Corporate Dr Pepper to allow a specific bottler to offer a varied logo or graphic. Except as so admitted, Dublin Dr Pepper denies the allegations in Paragraph 32 of the Complaint.

69. In response to Paragraph 33 of the Complaint, Defendant admits that its position is that it is entitled to continue using “DUBLIN DR PEPPER”, including those marks referenced on p. 14, and its past methods of sales. Except as so admitted, Dublin Dr Pepper denies the allegations in Paragraph 33 of the Complaint.

70. In response to Paragraph 34 of the Complaint, Dublin Dr Pepper admits that Paragraph 8 of the 2009 License Agreement contains a provision that addresses a certain right of approval by Corporate Dr Pepper, but denies that the first sentence of Paragraph 34 accurately or completely addresses that right or any other alleged right and, accordingly, the first sentence of Paragraph 34 is denied. Dublin Dr Pepper admits that since March 2011, Corporate Dr Pepper has attempted to withdraw its approval of the use of Dublin in conjunction with Dr Pepper, but denies it is entitled to do so and asserts such approval remains in effect and, thus, denies the second sentence of Paragraph 34 as phrased. Dublin Dr Pepper denies all remaining allegations in Paragraph 34.

71. In response to the allegations of Paragraph 35 of the Complaint, Dublin Dr Pepper admits that it has been selling or offering for sale bottles of Dr Pepper soft drink (using pure cane

sugar) with marks or labels bearing the DUBLIN DR PEPPER mark or logo, but otherwise denies the allegations in Paragraph 35 of the Complaint.

72. In response to the allegations of Paragraph 36 of the Complaint, Dublin Dr Pepper admits that the marks DUBLIN DR PEPPER or DUBLIN appear on its website, www.dublindrpepper.com. Given the potential vagueness of “prominently featured,” Dublin Dr Pepper is without sufficient knowledge or information to form a belief as to the truth of such phrase. To the extent not expressly admitted, Dublin Dr Pepper denies the allegations in Paragraph 36.

73. In response to the allegations of Paragraph 37 of the Complaint, Dublin Dr Pepper admits that it has sold and offered to sell various merchandise bearing the mark DUBLIN DR PEPPER, including but not limited to t-shirts, mugs, koozies and magnets, through its toll free number and through its internet website. To the extent not expressly admitted, Dublin Dr Pepper denies the allegations in Paragraph 37.

74. In response to the allegations of Paragraph 38 of the Complaint, Dublin Dr Pepper admits that the beverage distributed with the marks DUBLIN DR PEPPER or DUBLIN is “made in strict accordance with the instructions and formula,” (subject to certain allowed tolerances or variances under such instructions and formula) provided to Dublin Dr Pepper by Corporate Dr Pepper using concentrate purchased from Corporate Dr Pepper and pure cane sugar, and that Dublin Dr Pepper has done nothing to change the original recipe, first created over 125 years ago. Dublin Dr Pepper further admits that another bottler in Temple, Texas, bottles certain bottles bearing the marks DUBLIN DR PEPPER or DUBLIN, subject to a joint working relationship first formed between the bottler located in Temple, Texas and William P. (“Billie”) Kloster, pursuant to guidelines established by Dublin Dr Pepper and with Corporate Dr

Pepper approval. Dublin Dr Pepper denies that all beverages bearing the marks DUBLIN DR PEPPER or DUBLIN are made by another bottler located in Temple, Texas. To the extent not expressly admitted, Dublin Dr Pepper denies the allegations in Paragraph 38.

75. In response to the allegations of Paragraph 39 of the Complaint, Dublin Dr Pepper admits that Corporate Dr Pepper for decades has approved the use of the logos and marks DUBLIN DR PEPPER or DUBLIN, and despite such approval has recently demanded that Dublin Dr Pepper discontinue the use of the DUBLIN DR PEPPER or DUBLIN marks. Dublin Dr Pepper otherwise denies the allegations in Paragraph 39.

76. Dublin Dr Pepper denies the allegations in Paragraph 40 of the Complaint.

77. Dublin Dr Pepper denies the allegations in Paragraph 41 of the Complaint.

78. In response to the allegations of Paragraph 42 of the Complaint, Dublin Dr Pepper admits that the current management of Corporate Dr Pepper has since March 2011, given notice to Dublin Dr Pepper of Corporate Dr Pepper's claim that the use of the marks DUBLIN DR PEPPER or DUBLIN, allegedly constitutes trademark infringement (which is denied). Dublin Dr Pepper denies that Corporate Dr Pepper has ever given notice that Dublin Dr Pepper's use of the marks DUBLIN DR PEPPER or DUBLIN constitutes dilution. To the extent not expressly admitted, Dublin Dr Pepper otherwise denies the allegations found in Paragraph 42.

79. In response to the allegations of Paragraph 43 of the Complaint, Dublin Dr Pepper denies the allegations in Paragraph 43 of the Complaint.

2. Selling and Shipping DR PEPPER-Branded Products Outside the Six County Territory

80. In response to the allegations of Paragraph 44 of the Complaint, Dublin Dr Pepper admits that the 2009 License Agreement has a Paragraph 9 and that it is quoted, in part, as stated

in Paragraph 44 but, given that such Agreement is subject to course of dealing or performance between the parties and modification, the allegations in Paragraph 44 are otherwise denied.

81. In response to the allegations in Paragraph 45 of the Complaint, Dublin Dr Pepper admits that Exhibit A to the 2009 License Agreement describes the territory referenced in such License Agreement. To the extent not expressly admitted, Dublin Dr Pepper denies the allegations found in Paragraph 45.

82. Dublin Dr Pepper denies the allegations in Paragraph 46 of the Complaint.

83. In response to Paragraph 47 of the Complaint, Dublin Dr Pepper is without sufficient knowledge or information to form a belief as to the truth of the allegation, “Defendant has . . . shipped” as it is unclear whether such allegation is intended to include a shipment by a delivery service (such as UPS) and where the purchaser is responsible for the cost of shipping. The remaining allegations in this Paragraph 47 are denied.

84. In response to Paragraph 48 of the Complaint, Dublin Dr Pepper is without sufficient knowledge or information to form a belief as to the truth of the allegation, “Defendant has . . . shipped” as it is unclear whether such allegation is intended to include a shipment by a delivery service (such as UPS) and where the purchaser is responsible for the cost of shipping. The remaining allegations in this Paragraph 48 are denied.

85. In response to Paragraph 49 of the Complaint, Dublin Dr Pepper is without sufficient knowledge or information to form a belief as to the truth of the allegation, “Defendant has . . . shipped” as it is unclear whether such allegation is intended to include a shipment by a delivery service (such as UPS) and where the purchaser is responsible for the cost of shipping. The remaining allegations in this Paragraph 49 are denied.

86. In response to Paragraph 50 of the Complaint, Dublin Dr Pepper is without sufficient knowledge or information to form a belief as to the truth of the allegation, “Defendant has . . . shipped” as it is unclear whether such allegation is intended to include a shipment by a delivery service (such as UPS) and where the purchaser is responsible for the cost of shipping. The remaining allegations in this Paragraph 50 are denied.

87. In response to Paragraph 51 of the Complaint, Dublin Dr Pepper is without sufficient knowledge or information to form a belief as to the truth of the allegation, “Defendant has . . . shipped” as it is unclear whether such allegation is intended to include a shipment by a delivery service (such as UPS) and where the purchaser is responsible for the cost of shipping. The remaining allegations in this Paragraph 51 are denied.

88. In response to Paragraph 52 of the Complaint, Dublin Dr Pepper is without sufficient knowledge or information to form a belief as to the truth of the allegation, “Defendant has . . . shipped” as it is unclear whether such allegation is intended to include a shipment by a delivery service (such as UPS) and where the purchaser is responsible for the cost of shipping. The remaining allegations in this Paragraph 52 are denied.

89. Dublin Dr Pepper denies the allegations in Paragraph 53 of the Complaint.

90. Dublin Dr Pepper denies the allegations in Paragraph 54 of the Complaint.

3. Sales of Unauthorized Merchandise Bearing the DR PEPPER Mark

91. In response to Paragraph 55 of the Complaint, Dublin Dr Pepper admits that the 2009 License Agreement allows Defendant to sell Dr Pepper beverages in its territory but to the extent such allegation is intended to mean only such territory, it is denied, given the course of dealing or performance of the parties and their other agreements.

92. The allegations in Paragraph 56 of the Complaint are denied.

93. In response to the allegations in the first sentence of Paragraph 57 of Corporate Dr Pepper's Complaint and given the first sentence is not an accurate or complete summary of such terms, it is denied. Dublin Dr Pepper denies the second sentence of Paragraph 57 of the Complaint.

94. In response to Paragraph 58 of the Complaint, Dublin Dr Pepper admits that it has sold various merchandise through its website and retail store, including jewelry, t-shirts, mugs, koozies, and magnets, but denies such sales were unauthorized or unapproved. Dublin Dr Pepper otherwise denies the allegations in Paragraph 58 of the Complaint or is without sufficient knowledge or information to form a belief as to the truth of such allegations.

95. Dublin Dr Pepper denies the allegations in Paragraph 59 of the Complaint.

96. Dublin Dr Pepper denies the allegations in Paragraph 60 of the Complaint.

C. HARM CAUSED BY DUBLIN DR PEPPER'S UNLAWFUL CONDUCT

97. Dublin Dr Pepper denies the allegations in Paragraph 61 of the Complaint.

98. Dublin Dr Pepper denies the allegations in Paragraph 62 of the Complaint.

99. Dublin Dr Pepper denies the allegations in Paragraph 63 of the Complaint.

100. Dublin Dr Pepper denies the allegations in Paragraph 64 of the Complaint.

101. Dublin Dr Pepper denies the allegations in Paragraph 65 of the Complaint.

102. Dublin Dr Pepper denies the allegations in Paragraph 66 of the Complaint.

103. Dublin Dr Pepper denies the allegations in Paragraph 67 of the Complaint.

104. Dublin Dr Pepper denies the allegations in Paragraph 68 of the Complaint.

CLAIMS AND CAUSES OF ACTION

105. In regard to allegations found in Paragraph 69, Dublin Dr Pepper incorporates its prior responses.

**ANSWER TO FIRST CLAIM FOR RELIEF
FEDERAL TRADEMARK INFRINGEMENT UNDER 15 U.S.C. § 1114(1)**

- 106. Dublin Dr Pepper denies the allegations in Paragraph 70 of the Complaint.
- 107. Dublin Dr Pepper denies the allegations in Paragraph 71 of the Complaint.
- 108. Dublin Dr Pepper denies the allegations in Paragraph 72 of the Complaint.
- 109. Dublin Dr Pepper denies the allegations in Paragraph 73 of the Complaint.
- 110. Dublin Dr Pepper denies the allegations in Paragraph 74 of the Complaint.
- 111. Dublin Dr Pepper denies the allegations in Paragraph 75 of the Complaint.

**ANSWER TO SECOND CLAIM FOR RELIEF
FEDERAL UNFAIR COMPETITION AND FALSE DESIGNATION OF ORIGIN
UNDER 15 U.S.C. § 1125(a).**

- 112. Dublin Dr Pepper denies the allegations found in Paragraph 76 of the Complaint.
- 113. Dublin Dr Pepper denies the allegations found in Paragraph 77 of the Complaint.
- 114. Dublin Dr Pepper denies the allegations found in Paragraph 78 of the Complaint.
- 115. Dublin Dr Pepper denies the allegations found in Paragraph 79 of the Complaint.
- 116. Dublin Dr Pepper denies the allegations found in Paragraph 80 of the Complaint.
- 117. Dublin Dr Pepper denies the allegations found in Paragraph 81 of the Complaint.
- 118. Dublin Dr Pepper denies the allegations found in Paragraph 82 of the Complaint.

**ANSWER TO THIRD CLAIM FOR RELIEF
FEDERAL TRADEMARK DILUTION UNDER 15 U.S.C. § 1125(c)**

- 119. Dublin Dr Pepper denies the allegations in Paragraph 83 of the Complaint or is without sufficient knowledge or information to form a belief as to their truth.
- 120. Dublin Dr Pepper denies the allegations in Paragraph 84 of the Complaint.
- 121. Dublin Dr Pepper denies the allegations in Paragraph 85 of the Complaint.
- 122. Dublin Dr Pepper denies the allegations in Paragraph 86 of the Complaint.
- 123. Dublin Dr Pepper denies the allegations in Paragraph 87 of the Complaint. .

**ANSWER TO FOURTH CLAIM FOR RELIEF
COMMON LAW TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION**

124. Dublin Dr Pepper denies the allegations in Paragraph 88 of the Complaint.

125. Dublin Dr Pepper denies the allegations in Paragraph 89 of the Complaint.

**ANSWER TO FIFTH CLAIM FOR RELIEF
TRADEMARK DILUTION UNDER TEXAS STATE LAW FOR A VIOLATION OF
TEXAS BUSINESS AND COMMERCE CODE § 16.29)**

126. Given that it is unclear what is included in the term “Dr Pepper Mark,” which is not defined in the Complaint, Dublin Dr Pepper is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 90 of the Complaint.

127. Given that it is unclear what is included in the term “Dr Pepper Mark,” which is not defined in the Complaint, Dublin Dr Pepper is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 91 of the Complaint.

128. Dublin Dr Pepper denies the allegations in Paragraph 92 in Corporate Dr Pepper’s Complaint.

129. Dublin Dr Pepper denies the allegations in Paragraph 93 in Corporate Dr Pepper’s Complaint.

**ANSWER TO SIXTH CLAIM FOR RELIEF
DECLARATORY JUDGMENT THAT DUBLIN DR PEPPER HAS COMMITTED
TERMINABLE VIOLATIONS OF THE PARTIES’ LICENSE AGREEMENT
(28 U.S.C. §§ 2201 and 2202)**

130. In response to Paragraph 94 of the Complaint, Dublin Dr Pepper admits that Corporate Dr Pepper and Dublin Dr Pepper are parties to the License Agreement, but given that such agreement is subject to, among other things, course of dealing or performance, modification, waiver or other agreements, it is without sufficient knowledge or information to form a belief as to the truth of the “binding” allegation as used in the context of this Paragraph 94.

131. Dublin Dr Pepper denies the allegations found in Paragraph 95 in Corporate Dr Pepper's Complaint.

132. Dublin Dr Pepper denies the allegations found in Paragraph 96 in Corporate Dr Pepper's Complaint

133. Dublin Dr Pepper denies the allegations in Paragraph 97 of the Complaint

134. In response to Paragraph 98 of the Complaint, Dublin Dr Pepper admits that Paragraph 22 of the License Agreement contains part of the language quoted in Paragraph 98 of the Complaint, but denies it is a complete and accurate quotation of the entire Paragraph 22, including, without limitation, the obligation of Corporate Dr Pepper to make any judgment and determination "in good faith."

135. Dublin Dr Pepper denies the allegations in Paragraph 99 of the Complaint.

**ANSWER TO SEVENTH CLAIM FOR RELIEF
DECLARATORY JUDGMENT THAT DUBLIN DR PEPPER HAS NO TRADEMARK
RIGHTS IN THE DUBLIN DR PEPPER LOGO OR THE ALLEGED MARK
"DUBLIN DR PEPPER"
(28 U.S.C. §§ 2201 and 2202)**

136. In response to Paragraph 100 of the Complaint, Dublin Dr Pepper admits Dublin Dr Pepper has a license to use the Dr Pepper marks which, in part, is based on the 2009 License Agreement but denies, given the parties' course of dealings or performance and other agreements or modifications, it is limited to the scope of such Agreement. To the extent not expressly admitted, Dublin Dr Pepper denies the allegations in Paragraph 100.

137. Dublin Dr Pepper denies the allegations in Paragraph 101 of the Complaint.

138. Dublin Dr Pepper denies the allegations in Paragraph 102 of the Complaint.

139. Dublin Dr Pepper denies the allegations in Paragraph 103 of the Complaint.

**ANSWER TO EIGHTH CLAIM FOR RELIEF
BREACH OF CONTRACT**

140. In response to Paragraph 104 of the Complaint, Dublin Dr Pepper admits that Corporate Dr Pepper and it are parties to, among other things, the 2009 License Agreement but, given that, among other things, such agreement is subject to course of dealing or performance, modification, waiver or other agreements, it is without sufficient knowledge or information to admit or deny it is “binding,” “valid” or “enforceable” allegations as used in the context of Paragraph 104.

141. Dublin Dr Pepper denies the allegations in Paragraph 105 of the Complaint and specifically denies that Dr Pepper has made a good faith determination or judgment.

142. Dublin Dr Pepper denies the allegations in Paragraph 106 of the Complaint.

143. Dublin Dr Pepper denies the allegations in Paragraph 107 of the Complaint.

144. Dublin Dr Pepper denies the allegations in Paragraph 108 of the Complaint.

145. Dublin Dr Pepper denies the allegations in Paragraph 109 of the Complaint.

146. Dublin Dr Pepper denies the allegations in Paragraph 110 of the Complaint.

**ANSWER TO NINTH CLAIM FOR RELIEF
FOR ATTORNEYS’ FEES**

147. Dublin Dr Pepper denies the allegations in Paragraph 111 of the Complaint.

148. Dublin Dr Pepper admits the first sentence of Paragraph 112 of the Complaint and denies the remaining allegations of Paragraph 112.

149. Dublin Dr Pepper denies the allegations in Paragraph 113 of the Complaint.

150. Dublin Dr Pepper denies the allegations found in Paragraph 114 of the Complaint.

RESPONSE TO APPLICATION FOR PRELIMINARY INJUNCTION

151. Dublin Dr Pepper denies the allegations in Paragraph 115 of the Complaint and that Corporate Dr Pepper is entitled to the relief sought therein.

152. Dublin Dr Pepper denies the allegations in Paragraph 116 of the Complaint.

153. Dublin Dr Pepper denies the allegations in the first sentence of Paragraph 117 of the Complaint. As to the second sentence, Dublin Dr Pepper is without sufficient knowledge or information to form a belief as to the truth of such allegations.

154. Dublin Dr Pepper denies the allegations in Paragraph 118 of the Complaint.

155. Dublin Dr Pepper denies the allegations in Paragraph 119 of the Complaint.

156. Dublin Dr Pepper denies the allegations in Paragraph 120 of the Complaint.

157. Dublin Dr Pepper denies that Corporate Dr Pepper is entitled to the relief set forth in the prayer for relief on pages 30–32 of the Complaint.

OTHER CONTENTIONS AND DEFENSES

In addition to the foregoing, Dublin Dr Pepper incorporates by reference and realleges the allegations in Paragraphs 1 to 36, and the facts alleged therein in support of the defenses and other matters referenced below:

158. Corporate Dr Pepper has made material representations to Dublin Dr Pepper or has previously taken positions that are inconsistent with the claims or alleged rights it is now asserting. Among other things, Corporate Dr Pepper has expressly or impliedly represented and agreed that (a) Dublin Dr Pepper was and continued to be entitled on an ongoing basis to use DUBLIN DR PEPPER or DUBLIN marks or logos; (b) Dublin Dr Pepper was and continued to be entitled on an ongoing basis to use its methods of sale, including, without limitation, the internet and a toll free number, and to the extent sales occurred outside the territory set forth in the 2009 License Agreement, Dublin Dr. Pepper was and continued to be entitled on an ongoing basis to do so; and (c) Dublin Dr Pepper was and continued to be entitled on an ongoing basis to sell merchandise bearing the marks DUBLIN DR PEPPER or DUBLIN or any Dr Pepper marks

and all of the foregoing was good for the Dr Pepper brand (i.e. same did not create any alleged confusion or dilute any trademarks and was not improper). Dublin Dr Pepper has relied on the foregoing and will suffer material prejudice if Corporate Dr Pepper is allowed to make claims or assert alleged rights inconsistent with the foregoing. Accordingly, Corporate Dr Pepper's claims are barred, in whole or in part, by the defenses of estoppel and quasi-estoppel.

159. Corporate Dr Pepper has previously acknowledged and agreed by contract that Dublin Dr Pepper has trademark rights in the mark "DUBLIN" or "DUBLIN DR PEPPER." Accordingly, Corporate Dr Pepper is estopped by contract from making any claims or assertions to the contrary.

160. Based on Corporate Dr Pepper's conduct, action or inaction as described herein that has occurred over a substantial period of time, it has intentionally relinquished or engaged in intentional conduct that is inconsistent with the claims or rights it is now asserting. Accordingly, Corporate Dr Pepper has waived, in whole or in part, the claims or alleged rights it now seeks to assert.

161. Dublin Dr Pepper further alleges that the parties agreed that (a) Dublin Dr Pepper was and continued to be entitled on an ongoing basis to use the DUBLIN DR PEPPER or DUBLIN marks; (b) Dublin Dr Pepper was and continued to be entitled on an ongoing basis to use its methods of sale, including, without limitation, the internet and a toll free number, and to the extent sales occurred outside the territory set forth in the 2009 License Agreement, Dublin Dr. Pepper was and continued to be entitled on an ongoing basis to do so; and (c) Dublin Dr Pepper was and continued to be entitled on an ongoing basis to sell merchandise bearing the marks DUBLIN DR PEPPER or DUBLIN or any Dr Pepper marks and all of the foregoing was good for the Dr Pepper brand (i.e. same did not create any alleged confusion or dilute any

trademarks, and was not improper). To the extent the foregoing is inconsistent with any term of the 2009 License Agreement (which is denied), then such agreement was modified to reflect the foregoing agreements. Further, the course of dealing and performance between the parties was consistent with the foregoing agreements, and the 2009 License Agreement is to be construed in accordance with such course of dealing and performance.

162. Dublin Dr Pepper has used the name and marks DUBLIN DR PEPPER or DUBLIN, along with a host of names that also incorporate the words DR PEPPER and DUBLIN as the name of a business and as a trademark or service mark in direct connection with its products or services exclusively and continuously for at least, decades. For more than a decade, Dublin Dr Pepper has employed its current method and location of sales, including, without limitation, use of an internet connection and a toll free number. Corporate Dr Pepper and Dublin Dr Pepper have had continuous business dealings for more than 120 years and Corporate Dr Pepper has known about Dublin Dr Pepper's use of the names and/or marks and its methods and location of sales. Moreover, Corporate Dr Pepper has publicly acknowledged, congratulated, endorsed, and encouraged Dublin Dr Pepper to develop good will and name recognition in the community and throughout the world for the trade name and marks DUBLIN DR PEPPER or DUBLIN as well as the other marks identified in Paragraph 167. By its conduct and statements for many, many years, Corporate Dr Pepper consented to Dublin Dr Pepper's use of the marks and names, including DUBLIN DR PEPPER and DUBLIN and the methods and location of its sales and has actively represented it would not assert any alleged right or claim regarding same. Given Corporate Dr Pepper's knowledge, its delay is inexcusable, and Dublin Dr Pepper will suffer detriment and substantial prejudice if Corporate Dr Pepper is now allowed to assert such claims and rights, especially given the substantial time and sums spent by Dublin Dr Pepper in

the development of its business names and marks. Accordingly, Corporate Dr Pepper's claims are precluded by the defenses of acquiescence or estoppel by acquiescence.

163. Upon information and belief, Corporate Dr Pepper has ceased or abandoned its use of one or more of its registered marks that include the word(s) "Dr Pepper," "Pepper," or the stylized renditions thereof. As such, filings with the United States Patent and Trademark Office pertaining to the use thereof are incorrect and may have been filed with fraudulent intent.

164. Corporate Dr Pepper's claim for damages is barred, in whole or in part, by the applicable statute of limitations.

165. Corporate Dr Pepper's claims are barred, in whole or in part, by the doctrine of laches.

166. Corporate Dr Pepper's claims are barred, in whole or in part, as a result of its unclean hands.

167. Dublin Dr Pepper has used trade name and marks DUBLIN DR PEPPER; DUBLIN DR. PEPPER; DUBLIN BOTTLING WORKS; DUBLIN DR PEPPER BOTTLING COMPANY; DUBLIN DR. PEPPER BOTTLING COMPANY; DR PEPPER BOTTLING COMPANY; DR PEPPER BOTTLING COMPANY OF DUBLIN, TEXAS; DR PEPPER BOTTLING COMPANY; DR PEPPER BOTTLING CO., DUBLIN, TEXAS; or DUBLIN and other marks that incorporate the words/phrase "Dublin" and "Dr Pepper" prior to Corporate Dr Pepper's registration of marks incorporating the phrase "Dr Pepper." Such use creates prior, common law rights in such marks that predate Corporate Dr Pepper's federal trademark registrations.

168. Corporate Dr Pepper has licensed Dublin Dr Pepper to use marks and logos incorporating the phrase Dr Pepper, pursuant to one or more agreements between Dublin Dr

Pepper and Corporate Dr Pepper. These license(s) have permitted Dublin Dr Pepper to use the Dr Pepper marks for beverages and merchandise and for methods of sale used by Dublin Dr Pepper, including, without limitation, via the internet and a toll free number. To the extent any sales were outside the territory referenced in the 2009 License Agreement, then Dublin Dr Pepper was licensed by Corporate Dr Pepper to do so as well.

169. In addition to Corporate Dr Pepper not being able to meet the applicable requirements and other matters referenced herein, Corporate Dr Pepper's application must be denied because (a) it is not verified or supported by affidavit; and (b) such proposed injunction would not preserve the status quo.

III. COUNTERCLAIMS

170. Dublin Dr Pepper asserts the following counterclaims against Corporate Dr Pepper.

1. Declaratory Judgment of No Federal or Common Law Trademark Infringement

171. Dublin Dr Pepper restates and incorporates by reference its allegations in Paragraphs 1–36 and 158–168.

172. There is an actual and substantial case or controversy between Corporate Dr Pepper and Dublin Dr Pepper who have adverse legal interests, and such controversy is of sufficient immediacy and reality to warrant declaratory relief requested below. A judicial declaration is necessary and appropriate so Dublin Dr Pepper may ascertain its rights, actions and obligations in regard to matters referenced below.

173. Corporate Dr Pepper has, among other things, authorized (a) the use of the various DUBLIN DR PEPPER or DUBLIN marks, logos or phrases in connection with Dublin Dr Pepper's manufacture, sale and/or distribution of soft drink products and other products; (b)

the use of the alleged Dr Pepper marks in connection with sale and distribution by Dublin Dr Pepper of merchandise; and (c) the use of the alleged Dr Pepper marks in connection with soft drink and related products outside the territory referenced in Exhibit A of the License Agreement.

174. Further, given the foregoing authorization, the fact that Dublin Dr Pepper is a licensed distributor of Dr Pepper and has made soft drink beverages in accordance with the original formula and the other facts alleged herein, there is no likelihood that Dublin Dr Pepper's actions, use of marks, logos or other phrases, or methods of doing business have or will likely cause confusion, mistake or deceive consumers or the public.

175. Accordingly, Dublin Dr Pepper has not infringed and is not infringing, directly or indirectly, any alleged trademark, federal or common law, of Corporate Dr Pepper. Alternatively, based on the facts alleged herein, Corporate Dr Pepper is precluded from asserting any such claim.

176. Based on the facts and circumstances alleged herein, Dublin Dr Pepper is entitled to a declaration by the Court that:

a) Dublin Dr Pepper's use of the marks DUBLIN DR PEPPER or DUBLIN and related logos and phrases related thereto in connection with soft-drink products and other products, such as merchandise, is authorized and is not likely to cause confusion or to cause mistake or to deceive consumers and the public;

b) Dublin Dr Pepper's use of the alleged Dr Pepper mark in connection with merchandise is authorized and is not likely to cause confusion or to cause mistake or to deceive consumers and the public;

c) Dublin Dr Pepper's use of certain alleged marks incorporating the words or phrase "Dr Pepper" in connection with soft-drink and related products inside and outside the territory is authorized and is not likely to cause confusion or to cause mistake or to deceive consumers and the public;

d) Dublin Dr Pepper has not infringed and is not infringing, directly or indirectly, any valid and enforceable claim of the alleged trademarks, federal or common law, identified by Corporate Dr Pepper;

e) Dublin Dr Pepper is not liable to Corporate Dr Pepper for any claims of trademark infringement and Corporate Dr Pepper is precluded from asserting such claims; and

f) Dublin Dr Pepper's conduct has not and is not causing any injury to Corporate Dr Pepper and the public.

2. Declaratory Judgment of No Federal or State Unfair Competition and False Designation of Origin under 15 U.S.C. §1125(a)

177. Dublin Dr Pepper restates and incorporates by reference its allegations in Paragraphs 1–36, 158–168, and 172.

178. Based on the facts alleged herein, Dublin Dr Pepper further alleges that its actions, and use of DUBLIN DR PEPPER, DUBLIN and alleged Dr Pepper marks, logos, or names or methods of doing business have not and will not likely cause confusion, mistake, or deceive consumers and trade as to the origin, sponsorship, or approval of any soft drink or merchandise.

179. Based on the facts alleged herein, Dublin Dr Pepper has not committed any act that violates 15 U.S.C. §1125(a) and state law. Alternatively, based on the facts alleged herein, Corporate Dr Pepper is precluded from asserting any claim under federal or state unfair competition laws.

180. Accordingly, Dublin Dr Pepper is entitled to a declaration by the Court that:

a) Dublin Dr Pepper's use of the marks DUBLIN DR PEPPER or DUBLIN and related logos and phrases in connection with soft-drink products and other merchandise is authorized and is not likely to cause confusion or to cause mistake or to deceive consumers and the trade as to the origin, sponsorship, or approval of such products;

b) Dublin Dr Pepper's use of the marks DUBLIN DR PEPPER or DUBLIN or the alleged Dr Pepper marks in connection with merchandise has been approved by Corporate Dr Pepper and is authorized and is not likely to cause confusion or to cause mistake or to deceive consumers and the trade as to the origin, sponsorship, or approval of such merchandise;

c) Dublin Dr Pepper's use of the marks DUBLIN DR PEPPER or DUBLIN or the alleged Dr Pepper mark in connection with soft drink and related products outside a territory referenced in Ex. A of the License Agreement was authorized and is not likely to cause confusion or to cause mistake or to deceive consumers and the trade as to the origin, sponsorship, or approval of such merchandise;

d) Dublin Dr Pepper's conduct has not caused and is not causing any injury to Corporate Dr Pepper or has not and will not deceive the public; and

e) Dublin Dr Pepper's actions have not and do not constitute unfair competition and false designation of origin, sponsorship, or approval of Dr Pepper products under state or federal law, Corporate Dr Pepper is precluded from asserting claims under such laws, and Dublin Dr Pepper is not liable to Corporate Dr Pepper under such laws.

**3. Declaratory Judgment of No Federal Dilution Under
15 U.S.C. §1125(c) or Under State Law**

181. Dublin Dr Pepper restates and incorporates by reference its allegations in Paragraphs 1–36, 158–168, and 172.

182. Based on the facts alleged herein, Dublin Dr Pepper's use of the DUBLIN DR PEPPER or DUBLIN as well as the alleged Dr Pepper marks and its actions have not diluted, blurred or tarnished any alleged mark of Corporate Dr Pepper and, if anything, have enhanced the alleged Dr Pepper mark, as Corporate Dr Pepper has repeatedly acknowledged.

183. Accordingly, Dublin Dr Pepper is entitled to a declaration by the Court that:

a) The alleged Dr Pepper marks did not become famous long before Dublin Dr Pepper commenced its use of the trade name DUBLIN DR PEPPER and its use of the marks DUBLIN DR PEPPER or DUBLIN;

b) Dublin Dr Pepper's use of the marks DUBLIN DR PEPPER or DUBLIN and of the phrase "Dublin Dr Pepper" do not dilute the alleged Dr Pepper mark by blurring its alleged distinctiveness;

c) Dublin Dr Pepper's use of the alleged Dr Pepper mark in connection with soft drinks and merchandise as described herein does not dilute Corporate Dr Pepper's mark by tarnishing it and its conduct is not likely to dilute, tarnish or blur the alleged distinctiveness of the alleged Dr Pepper mark;

d) Dublin Dr Pepper's conduct has not caused and is not causing any injury to Corporate Dr Pepper or the public; and

e) Any claim of Corporate Dr Pepper for dilution is precluded and Dublin Dr Pepper is not liable for dilution under state or federal law.

4. Declaratory Judgment of Dublin Dr Pepper Regarding Contracts or Licenses

184. Dublin Dr Pepper restates and incorporates by reference its allegations in Paragraphs 1–36, 158–168, and 172.

185. Pursuant to the 2009 License Agreement, Dublin Dr Pepper was granted, among other things, certain rights and licenses to sell, distribute and manufacture Dr Pepper drinks.

186. At the time the Agreement was entered into and for many years prior, Corporate Dr Pepper had approved designs for bottles, cans and other containers submitted by Dublin Dr Pepper which included the marks DUBLIN DR PEPPER or DUBLIN. Subsequent to the 2009 License Agreement, Dublin Dr Pepper submitted additional designs which continued to include the marks DUBLIN DR PEPPER or DUBLIN, which were approved by Corporate Dr Pepper.

187. At the time of the foregoing approvals, Corporate Dr Pepper placed no time limitations on such approvals or otherwise indicated there were any such limitations. Further, based on the course of dealing or performance of the parties, and other conduct of the parties, it was clearly understood and agreed that such approvals continued without any time limitations and could not be withdrawn or revoked by Corporate Dr Pepper. Further, the 2009 License Agreement, especially when construed in light of course of dealing or performance, does not provide Corporate Dr Pepper with that right. Finally, based on the facts and defenses alleged herein, Corporate Dr Pepper is precluded from exercising such alleged right.

188. Additionally, Dublin Dr Pepper and Corporate Dr Pepper have entered into agreements pursuant to which Dublin DR Pepper was licensed or authorized to sell merchandise using the marks DUBLIN DR PEPPER or DUBLIN as well as the alleged Dr Pepper marks. Further, Corporate Dr Pepper has approved the sales of such merchandise, including the use of the foregoing marks and, as applicable, the manufacturer. Alternatively, based on the facts and defenses alleged herein, Corporate Dr Pepper is precluded from asserting that Dublin Dr Pepper does not have the right to sell merchandise using such marks.

189. Finally, Dublin Dr Pepper and Corporate Dr Pepper have agreed that Dublin Dr Pepper was and is entitled to use its sales methods, including, without limitation, the internet and a toll free number and to the extent any sales occurred outside the territory set forth in the 2009 License Agreement, Dublin Dr Pepper was and is entitled to do so. Alternatively, based on the facts and defenses alleged herein, Corporate Dr Pepper is precluded from asserting that Dublin Dr Pepper did not and does not have the right to use its sales methods or that the location of such sales was or is improper.

190. In the alternative, to the extent that Dublin Dr Pepper's use of the marks DUBLIN DR PEPPER or DUBLIN, and its sales of merchandise and methods and location of sales are inconsistent with the original terms of the 2009 License Agreement, then the parties have modified such terms or otherwise agreed that Dublin Dr Pepper has the rights to use such marks, and sell its products and merchandise using its methods of sale and at locations outside the territory referenced in the 2009 License Agreement.

191. Accordingly, based on the foregoing and facts alleged herein, Dublin Dr Pepper has not breached the 2009 License Agreement and any other agreement with Corporate Dr Pepper. Alternatively, based on the facts and defenses alleged herein, Corporate Dr Pepper is precluded from asserting that Dublin Dr Pepper is in breach of such agreements.

192. As a result of the foregoing, the 2009 License Agreement is not subject to termination as alleged by Corporate Dr Pepper and it is precluded from asserting such right of termination. Alternatively, the 2009 License Agreement requires that any exercise by Corporate Dr Pepper of any right of termination be "made in good faith" and Corporate Dr Pepper has not acted or invoked such right in good faith.

193. Dublin Dr Pepper is entitled to a declaration from the Court that:

a) Dublin Dr Pepper has not improperly sold Dr Pepper-branded products outside of the territory or without Corporate Dr Pepper's approval or agreement and therefore Dublin Dr Pepper is not in contravention of the License Agreement;

b) Dublin Dr Pepper has not used an unauthorized and altered form of the Dr Pepper Mark in connection with soft drink products and other merchandise without Corporate Dr Pepper's approval or agreement and is not in contravention of the License Agreement;

c) Dublin Dr Pepper has not sold unauthorized merchandise bearing the alleged Dr Pepper mark without Corporate Dr Pepper's approval or agreement and, therefore, is not in contravention of the License Agreement;

d) Dublin Dr Pepper is not in breach of the License Agreement as claimed by Corporate Dr Pepper and is not liable to Corporate Dr Pepper;

e) Corporate Dr Pepper is not entitled to terminate the License Agreement;
and

f) Dublin Dr Pepper's conduct has not and will not cause any injury or damage to Corporate Dr Pepper.

5. Estoppel

194. Dublin Dr Pepper restates and incorporates by reference its allegations in Paragraphs 1–36. The following claim is plead in the alternative to Dublin Dr Pepper's other claims that seek a declaratory relief.

195. Corporate Dr Pepper has repeatedly made statements and engaged in other conduct by which it represented and promised that Dublin Dr Pepper had, on an ongoing basis, (a) the right and was authorized to use the name and the marks DUBLIN DR PEPPER or DUBLIN in connection with its business and products manufactured, marketed, distributed, and

sold by Dublin Dr Pepper; (b) the right to use its methods of sale, including, with limitation, the internet and a toll free number, and to the extent sales occurred outside the territory referenced in the License Agreement, Dublin Dr Pepper had the right to do so; and (c) the right to sell merchandise bearing the marks DUBLIN DR PEPPER or DUBLIN as well as the alleged Dr. Pepper marks.

196. Corporate Dr Pepper repeatedly acknowledged, recognized, approved and celebrated Dublin Dr Pepper's commitment to the true or original formula of Dr Pepper and its continued use of pure cane sugar, as opposed to alternative sugar substitutes, and the related actions to manufacture, distribute, and market Dublin Dr Pepper products and to create a connection between Dublin Dr Pepper's commitment and the names or marks DUBLIN DR PEPPER or DUBLIN and its methods of conducting business. These actions included the development of technical know-how to package Dublin Dr Pepper in a variety of packages (e.g., cans, bottles) and the investment in manufacturing facilities and delivery systems. These actions also included the development of a website www.dublindrpepper.com, the acquisition of the toll free telephone number 1-888-398-10-2-4, and links between DUBLIN DR PEPPER'S or DUBLIN website and Corporate Dr Pepper's website. In addition, these actions included Dublin Dr Pepper's hiring, training and utilizing a sales force to sell and to distribute Dublin Dr Pepper products.

197. Dublin Dr Pepper reasonably relied on the foregoing and repeated promises in the adoption and use of the name Dublin Dr Pepper in commerce, both as the name of the Dublin Dr Pepper business entity as well as the brand of products bearing the marks DUBLIN DR PEPPER or DUBLIN. Further, Dublin Dr Pepper reasonably relied on the foregoing and repeated promises in the adoption and establishment of the www.dublindrpepper.com website, its

marketing products marked with the marks DUBLIN DR PEPPER or DUBLIN, and its generating goodwill as part of a large following for the product bearing the marks DUBLIN DR PEPPER or DUBLIN. Dublin Dr Pepper has reasonably relied on the foregoing and repeated promises in it's a) direct actions taken in hiring employees, b) preparations for the museum, gift shop, and soda shop, c) upgrading and enhancing its manufacturing facility (including certain construction and building expensed), d) the purchase of real estate, and e) incurring promotional expenses and obligations.

198. Dublin Dr Pepper has been damaged as a result of its reasonable reliance as alleged herein, in time and costs already incurred, and is entitled to recover the amounts it has expended as damages or losses already incurred from Corporate Dr Pepper associated with the development of the business and marketing products.

6. Attorney's Fees

199. Dublin Dr Pepper requests that the Court declare this is an exceptional case in accordance with 15 U.S.C. § 1117 and award Dublin Dr Pepper its reasonable attorney's fees incurred in connection with this action in accordance with such statute or as otherwise allowed by law.

No Election

200. Nothing herein is intended to and shall not constitute an election of remedies. Dublin Dr Pepper reserves the right to amend this Answer and Counterclaims and to make different or additional claims, defenses and allegations. To the extent any claim, defense or allegation is inconsistent with any other claim, defense or allegation, then it is asserted in the alternative.

WHEREFORE, DUBLIN DR PEPPER prays for relief as follows:

A. The Court enter judgment that Corporate Dr Pepper take nothing and dismiss all of its claims with prejudice and deny any application for injunctive relief;

B. The Court grant the declaratory relief sought by Dublin Dr Pepper in its counterclaims;

C. In the alternative, the Court award damages to Dublin Dr Pepper against Corporate Dr Pepper as sought herein;

D. The Court award Dublin Dr Pepper its reasonable attorney's fees and all costs and expenses incurred in connection with this action; and

E. For such other and further relief as the Court may decree to be just and proper.

JURY DEMAND

Defendant hereby demands a trial by jury.

Respectfully submitted,

By: /s/ Steven D. Wolens

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ATTORNEYS FOR DUBLIN DR PEPPER

CERTIFICATE OF SERVICE

I hereby certify that counsel of record are being served with a copy of this document via electronic mail on this the 9th day of August, 2011.

/s/ Steven D. Wolens
Steven D. Wolens