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

Proceeding	91180742
Party	Plaintiff Dr Pepper/Seven Up, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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DR PEPPER/SEVEN UP, INC.,	:	
	:	
Opposer/Petitioner,	:	<u>Consolidated Proceedings</u>
	:	Opposition No. 91180742
- against -	:	Cancellation No. 92048446
	:	
KRUSH GLOBAL LIMITED,	:	
	:	
Applicant/Registrant.	:	
-----X		

**OPPOSER/PETITIONER’S REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

The memorandum of Krush Global Limited (“Krush Global”) in opposition to the Motion for Summary Judgment filed by Dr Pepper/Seven Up, Inc. (“Dr Pepper”) is filled with conjecture, hearsay and opinion. What it lacks is evidence sufficient to show that there are material issues of disputed fact.

This opposition proceeding is straightforward, and the facts, notwithstanding Krush Global’s attempts, are simple and undisputed. The Board is presented, on the one hand, with uncontroverted evidence of Dr Pepper’s priority in various CRUSH marks used in connection with beverages, and, on the other hand, with Krush Global’s attempt to register or maintain a registration for the mark CRUSSH for use in connection with restaurant services that feature beverages. In essence, the Board is presented with two nearly identical marks used in connection with clearly related goods and services, provided to the same class of consumers through related trade channels. Krush Global offers no admissible evidence to dispute these determinative facts.

Faced with this, Krush Global attempts to confuse the Board by pretending that the facts are other than what they are. For example, Krush Global pretends that Dr Pepper does not own

rights in the mark CRUSH but owns only the mark ORANGE CRUSH and only in a particular logo format. Krush Global also pretends that the application and registration at issue are limited to a certain type of restaurant serving a certain type of customer. The Board should not be misled by Krush Global's wishful but incorrect rendition of the facts.

Knowing that it cannot overcome the facts no matter its efforts, Krush Global pins its hopes on rewriting the law, seeking to impose on Dr Pepper a standard for likelihood of confusion that Krush Global claims is applicable uniquely to cases concerning food or beverages and restaurant services. Of course, this heightened standard is located nowhere in the governing law and is simply a figment of Krush Global's imagination. The likelihood of confusion standard to be applied in this case is the same standard applied in every other Board proceeding.

When Krush Global's conjecture and imagined legal standards are properly discarded, and when the appropriate likelihood of confusion factors are analyzed and weighed, it is evident from the undisputed facts that Krush Global's CRUSSH marks are likely to cause confusion with Dr Pepper's prior used, federally registered, and century-old CRUSH marks.

ARGUMENT

I. DR PEPPER HAS SATISFIED THE SUMMARY JUDGMENT STANDARD

Section 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. The standard is not whether there may be some alleged factual disputes (*i.e.*, such as whether in the U.K. orange soda is called orange squash); the requirement is that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

As to what facts are *material*, that is determined by the substantive law governing the

underlying claims. “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Id.* In this case, the only *material* facts are those necessary to determine standing and priority and to analyze the likelihood of confusion factors set forth in *In re E. I. du Pont de Nemours & Co.*, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973). *See, e.g., Venture Out Props. LLC v. Wynn Resorts Holdings, LLC*, 81 U.S.P.Q.2d 1887, 1891-94 (T.T.A.B. 2007).

As to whether a factual dispute is *genuine*, that depends on whether a reasonable fact-finder could resolve the dispute in favor of the non-moving party on the evidence of record. *Bausch & Lomb Inc. v. Karl Storz GmbH & Co. KG*, 87 U.S.P.Q.2d 1526, 1530 (T.T.A.B. 2008) (citing *Opryland USA Inc. v. Great Am. Music Show Inc.*, 23 U.S.P.Q.2d 1471, 1472 (Fed. Cir. 1992); *Olde Tyme Foods, Inc. v. Roundy’s, Inc.*, 22 U.S.P.Q.2d 1542, 1544 (Fed. Cir. 1992)). The initial burden is on the moving party Dr Pepper to show no genuine issue of material fact. But then the burden shifts to the non-moving party Krush Global to submit admissible evidence sufficient to rebut Dr Pepper’s factual showings and demonstrate a genuine dispute warranting trial. *See Venture Out Prop.*, 81 U.S.P.Q.2d at 1890; *see also* TBMP § 528.01. To fulfill its burden of showing a genuine dispute, Krush Global must do more than make arguments. It must proffer real and admissible evidence countering that submitted by Dr Pepper.

Here, Krush Global has not shouldered its burden of submitting admissible evidence sufficient to create a *genuine* dispute as to any of the *material* facts. The evidence Krush Global offers is primarily hearsay statements of its principal, and even those hearsay statements do not address any of the material facts. When Krush Global’s opposition brief is stripped of its rhetoric and hearsay, the remaining facts indisputably show Dr Pepper’s entitlement to summary judgment in these consolidated proceedings.

II. KRUSH GLOBAL HAS FAILED TO COME FORWARD WITH SUFFICIENT EVIDENCE TO RAISE A DISPUTED ISSUE OF MATERIAL FACT

A. The Uncontroverted Evidence Establishes Dr Pepper's Standing and Priority

Dr Pepper established through its moving brief that it has standing to challenge Krush Global's CRUSSH marks, and that it has priority of use in its own CRUSH marks through century-long use and decades-long registration. (*See Opposer/ Petitioner's Motion for Summary Judgment* ("Mov. Br.") at 10, 11-12.) Krush Global has not attempted to Dr Pepper's standing or priority, and both are therefore established for purposes of this motion.

B. The Uncontroverted Evidence Establishes Likelihood of Confusion

Krush Global's analysis of the likelihood of confusion factors is an artful dance that argues facts that are not relevant and not admissible, that ignores the actual facts, and that relies on imaginary or irrelevant law. Whatever else Krush Global's opposition brief might be, it is not sufficient to overcome Dr Pepper's showing that it is entitled to judgment as a matter of law.

1. Krush Global's Proposed Likelihood of Confusion Test is Fiction

From beginning to end, Krush Global's argument on likelihood of confusion is flawed. The first mistake Krush Global makes is to argue that the likelihood of confusion analysis in cases such as this – that is, those involving food or beverage products on the one hand and restaurant services on the other – is different from and more onerous than the likelihood of confusion test applied in every other Board proceeding. (*See Opp. Br. at 7-8.*) In such cases, Krush Global argues, not only must the marks at issue be *identical*, but also the opposer's mark must be *famous*. (*Id. at 7.*)

There is no question that Krush Global is wrong. The cases Krush Global cites for the absurd proposition that a different likelihood of confusion standard is applicable here – *Jacob's v. International Multifoods Corp.*, 212 U.S.P.Q. 641 (C.C.P.A. 1982), *Lloyd's Food Products*

Inc. v Eli's Inc., 25 U.S.P.Q.2d 2027 (Fed. Cir. 1993), and *In re Coors Brewing Co.*, 68 U.S.P.Q.2d 1059 (Fed. Cir. 2003) – say nothing of the sort. These cases simply stand for the very unremarkable proposition that likelihood of confusion is not automatic just because the marks at issue may share some similarities and are used in connection with food products on one side and restaurant services on the other. *E.g. Lloyd's Food Prods.*, 25 U.S.P.Q.2d at 2030 (“The board is correct that there is no *per se* rule about confusion where similar marks are used in connection with restaurant services and food products.”) (citing *Jacobs*, 212 U.S.P.Q. at 642); *see also In re Coors*, 68 U.S.P.Q.2d at 1063 (“[T]he fact that restaurants serve food and beverages is not enough to render food and beverages related to restaurant services for purposes of determining the likelihood of confusion. . . . The Board therefore properly looked to other evidence to determine whether beer and restaurant services are related for purposes of assessing the likelihood of confusion.”). In other words, , the whole spectrum of the *du Pont* likelihood of confusion factors is relevant in cases involving food and restaurant services, just as in all cases.¹

2. Krush Global Has Not Shown a Dispute on Any Issue of Material Fact as to Likelihood of Confusion

Not only does Krush Global’s likelihood of confusion discussion proceed from a flawed legal perspective, it also proceeds from a flawed factual basis. Although Krush Global in both its opposition brief and in the declaration of its president sets forth a number of statements disguised as facts, nothing Krush Global offers creates a genuine issue of material fact sufficient to overcome Dr Pepper’s weight of evidence on likelihood of confusion.

¹ Even if Krush Global were somehow correct that a unique likelihood of confusion standard is applicable, Dr Pepper would still be at a loss to explain how Krush Global came to the conclusion that such a standard requires the marks to be identical and the prior mark to be famous. Such a rule of law can be found in *none* of the three cases cited by Krush Global (or any other case).

a. Similarity of the Marks

The similarity of the marks is one of the most important *du Pont* factors, *Ava Enters., Inc. v. Audio Boss USA, Inc.*, 77 U.S.P.Q.2d 1783, 1784 (T.T.A.B. 2006), and the near identity of the marks at issue here cannot plausibly be disputed. This case involves, on the one hand, Dr Pepper's CRUSH marks – which include not only the word mark CRUSH, but also stylized versions of the CRUSH mark with and without design elements, as well as the word mark ORANGE CRUSH² – and, on the other hand, Krush Global's registration of the word mark CRUSSH and its application to register the mark  (the "CRUSSH Logo Mark").

Krush Global does not attack the ownership or validity of Dr Pepper's various CRUSH-inclusive registrations – nor could it. Instead, Krush Global simply pretends that Dr Pepper does not have rights in CRUSH standing alone.³ That leaves Krush Global free to base its entire argument against similarity on the fiction that Dr Pepper has rights only in the mark ORANGE CRUSH in its current logo format. (*See, e.g.*, Opp. Br. at 9 (“Since [Dr Pepper] has indicated that the principal flavor mark is ORANGE CRUSH, that is the trademark that should be used for comparison purposes, as seen below [depicting current ORANGE CRUSH logo].”)).⁴ And to help Krush Global pursue its fantasy that the parties' marks are not similar, Krush Global also

² This recitation of Dr Pepper's marks is limited to its registered marks. Dr Pepper has common law rights in a greater number of word marks – such as GRAPE CRUSH – as well as in a number of stylized and design-inclusive presentations of its word marks.

³ In ignoring the existence of the mark CRUSH, Krush Global ignores not only Dr Pepper's numerous registrations for the mark but also evidence of use submitted in connection with Dr Pepper's moving brief. While Krush Global states that Dr Pepper has submitted no evidence it uses CRUSH as a stand-alone mark (Opp. Br. at 8-9), even the CRUSH logos reproduced in Krush Global's opposition brief at page 8 clearly show that CRUSH exists and is used as a stand-alone mark. The addition of design elements and flavor designations actually emphasizes that the name of Dr Pepper's soda is, simply, CRUSH.

⁴ In an attempt to support its distorted view of the marks at issue, Krush Global relies on a number of “facts” that it creates out of thin air. For example, there is no support for Krush Global's statements that Dr Pepper's CRUSH soda is sold “in a see-through bottle or can of the same color” (Opp. Br. at 8); that Dr Pepper's CRUSH mark is known to consumers only as “ORANGE CRUSH or GRAPE CRUSH, and so on” (*id.*); or that consumers “are not inclined to ask for a CRUSH in a store – instead one asks for an ‘ORANGE CRUSH’” (*id.* at 9).

conveniently ignores its own CRUSSH word mark, arguing against similarity solely on the basis of its CRUSSH Logo Mark. (*See* Opp. Br. at 9.)

Krush Global's efforts are understandable, as there can be no substantial debate regarding the overwhelming similarity of the real marks at issue here.

i. *Krush Global Does Not Dispute That the Parties' Word Marks Are Similar*

The word marks CRUSH and CRUSSH – the existence of both of which Krush Global conveniently attempts to ignore – are virtually indistinguishable in terms of sight, sound and meaning. Krush Global has admitted that it essentially took Dr Pepper's CRUSH mark and simply added an additional letter "S." (Opp. Br. at 11). The addition of the letter "s" does not differentiate the marks in any material way. In terms of appearance, even Krush Global itself does not argue that the marks are visually distinctive, instead focusing all its efforts on distinguishing the parties' respective logo marks. (Opp. Br. at 9.) As to the sound of the marks, Krush Global admits that its mark can be pronounced in any number of ways: consumers can extend or not extend the double-s for as long as they like. (Opp. Br. at 11.) This also means that the speaker can limit the sound for as short a period as it wants – making the CRUSSH mark, by Krush Global's own admission, identical in sound to Dr Pepper's CRUSH mark. In any event, the Board has held that there is no correct pronunciation of a trademark and its owner cannot control how purchasers will vocalize it. *InterLego A.G. v. Abrams/Gentile Entm't, Inc.*, 63 U.S.P.Q. 2d 1862, 1863 (T.T.A.B. 2002). As to the marks' meanings, to the extent Krush Global's arguments that the term "crush" has many meanings (*see* Opp. Br. at 11-12) are relevant,⁵ such arguments could apply equally to CRUSH as to CRUSSH.⁶ Krush Global therefore has admitted that the marks have the same meaning.

⁵ On this point, we note that Dr Pepper's CRUSH marks are incontestable and cannot be challenged as descriptive.

Krush Global's reliance on the *7-Eleven, Inc. v. Wechsler*, 83 U.S.P.Q.2d 1715 (T.T.A.B. 2007), concerning the lack of similarity between GULPY and GULP (*see* Opp. Br. at 11) is of little consequence here. Unlike CRUSSH (which is but a misspelling of Dr Pepper's CRUSH mark) and CRUSH which look the same, sound the same, and have the same meaning, by no stretch of the imagination do GULPY and GULP have the same pronunciation or meaning.

Krush Global's reliance on *In re Hearst Corp.*, 25 U.S.P.Q.2d 1238 (Fed. Cir. 1992) (involving VARGAS and VARGA GIRL), *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 198 U.S.P.Q. 151 (C.C.P.A. 1978) (involving RED ZINGER and ZINGERS), and *King Candy Co. v. Eunice King's Kitchen, Inc.*, 182 U.S.P.Q. 108 (C.C.P.A. 1974) (involving MISS KING'S and KINGS), is likewise misplaced, since, among other reasons, Dr Pepper owns rights in CRUSH, not just ORANGE CRUSH.

i. *Krush Global Does Not Create a Genuine Dispute Regarding the Similarity of Its Logo Mark to Dr Pepper's Marks*

The CRUSSH Logo Mark at issue is also highly similar to Dr Pepper's established CRUSH marks. Although Krush Global attempts to limit the comparison of its logo mark to only Dr Pepper's current ORANGE CRUSH logo format (*see* Opp. Br. at 9), all of Dr Pepper's various CRUSH-inclusive marks are potentially relevant to the inquiry.

Krush Global does not dispute that the dominant portion of its CRUSSH Logo Mark is the word CRUSSH. This is essentially identical to both Dr Pepper's CRUSH mark, to the dominant portion of Dr Pepper's ORANGE CRUSH mark, and to the dominant portion of any of

⁶ Krush Global does not – and cannot – argue that the additional letter “s” changes the meaning of CRUSSH from the meaning of CRUSH. In this respect, these marks are indeed different than those in which “s” makes a word plural or possessive. (*See* Opp. Br. at 11-12 (citing *Automatic Timing & Controls, Inc. v. McDowell-Wellman Eng'g Co.*, 162 U.S.P.Q. 462 (T.T.A.B. 1969) (Board concluded opposer not injured by registration of ABC where applicant already owned registration for ABCs); and *Hess's of Allentown, Inc. v. Nat'l Bellas Hess, Inc.*, 169 U.S.P.Q. 673 (T.T.A.B. 1971) (although Opposer owned marks HESS and HESS'S, Board concluded no likelihood of confusion where Hess was a common surname and application was for BELLAS HESS)).

Dr Pepper's CRUSH logo marks.⁷ As such, for all the reasons discussed above in connection with the word marks, Krush Global's logo mark is essentially the same as Dr Pepper's CRUSH marks. *See, e.g., Ava Enters., Inc., 77 U.S.P.Q.2d at 1785* (design marks "highly similar" where word portion differed only by a single letter).

The design portions and the orange coloring of the parties' marks only serve to reinforce the similarity created by dominant word portions of the marks. Krush Global does not really dispute this, contending instead that the design and color features of Dr Pepper's logo mark are weak on the theory that similar features are used in connection with other orange-flavored soda. (Opp. Br. at 10.)⁸ However, even Krush Global cannot have failed to notice that, unlike the CRUSSH Logo Mark, *none* of these logo marks bear a word mark that resembles Dr Pepper's mark in any way, shape or fashion. If anything, these logo marks serve merely to reinforce the similarity between Dr Pepper's CRUSH logo and Krush Global's CRUSSH logo.⁹

b. *Krush Global Does Not Create a Genuine
Dispute as to the Strength of the CRUSH Marks*

Krush Global's discussion regarding the fame of Dr Pepper's CRUSH marks proceeds from the flawed assumption, discussed above, that Dr Pepper cannot succeed in this proceeding unless one or more CRUSH marks is famous. (*See* Opp. Br. at 13.) This is not the law. A

⁷ That CRUSH is the dominant feature of Dr Pepper's mark is shown by Krush Global's own papers. For example, in all of Krush Global's depictions of Dr Pepper's ORANGE CRUSH mark (*see* App. Br. at ¶¶ 8, 9, 10), CRUSH is the principle, dominant and source-identifying term. Indeed, the terms ORANGE, CHERRY, GRAPE are, as Krush Global has noted, merely flavor designations that cannot be exclusively appropriated by Dr Pepper.

⁸ Krush Global has submitted no evidence that any of the third party logos it references are in use. As such, even if the logos were relevant to any issue in this proceeding, they could not be considered.

⁹ Several of the assertions that Krush Global makes in support of its argument that the parties' logo marks are not similar have no support and no relevance, including (i) the assertion that "for most of its history, Opposer's logo looked more like this [showing an early version of the CRUSH logo]" (Opp. Br. at 10); (ii) "[Dr Pepper]'s ORANGE CRUSH, the equivalent 'Orange slice design', and the orange flavored and colored soda which is visible through a soda bottle, are always the first thing a consumer sees" (*id.*); and (iii) "[N]o one says 'I'll have a Crush Orange' or 'I'll have a Crush Grape.' It is an 'Orange Crush' or 'Grape Crush.'" (Opp. Br. at 11). These "facts" must be disregarded.

mark's strength is merely one factor in determining the scope of protection, and therefore Dr Pepper does not need to prove that any of its CRUSH marks is famous in order to succeed on its claim. *E.g., Ava Enter.*, 77 U.S.P.Q.2d at 1786; *DC Comics v. Pan Am. Grain Mfg. Co.*, 77 U.S.P.Q.2d 1220, 1228 (T.T.A.B. 2005). Moreover, even relatively weak marks enjoy protection against closely similar marks for related goods, 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* ("McCarthy"), § 11:76 (4th ed. 2008).

Even though Dr Pepper need not show that its CRUSH marks are famous or even particularly strong, Dr Pepper nonetheless has submitted evidence that its CRUSH marks are strong and well known. As Krush Global itself recognizes, Dr Pepper's survey evidence shows that Dr Pepper's ORANGE CRUSH mark enjoys a significant awareness among consumers.¹⁰ But Dr Pepper's evidence of the renown of its CRUSH marks goes well beyond the impressive awareness survey figures. In fact, Krush Global admits that Dr Pepper's CRUSH marks have been used and advertised since the early part of the 1900s (*See* Opp. Br. at 13, 17.)

The only thing Krush Global attempts to dispute is the sales success of Dr Pepper's CRUSH sodas, arguing that Dr Pepper's ORANGE CRUSH soda is not currently the top selling orange soda. (Opp. Br. at 15-16.) However, there is no rule of law stating that only top selling marks in their category enjoy protection. Moreover, it is hard to difficult to see how a brand that has endured for more than 100 years could not be considered successful.¹¹

¹⁰ Krush Global's arguments regarding the admissibility of Dr Pepper's survey evidence are misplaced. Dr Pepper produced the summary of the survey results to Krush Global during discovery. The survey was not conducted by Dr Pepper, and Dr Pepper does not have in its possession, custody or control the underlying survey documents. Krush Global did not complain about Dr Pepper's document production at any point, nor otherwise request additional information about the awareness survey, whether formal discovery methods or informal means.

¹¹ In any event, Dr Pepper's sales of CRUSH concentrate compare favorably even to those cases cited by Krush Global. For example, Dr Pepper's recent annual sales far exceed those in *Parfums de Coeur, Ltd. v. Lazarus*, 83 U.S.P.Q.2d 1012 (T.T.A.B. 2007), where the Board concluded that the opposer's mark had achieved "some degree of success."

c. *Krush Global Does Not Create a Genuine Dispute as to the Similarity of Goods and Services*

Another key factor in the *du Pont* analysis is the relatedness of the goods and services at issue. *Ava Enter. Inc.*, 77 U.S.P.Q.2d at 1784 Much like Krush Global pretends the marks at issue are different than what they are in an attempt to overcome another key *du Pont* factor, so too does Krush Global pretend that the services and goods at issue are different than what they really are in an attempt to overcome this *du Pont* factor.

The application and registration of Krush Global at issue cover a broad identification of services, namely, “restaurant, catering, snack bar and café services; provision of prepared food; food and drink preparation and presentation services; bar services; catering services for the provision of food and drink; preparation of food stuffs or meals for consumption off the premises; sandwich and salad bar services; wine bar services.” Notwithstanding this indisputable fact, Krush Global goes through great efforts to convince the Board that Krush Global’s services are actually far more limited. Specifically, Krush Global seeks to pretend that the only services at issue are restaurant services “sell[ing] healthy good and beverages to health conscious consumers.” (Opp. Br. at 20.)

However, there are *no* limits in the application or registration as to the types of restaurant, catering, snack bars and café services to be provided under the CRUSSH marks. There are *no* limits in the application or registration as to the type of food or drink to be served at Krush Global’s proposed CRUSSH service outlets. And there are *no* limits in the application or registration as to the types of consumers for Krush Global’s CRUSSH-branded services.

Krush Global’s attempt to rewrite and narrow the scope of its intended use is transparent: it hopes to avoid the obvious relationship between the broad services identified and the beverage goods on which Dr Pepper has long used its CRUSH marks. But, on this motion for summary

judgment, the Board is required to consider the identification of services as set forth in the application and registration, not some imagined identification of services put forth solely for purposes of avoiding summary judgment. *Paula Payne Prods. Co. v. Johnson Publ'g Co., Inc.*, 473 F.2d 901, 902 (C.C.P.A. 1973); *In re Elbaum*, 211 U.S.P.Q. 639, 640 (T.T.A.B. 1981). Thus, the services of Krush Global relevant to this proceeding are those identified in the application and registration, namely, the provision of *any* type of food and *any* type of drink to *any* type of consumers. And, as Dr Pepper demonstrated in its moving brief, those broad services are clearly related to the beverage products primarily offered under Dr Pepper's CRUSH marks.

While Krush Global cannot rewrite its identification of services to avoid summary judgment, it is nonetheless relevant to the similarity of goods and services analysis that Krush Global intends to focus its offerings on beverages products, much as it does in its existing CRUSSH outlets in the U.K.. It is clear that the beverage-centric restaurant services Krush Global seeks to provide are closely related to the beverage products on which Dr Pepper has used its CRUSH marks for more than a century. *See, e.g., In re Sage Dining Servs., Inc.*, Ser. No. 75/789,623, slip op. at 8-12 (available at <http://des.uspto.gov/Foia/ReterivePdf?system=TTABIS&flNm=75789623-05-07-2003>), 2003 TTAB LEXIS 216 (T.T.A.B. May 7, 2003).

Even the case on which Krush Global relies so heavily, *In re Coors Brewing Co.*, 68 U.S.P.Q.2d 1059 (Fed. Cir. 2003) (*see* Opp. Br. at 22-23), supports this conclusion. *Coors* concerned, *inter alia*, the question whether beer is related to restaurant services. The Board held that beer and restaurant services were related, but the Federal Circuit held otherwise on the evidence presented. Noting that there is no *per se* rule that food and restaurant services are related, 68 U.S.P.Q.2d at 1063, the Federal Circuit nonetheless concluded that “th[e] case would

be different . . . if the registrant's mark had been for a brewpub or for restaurant services and beer. In that case, the goods and services associated with the two marks *would clearly be related.*" *Id.* at 1064 (emphasis added). Here, Krush Global's broadly identified restaurant services, which by its own admission will be centered on providing beverages, are clearly related to Dr Pepper's CRUSH-branded beverages, much like a brewpub is clearly related to beer.

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d. *Krush Global Does Not Create a Genuine
Dispute as to the Overlapping Trade Channels*

In analyzing the similarity of trade channels, unless there is a limitation in the goods or services identification at issue, the Board presumes that the services are marketed in all normal trade channels for the identified services to ordinary consumers for such services. *In re Elbaum*, 211 U.S.P.Q. at 640. In order to avoid the conclusion that the parties' trade channels and consumers overlap as shown in Dr Pepper's moving brief (Mov. Br. at 21-22), Krush Global again engages in the fiction that its identification of services in its application and registration is narrowly drawn.

As discussed above, the application and registration at issue include a broad identification of restaurant, catering, snack bar and café services and provision of food and drink. Despite this,

Krush Global pretends in its opposition brief that use of its CRUSSH mark will be limited to “stand-alone facilit[ies] located in busy, high-traffic, metropolitan locations” frequented “by busy professionals looking to grab a healthy breakfast, lunch or smoothie.” (Opp. Br. at 21.) However, there is no such limitation in Krush Global’s application and registration. And, as with the *du Pont* factor concerning similarity of the goods and services, the factor concerning overlap of trade channels must be considered in light of the full identification of services in the application and registration at issue. *Paula Payne Prods. Co.*, 473 F.2d at 902; *In re Elbaum*, 211 U.S.P.Q. at 640. As shown in Dr Pepper’s moving brief, these broad restaurant services include the types of restaurant services selling Dr Pepper’s CRUSH soda. The trade channels and consumers clearly overlap.¹²

Further, the argument that Krush Global does not currently sell its juice products in third-party retail locations in the U.K. (*see* Opp. Br. at 21) ignores the relevant inquiry, which is whether consumers would believe, upon seeing Krush Global’s CRUSSH mark, when used in connection with restaurant services providing drinks, is somehow associated or connected with Dr Pepper. *Cf. Venture Out Prods.*, 81 U.S.P.Q.2d at 1892. The argument also ignores the extensive third-party evidence showing that it is a common phenomenon for companies – including, critically, Dr Pepper – to sell food or beverage products in mass-market chains and supermarkets under an identical mark as used for offering restaurant services such as those identified in Krush Global’s application and registration. (Mov. Br. at 8.)

¹² Dr Pepper is at a loss as to how Krush Global concluded that CRUSH-branded soda is sold primarily in rural areas. (*See* Opp. Br. at 21.) The evidence Krush Global relies on in support of this statement actually shows that rural and suburban areas are high-traffic markets for CRUSH soda. Similarly, there is not one iota of evidence to support the claim that orange soda is consumed mostly by children. (*See, e.g.*, Opp. Br. at 20.)

e. Krush Global Has Not Disputed the Evidence of its Bad Faith

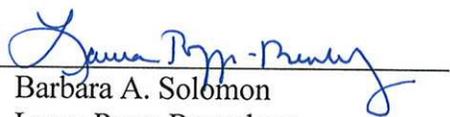
Krush Global's bad faith in pursuing its application and registration at issue is manifest. (See Mov. Br. at 24.) Krush Global does not dispute the bad faith evidenced in its application and registration history, instead arguing only that soda is "bad" and that Krush Global therefore would not want to be associated with a soda brand. (Opp. Br. at 22.) Regardless of whether soda is or is not healthy, Krush Global does not dispute the obvious benefits of consumers believing that its juice bars are associated with a century-old brand. In any event, even if Krush Global did not adopt the CRUSSH mark in bad faith, its alleged good faith does not weigh in its favor in the likelihood of confusion analysis. *McCarthy* at § 23:107.

CONCLUSION

For the foregoing reasons, and the reasons set forth in its moving brief, as well as the facts set forth in the accompanying declarations and exhibits thereto, Dr Pepper submits that the undisputed material facts establish a strong likelihood of confusion, mistake and deception arising from registration of Krush Global's CRUSSH Marks. Accordingly, Dr Pepper respectfully requests: (1) that registration of Application Serial No. 79/033,050 be denied; (2) that Registration No. 3,275,548 be cancelled; and (3) and that judgment for Dr Pepper be entered in this consolidated proceeding.

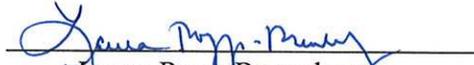
Dated: New York, New York
January 2, 2009

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **Opposer/Petitioner's Reply Memorandum of Law in Further Support of Its Motion For Summary Judgment** to be deposited with the United States Postal Service as First Class mail, postage prepaid, in an envelope addressed counsel for applicant, Jason Drangel, Esq., 60 East 42nd Street, Suite 820, New York, NY 10165, this 2nd day of January, 2009.



Laura Popp-Rosenberg