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

|                        |   |
|------------------------|---|
| Proceeding             | 91180742  |
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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

**APPLICANT/REGISTRANT'S OPPOSITION TO OPPOSER/PETITIONER'S  
MOTION FOR SUMMARY JUDGMENT**

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## I. RECITATION OF FACTS

Applicant /Registrant Krush Global Limited (“KGL” or “Applicant”) has registered the service mark CRUSSH (U.S. Reg. No. 3,275,548) with the United States Patent and Trademark Office (“USPTO”) for, among other related services, restaurant, catering, snack bar and cafe services; provision of prepared food; food and drink preparation and presentation services (“Services”). KGL has also applied to register,  (Ser. No. 79/033,050) with the USPTO for, among other related services, restaurant, catering, snack bar and cafe services; provision of prepared food; food and drink preparation and presentation services. The CRUSSH and CRUSSH logo service marks are the subject of the current consolidated opposition/cancellation proceeding (collectively “CRUSSH Service Marks”).

KGL opened its first CRUSSH restaurant in 1998 in the United Kingdom. Ten years later, KGL currently has 24 CRUSSH restaurants in the United Kingdom. CRUSSH restaurants are the best selling juice and food bars in the United Kingdom. In its first year of operation in 1998, CRUSSH’s revenue was 200,000 pounds. By 2008, CRUSSH stores sell approximately a million smoothies and fresh juices a year and annual revenues are nearly 7 million pounds per year. *Learmond Dec.*, ¶¶ 2-5.

KGL’s restaurants sell seasonal, healthy food and beverages to health conscious consumers. *Learmond Dec.*, ¶ 9. CRUSSH juice bars make fresh juice and fresh juice smoothies on premises and made to order. CRUSSH also sells health sandwiches, salads, soups, wraps and organic, low-fat desserts made daily. *Learmond Dec.*, ¶ 6.

CRUSSH restaurants were designed for “the busy health conscious urban professional” looking to grab a healthy breakfast, lunch or snacks. *Learmond Dec.*, ¶ 8.

Each restaurant is a stand-alone facility located in busy, high traffic, metropolitan locations. Great care went into the design of the 24 restaurants. They were designed to have fresh, uplifting, and energetic atmospheres. *Learmond Dec.*, ¶ 7, *Ex. 1*.

The rise of juice bars is due to increasingly health conscious societies. Applicant's stores are frequented 50:50 between men and women. Driven by desire for products that are natural, nutritious and low on calories, today's business professional wants more than a short lived energy burst from a caffeine-rich jolt of java or a sugary soda. Most people are choosing between a coffee or a smoothie: not a smoothie or a soda. *Learmond Dec.*, ¶ 9.

CRUSSH juice bars were designed to sell made to order fruit smoothies by fresh pressing all the fruit smoothies right in front of the customer. Applicant has always strongly believed in avoiding additives, preservatives, salts and sugars in their food and drinks, and to use the best natural and organic ingredients whenever possible. *Learmond Dec.*, ¶ 10.

In addition to its 24 store locations, Krush maintains a website at [crussh.com](http://crussh.com) established to provide nutritional information on their products, store location, and history. Orders for delivery can also be placed through the website or by facsimile. *Learmond Dec.*, ¶ 4.

The names of the products sold in CRUSSH restaurants have names like: Green Goddess, Love Juice, Berry Blast, Strawberry Cool and BrainStorm. *Learmond Dec.*, ¶ 12.

CRUSSH products are made to order. CRUSSH does not sell smoothie beverages in third party retail stores or third party restaurants since, when packaged the goods would need to be pasteurized, and Applicant does not believe in pasteurization. *Learmond Dec.*, ¶ 11.

KGL has not opened a CRUSSH restaurant/juice bar in the United States, but has an intention to do so. Accordingly, it filed the above- referenced applications. KGL intends to

conduct its business as it has done in the United Kingdom for the past ten (10) years. *Learmond Dec.*, ¶ 13.

As indicated by Opposer, Applicant’s CRUSSH logo has an amorphous background. *Summary Judgment Motion, Pg. 16.* The background has no meaning or purpose. The CRUSSH logo is a fanciful mark having a playful look and sound with the letters appearing in all caps. *Learmond Dec.*, ¶ 16.



CRUSSH is a one syllable word and can last as long as a speaker would like by extending the “usssshhhhhhh” sound. Applicant wanted a mark with more distinction in sound and appearance than “crush”. Accordingly, KGL decided to add an S to CRUS\_H – resulting in a trademark with a different appearance and sound: CRUSSH (long S) with the double SS appearing more prominently than the other letters. *Learmond Dec.*, ¶¶ 22-23. While Opposer claims Applicant selected the CRUSSH design in bad faith, Applicant actually designed and began to use its CRUSSH logo in 1998 in the U.K., prior to when Opposer claims to have first used its new CRUSH design in commerce in 1999. *Learmond Dec.*, ¶¶ 14-15, *Ex. 2; Wright Dec.*, ¶ 3, *Ex. 1.*

In the U.K., orange soda is commonly referred to as “orange squash” or “orangeade”. *Learmond Dec.*, ¶ 25; *Wright Dec.*, ¶¶ 4, *Exs. 2-3.* KGL’s CRUSSH trademark can mean crushed fruit or crushed ice (more commonly associated with a smoothie drink). *Learmond Dec.*, ¶¶ 17-18, *Exs. 3-4.* Blenders sold to make smoothies are referred to as “crush drink blenders.” *Learmond Dec.*, ¶¶ 21, *Ex. 7-8.* There are many drink recipes for drinks to make in crush drink blenders, and many of the recipe names are: GRAPE CRUSH DRINK or GRAPE CRUSH,

BLUEBERRY CRUSH, GRAPEFRUIT CRUSH DRINK, among others. Moreover, a “fruit crush” is defined as a “drink produced by squeezing or crushing fruit.” *Learmond Dec.*, ¶ 20, Ex. 6. The term “crush” itself, among other meanings is “to extract or obtain by pressing or squeezing: *crush juice from a grape.*” *Learmond Dec.*, ¶¶ 17-18, Exs. 3-4. Crush also could mean an infatuation, *i.e.*, “a crush.” *Learmond Dec.*, ¶ 19, Ex. 5. The multitude of meanings was a benefit when selecting the name for KGL’s restaurant. *Learmond Dec.*, ¶ 17.

Opposer/Petitioner, Dr. Pepper/Seven Up, Inc. (“DPSU” or “Opposer”) is the owner of the registered trademarks in the U.S. for: ORANGE CRUSH and CRUSH for soft drinks and concentrates for making the same in Class 32. In addition to ORANGE CRUSH, DPSU also claims to sell DIET ORANGE CRUSH, STRAWBERRY CRUSH, GRAPE CRUSH, PEACH CRUSH, PINEAPPLE CRUSH, CHERRY CRUSH AND TROPICAL PUNCH CRUSH.

DPSU indicates that its ORANGE CRUSH “is one of the strongest sellers in the orange soda category, and remains the most popular of DPSU’S crush sodas.” *Springate Dec.*, ¶ 12.

ORANGE CRUSH is not the best selling orange soda in the United States. In fact, it is not even the best selling orange soda sold by DPSU. SUNKIST, sold by DPSU is the number one selling orange soda in the United States. DPSU’s website indicates that “Sunkist maintains a high level of brand awareness with consumers and is often named as consumers’ favorite orange soda.” *Wright Dec.*, ¶ 5, Ex. 4.

ORANGE CRUSH soda is not even the second best selling orange soda in the United States: Coca Cola’s FANTA is. *Wright Dec.*, ¶ 6, Ex. 4. DPSU’s website does not even list ORANGE CRUSH / CRUSH as a “key brand” for the company, nor does the company consider it to be one of its four core brands. *Wright Dec.*, ¶ 8, Ex. 6. DPSU indicates that it owns six of the top-ten flavored carbonated soft drinks in the United States: DR. PEPPER, 7- UP, SUNKIST,

A&W, CANADA DRY, and SQUIRT. ORANGE CRUSH is not even on this list. *Wright Dec.*, ¶ 9, Ex. 7.

FANTA is the best selling orange soda in Europe. The Founder of CRUSSH, domiciled in the U.K., never heard of ORANGE CRUSH as a consumer. *Learmond Dec.*, ¶¶ 24- 25.

DPSU represents that its product is sold throughout the United States (*Summary Judgment Motion, Pg. 3*). However, DPSU’s own press release from August, 2008, indicates that “[t]he Crush brand is currently available in less than 40 percent of the U.S.” *Wright Dec.*, ¶ 10, Ex. 8.

DPSU also claims that each CRUSH soda bears the CRUSH mark in a consistent stylized presentation, with the flavor designation signified by the addition to the CRUSH mark of the flavor name and appropriate graphic depictions of the relevant fruit. *Springut*, ¶ 13. While this may be true now, the evidence submitted by DPSU clearly shows, that for most of its history, DPSU’s beverages and concentrates bore the trademark: ORANGE CRUSH, similar in appearance to the logo shown below:



*Declaration of Andrew D. Springate Dec.*, ¶¶ 23, 26-27, 35, Exs. 4-23, 26.

Opposer’s founder intended ORANGE CRUSH to mean what it is: crushed orange oil added to a carbonated soda. DPSU’s own website indicates that the founder of the Crush Company and creator of the ORANGE CRUSH soda “included the word ‘crush’ in the original soft drink’s name to refer to the process of extracting oils from oranges.” *Wright Dec.*, ¶ 11, Ex. 9.

DPSU sells its carbonate beverages “through the following beverage channels: big-box general merchandisers (such as Wal-mart and Target), supermarkets, grocery stores, bodegas, Outlets, vending machines and the Internet.” *Wright Dec.*, ¶ 12, Ex. 10, (*Interrog. Response No. 12*).

Carbonated soda is considered by most to be an unhealthy beverage, containing little or no orange juice “and high levels of sodium benzoate.” *Wright Dec.*, ¶ 4, Exs. 2-3. There is no reason for KGL to associate itself with an unhealthy carbonated soda drink. *Learmond Dec.*, ¶ 26.

## II. BURDEN OF PROOF

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See*, Fed. R. Civ. P. 56(c). The party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact and that it is entitled to a judgment as a matter of law. *See, Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The evidence must be viewed in a light favorable to the non-moving party, and all reasonable inferences are to be drawn in the non-movant's favor. Thus, in considering the propriety of summary judgment, the Board may not resolve issues of material fact against the non-moving party; it may only ascertain whether such issues are present. *See, e.g., Lloyd's Food Products Inc. v. Eli's Inc.*, 25 U.S.P.Q.2d 2027 (Fed. Cir. 1993). Summary judgment will be granted against a party who fails to establish an element essential to his case when that party will ultimately bear the burden of proof at trial. *See, Celotex*, 477 U.S. at 322.

## A. Likelihood of Confusion

Opposer has only plead a claim for likelihood of confusion in this action, and Opposer has moved for summary judgment based on that claim. The relevant factors set forth in *In re E.I. DuPont DeNemours & Co.*, 177 U.S.P.Q. 563, 567 (CCPA 1973) (the *DuPont* factors), as applied to the facts in the present case are discussed below.

### 1. Unique Consideration for Food/Restaurant Likelihood of Confusion Cases

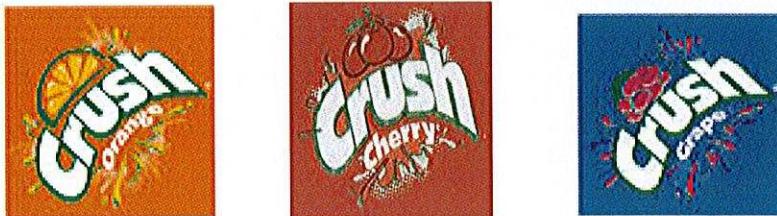
The TTAB and Federal Circuit have made it abundantly clear on numerous occasions that “to establish likelihood of confusion a party must show *something more* than that similar or even identical marks are used for food products and for restaurant services.” *Jacobs v. International Multifoods Corp.*, 212 U.S.P.Q. 641, 642 (CCPA 1982) (emphasis added). *See also, Lloyd's Food Products Inc. v. Eli's Inc.*, 25 U.S.P.Q.2d 2027, 2030 (Fed. Cir. 1993) (“so the board's determination . . . disregards the requirement that a party must show something more than that similar or even identical marks are used for food products and for restaurant services.”) and *In re Coors Brewing Co.*, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003). Generally, the “something more” requirement can be met if the registered mark is not only identical to the applied for mark, but in addition the registered mark is “well known and famous.” *Jacobs*, 212 U.S.P.Q. at 642.

KGL has registered CRUSSH and applied to register  for restaurant services. DPSU is the owner of the registered trademark ORANGE CRUSH and CRUSH for carbonated sodas and concentrates. DPSU has failed to come forward with evidence sufficient to support a claim of “something more”, namely, that the trademarks are identical and that the ORANGE CRUSH trademark is famous. The issues will be discussed below (*See, Secs. 2 & 3*), however,

given DPSU's failure to prove "something more" DPSU's summary judgment motion should be denied and the Board should *sua sponte* rule on summary judgment for KGL.

## 2. Comparison of Respective Trademarks

The first *DuPont* factor often considered is the similarity of the respective marks. This is also the first factor to be considered in the "something more" analysis. In adjudging the similarity of the marks, the relevant standard is the "total effect" of the mark, considering sight, sound, and meaning. *See, Volkswagenwerk Aktiengesellschaft v. Wheeler*, 2 U.S.P.Q.2d 1264 (1st Cir. 1987). "Similarity of the marks must be considered in light of what occurs in the marketplace, taking into account the 'circumstances surrounding the purchase of the goods' or services." *Calamari Fisheries, Inc. v. The Village Catch, Inc.*, 8 U.S.P.Q.2d 1953 (D. Mass. 1988). Since 1999 (claimed date of first use in CRUSH design mark application) DPSU has updated the appearance of its trademark so that each different CRUSH flavored soda "bears the CRUSH mark in a consistent stylized presentation, with the flavor designation signified by the addition to the CRUSH mark of the flavor name and appropriate graphic depictions of the relevant fruit", examples appearing below *Springate Dec.*, ¶ 13.



Regardless of which combination of CRUSH and/or the flavor term or image, when it appears in connection with the flavor in a see-through bottle or can of the same color (orange for orange flavor, purple for grape flavor and so on) the mark is known to the consumer as ORANGE CRUSH or GRAPE CRUSH, and so on. There is simply no evidence that the

CRUSH mark is either used alone or recognized by consumers as a stand alone trademark. In fact, the evidence submitted by DPSU clearly shows that for most of its history, DPSU's beverages and concentrates bore the trademark: ORANGE CRUSH as opposed to CRUSH *per se*. *Springate Dec.*, ¶¶ 23, 26-27, 35, Exs. 4-23, 26. Consumers are not inclined to ask for a CRUSH in a store – instead one asks for an “ORANGE CRUSH”. Accordingly, since DPSU has not argued that it owns a family of CRUSH trademarks, the mark to be considered in the *DuPont* analysis can only be the trademark that is used, namely, ORANGE CRUSH, GRAPE CRUSH, STRAWBERRY CRUSH, and so on.

Since DPSU has indicated that the principal flavor mark is ORANGE CRUSH, that is the trademark that should be used for comparison purposes, as seen below:

**CRUSSH**

**ORANGE CRUSH**

v.



**(a) Appearance**

The appearance (sight) of the mark CRUSSH differs dramatically from the Opposer's ORANGE CRUSH mark. As indicated by Opposer, Applicant's mark has an amorphous background. *SJ Motion, Pg. 16*. The background has no meaning or purpose. The CRUSSH logo is a fanciful mark having a playful look and sound with the letters appearing in all caps. *Learmond Dec.*, ¶ 16. On the other hand, Opposer's ORANGE CRUSH is simply a combination of commonly used words (ORANGE and CRUSH) in the English vocabulary which are inherently descriptive as applied to Opposer's goods and a very descriptive image (sliced orange) to describe the drink flavor. *Springate Dec.*, ¶ 13.

Opposer would like the Board to believe that the amorphous design looks like its crushed juice splash design. It simply does not. In fact, Opposer's ORANGE CRUSH logo design with lower cased lettering, a sliced orange design and an orange background is visually closer to Opposer's own SUNKIST brand and other orange soda competitors than ORANGE CRUSH is to Applicant's CRUSSH logo (see below comparison). Most are diagonal word marks in lower case lettering. CRUSSH is horizontal and shown in capital letters. Nearly all of these brands feature orange backgrounds and use an orange fruit image. CRUSSH does not. The use of an orange color, an orange fruit and/or orange slice and a splash scene is clearly not owned by Opposer and are weak designations of origin.



*Wright Dec., ¶ 13, Ex. 11.*

In any event, for most of its history, Opposer's logo looked more like this:



Since DPSU'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, the marks at issue are visually distinguishable.

**(b) Sound**

The sound of Opposer's ORANGE CRUSH mark and Applicant's CRUSSH mark are entirely different. ORANGE CRUSH is two syllables, while CRUSSH is a one syllable word that can be extended as long as the speaker would like to extend the "usssshhhhhhhh" sound. Applicant wanted a mark with more distinction in sound and appearance than simply "crush." Accordingly, KGL decided to add an S to CRUS\_H – resulting in a trademark with a different appearance and sound: CRUSSH (long S) with the double SS appearing more prominently than the other letters. *Learmond Dec.*, ¶¶ 22-23.

Although Opposer's new logo appears as CRUSH ORANGE, no one says "I'll have a Crush Orange" or "I'll have a Crush Grape." It is an "Orange Crush" or "Grape Crush." All other flavored CRUSH marks are preceded by one or more modifying fruit flavors, such as GRAPE, STRAWBERRY and the like, further distinguishing the sound of the Opposer's marks from that of the CRUSSH mark.

Contrary to opposer's argument that consumers will view GULPY as a diminutive for "Gulp," we believe that the existence of one mark consisting of an ordinary word contrasted with an unfamiliar term with a different commercial impression results in the marks being sufficiently distinguishable, when compared in their entireties, despite any similarities in appearance or sound. In other words, the familiar ("Gulp") is readily distinguishable from the unfamiliar ("Gulpy"). *7-Eleven, Inc. v. Wechsler*, 83 U.S.P.Q.2d 1715 (TTAB 2007).

**(c) Meaning**

The meaning and commercial impression of the CRUSSH mark is different from Opposer's ORANGE CRUSH. This is not a case involving the addition of an "s" to a mark to create a plural as in "ABC" to "ABCs", *Automatic Timing & Controls, Inc. v. McDowell-Wellman Engineering Company*, 162 U.S.P.Q. 462 (TTAB 1969), or creating a possessive as in "HESS" to "HESS's", *Hess's of Allentown, Inc. v. National Belles Hess, Inc.*, 169 U.S.P.Q. 673

(TTAB 1971). The significance of a mark is not determined in the abstract, but in connection with the goods to which the mark is applied and the context in which it is used because that is how purchasers encounter the mark. *Presto Products v. Nick-Pak Products*, 9 U.S.P.Q.2d 1895, 1897 (TTAB 1988).

Opposer's founder and creator of ORANGE CRUSH soda "included the word 'crush' in the original soft drink's name to refer to the process of extracting oils from oranges." *Wright Dec.*, ¶ 11, Ex. 9. In the U.K. where Applicant is domiciled, orange soda is commonly referred to as "orange squash" or "orangeade". *Learmond Dec.*, ¶ 25; *Wright Dec.*, ¶ 4, Exs. 2-3.

KGL's CRUSSH trademark can mean crushed fruit or crushed ice (more commonly associated with a smoothie drink). Blenders sold to make smoothies are referred to as "crush drink blenders." There are many drink recipes for drinks to make in crush drink blenders, and many of the recipe names are: GRAPE CRUSH DRINK or GRAPE CRUSH, BLUEBERRY CRUSH, GRAPEFRUIT CRUSH DRINK, among others. "Fruit crush" is defined as a "drink produced by squeezing or crushing fruit." The term "crush" itself, among other meanings is "to extract or obtain by pressing or squeezing: *crush juice from a grape.*" Crush also means an infatuation, *i.e.*, "a crush." The multitude of meanings was a benefit when selecting the name for KGL's restaurant. *Learmond Dec.*, ¶¶ 17- 21, Exs. 3-8.

Thus, while CRUSSH, in a technical sense, differs from Opposer's ORANGE CRUSH mark only by a fruit flavor descriptor and an additional letter "S," given the weakness of the 'crush' term alone, and its various meanings, when the respective marks are viewed in connection with their respective goods/services, the meaning is distinctive. *Learmond Dec.*, ¶

22.

The appearance, sound, sight and commercial impression of VARGA GIRL derive significant contribution from the component "girl".

By stressing the portion "varga" and diminishing the portion "girl", the Board inappropriately changed the mark. Although the weight given to the respective words is not entirely free of subjectivity, we believe that the Board erred in its diminution of the contribution of the word "girl". When GIRL is given fair weight, along with VARGA, confusion with VARGAS becomes less likely.

Just as a reasonable consumer would easily know the difference between VARGAS and VARGA GIRLS, consumers will easily know the difference between CRUSSH and ORANGE CRUSH.<sup>1</sup>

### 3. DPSU's CRUSH Mark is Not Famous

The fifth *Du Pont* factor requires consideration of evidence of fame of Opposer's mark. It is important to note that "the fame of the [plaintiff's] name is insufficient in itself to establish likelihood of confusion under § 2(d)" *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, U.S.P.Q. 505, 507 (Fed. Cir. 1983). Regardless of this, DPSU has failed to prove that either the ORANGE CRUSH or CRUSH trademarks, are famous as required in the "something more" requirement for restaurant/food-beverage cases and/or in support of a typical likelihood of confusion analysis.

Although Applicant does not dispute that the ORANGE CRUSH trademark may have been in use since the early 1900s, consumers *today* simply do not recognize either ORANGE CRUSH, or even less so, CRUSH, as famous. DPSU would like the Board to disregard evidence of fame (extent of use, sales success, extent and duration of advertising and distinctiveness of the mark) because "analysis of these factors is not actually necessary, since [ ] % of consumers are

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<sup>1</sup> *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 198 U.S.P.Q. 151, 153 (CCPA 1978) ("[T]he presence of the word 'RED' in applicant's mark cannot be dismissed as an identification factor. Thus whether we consider applicant's mark to be 'THE RED ZINGER' or 'RED ZINGER', it is distinguishable from 'ZINGERS', *per se.*"); *King Candy Co. v. Eunice King's Kitchen, Inc.*, 182 U.S.P.Q. 108 (CCPA 1974) (MISS KING'S not confusingly similar to KINGS); *In re August Storck*, 218 U.S.P.Q. 823 (TTAB 1983) (JUICY 2 not confusingly similar to JUICY BLEND II); *Jacobs v. International Multifoods Corp.*, 212 U.S.P.Q. 641 (CCPA 1982) (no likelihood of confusion between BOSTON SEA PARTY for restaurant services and BOSTON TEA PARTY for tea).

aware of the CRUSH mark, making it a very well-known mark by any standards.” *SJ Motion, Pg. 13.* ([ ] confidential percentage)

Quite to the contrary, the Board should not consider DPSU’s claim of [ ]% recognition at all since it is not supported by any admissible evidence, or even sufficient inadmissible evidence. Other than a blanket statement of [ ]% recognition in a declaration by DPSU’s Senior Vice-President of Brand Marketing, no survey has been produced during discovery (although demanded during discovery) or in connection with this summary judgment motion. *Springut Dec., ¶¶ 37-38.* ([ ] confidential percentage)

In addition to being inadmissible, the survey results only analyze recognition of ORANGE CRUSH, not CRUSH alone. In a recent case testing the fame of 7-Eleven’s BIG GULP, Opposer produced an *unaided* awareness survey that evidenced recognition of BIG GULP to be between 64 and 81%. *See, 7-Eleven, Inc.*, 83 U.S.P.Q.2d at 1715. As a result of the totality of the Gulp evidence, the Gulp Board concluded that:

opposer's BIG GULP mark when used in connection with fountain soft drinks has a very high degree of public recognition and renown. On the other hand, the evidence does not show any significant public recognition and renown for opposer's GULP trademark or for any other variance of the "Gulp" trademarks. Accordingly, with respect to only the BIG GULP trademark, we find that this du Pont factor favors opposer. We do not find support for opposer's argument that its family of "Gulp" marks, as opposed to its core mark BIG GULP, is "famous". *Id.*

The survey in the *Gulp* case showed lower levels of recognition for SUPER BIG GULP and DOUBLE GULP and did not show any evidence of notoriety for the term GULP alone. Accordingly, while the unaided survey contributed to a showing of fame for BIG GULP, the survey itself did not show any recognition of GULP itself, which lead the Board to hold that GULP itself and with terms other than BIG, were not famous. Similarly here, there simply is no evidence of recognition of CRUSH alone. Regardless of whether or not the results were aided or

not unaided,<sup>2</sup> since the report itself was not supplied and can not be subject to analysis or objection by Applicant, it and its results should be disregarded in total for the purposes of any fame analysis or otherwise in connection with this case.

**(a) Fame Factors**

Given that the Board can not and should not consider the survey results, an analysis of the fame factors and evidence supplied by DPSU in support of Opposer's fame claim follows. As the Board recently stated: "In view of the extreme deference that is accorded to a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, we think that it is the duty of a plaintiff asserting that its mark is famous to clearly prove it. *Blue Man Productions, Inc. v. Tarmann*, 75 U.S.P.Q.2d 1811, 1819 (TTAB 2005).

**(b) Sales**

ORANGE CRUSH is not the best selling orange soda in the United States. In fact, it is not even the best selling orange soda sold by DPSU. SUNKIST, sold by DPSU is the number one selling orange soda in the United States. DPSU's website indicates that "Sunkist maintains a high level of brand awareness with consumers and is often named as consumers' favorite orange soda." DPSU's website does not even list ORANGE CRUSH / CRUSH as a "key brand" for the company, nor does the company consider it to be one of its four core brands. DPSU indicates that it owns six of the top-ten flavored carbonated soft drinks in the United States: DR. PEPPER, 7- UP, SUNKIST, A&W, CANADA DRY, and SQUIRT. ORANGE CRUSH is not even on

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<sup>2</sup> With regard to the conclusory, aided survey results for ORANGE CRUSH, the difference between an aided and unaided survey is critical. The unaided awareness test used in the Gulp case shows "awareness of brand without prompting from the interviewer." In this case, DPSU allegedly used an "aided awareness" test which shows "awareness after brand has been prompted." Clearly more people will recognize a brand if they are asked "have you heard of Orange Crush?" as opposed to "what orange sodas are you aware of?" Aided awareness tests should be disregarded in a fame determination.

this list. ORANGE CRUSH soda is not even the second best selling orange soda in the United States: Coca Cola's FANTA is.

It is clear that ORANGE CRUSH soda is intentionally not actively marketed and promoted by DPSU in order to further the success of its number one selling SUNKIST brand. *Wright Dec.*, ¶¶ 5-9, Exs. 4-7. While DPSU represents that its product is sold throughout the United States (*SJ Motion*, Pg. 3), DPSU's own press release from August, 2008, indicates that "[t]he Crush brand is currently available in less than 40 percent of the U.S." *Wright Dec.*, ¶ 10, Ex. 8. Likewise, while DPSU indicates that the product is sold in excess of "[ ] retail stores and [ ] food outlets," there simply is no concrete documented confirmation that ORANGE CRUSH is sold in all these stores and for how long that has occurred. *Springate Dec.*, ¶ 16 ([ ] confidential figures). *Nike, Inc. (substituted for Official Starter LLC) n1 v. WNBA Enterprises, LLC*, 85 U.S.P.Q.2D 1187 (T.T.A.B. 2008) ("Finally, while Ms. Kain states that opposer's goods are currently being sold in general retail stores and on the websites of K-Mart, Wal-Mart and www.gifts.com, we have no evidence of the number of stores (other than in Texas) in which the products are currently sold or the length of time the products have been sold on these websites.")

Even if there was sufficient evidence of actual retail sales, DPSU indicates that the wholesale sales between 2001 through mid-2008 reached only \$[ ] million, an average of \$[ ] million per year and would be much more at retail. *Springate Dec.*, ¶ 18 ([ ] confidential figures). Since Opposer has not made a comparison to other brands, most notable SUNKIST (its own brand and the best selling orange soda), it is difficult to determine in today's world what this figure means. Further, sales figures, in and of themselves, while perhaps demonstrating the popularity of a product do not necessarily reflect awareness or recognition of the mark applied to

the product. *See, e.g., In re Bongrain International (American) Corp.*, 13 U.S.P.Q.2d 1727 (Fed. Cir. 1990).

Regardless, [ ] million in sales of ORANGE CRUSH per year over eight (8) years does not rise to the level required for fame. *Springate Dec.*, ¶ 18 ([ ] confidential figures)

We find that the evidence is not sufficient on this record to prove that opposer's S and star design is a famous mark. . . . Ms. Kain testified that opposer has used the marks consisting of or comprising the S and star design for over 20 years. She has provided sales figures for the years 2000-2005 for apparel, footwear, headwear and bags at the wholesale level ranging from \$ 125 million in 2000 to \$ 289 million in 2004, and then dropping to \$ 109 million in 2005. Ms. Kain explains that the wholesale figures 'translate to be double when the goods are sold at retail.' The sales figures appear in the abstract to be substantial. However, we cannot determine the significance of these figures in a vacuum, and opposer has not provided a meaningful context for them, such as evidence of opposer's market share for the goods. As stated by the Federal Circuit, "[r]aw numbers of product sales and advertising expenses may have sufficed in the past to prove fame of a mark, but raw numbers alone in today's world may be misleading... Consequently, some context in which to place raw statistics is reasonable." *Nike, Inc. (substituted for Official Starter LLC) n1 v. WNBA Enterprises, LLC*, 85 U.S.P.Q.2D 1187 (TTAB 2008);

### (c) Advertising

DPSU has produced evidence of advertisements that ran between 1923 and 1980. Again, nearly all the evidence shows use of ORANGE CRUSH, not CRUSH alone. Further, while the advertisements from this early time period may be historically interesting, it is not an indication of current fame. *Springate Dec.*, ¶¶ 23, 26-27, 35, Exs. 4-23, 26. Likewise, DPSU has failed to provide *any* sample evidence of advertising run since 1980. This is not surprising since, between 2001 and the first half of 2008, DPSU spent only [ ] in marketing the CRUSH brand. *Springate Dec.*, ¶ 31 ([ ] confidential figures). DPSU tries to justify this low figure by indicating that since "CRUSH" products are made by bottlers and sold by third parties, most of the advertising expenses for CRUSH are incurred by these third parties, which advertise CRUSH

in media such as Internet and weekly circulars. *Springate Dec.*, ¶ 19. This statement alone without even a shred of evidence of third party advertising and promotions activities does not prove substantial advertising expenditures in order to support a claim of fame.

Opposer's additional evidence is not much more revealing. Ms. Kain testified as to advertising and promotional expenditures for only a two-year period, stating that opposer spent over \$ 7.5 million in marketing and promoting the marks in 2001, and \$ 10 million in 2002 in marketing in association with the NBA and NCAA. In addition, because all of opposer's catalogs (including the catalog relating to the 1996 Olympics) and most of its promotional materials are directed to merchandisers, it is unclear whether a substantial portion of those amounts was spent on promotion to consumers. Nor, in any event, do we have any evidence of the extent to which these materials have been distributed to the trade. *Nike, Inc. (substituted for Official Starter LLC) n1 v. WNBA Enterprises, LLC*, 85 U.S.P.Q.2d 1187 (TTAB 2008)

DPSU then goes on to say that next year, due to a “*refocused push of the CRUSH brand*”, DPSU will expend substantially more for consumer and trade advertising. *Springate Dec.*, ¶ 19. “Refocusing efforts” does not sound like something that should be required for a famous brand.

**(d) Extensive Use**

DPSU indicates that the product is sold in excess of “[ ] retail stores and [ ] food outlets.” *Springate Dec.*, ¶ 16 ([ ] *confidential figures*). However, there simply is no concrete documented support of this.<sup>3</sup> Furthermore, as indicated above, DPSU’s own press release from August, 2008, indicates that “[t]he Crush brand is currently available in less than 40 percent of the U.S.” *Wright Dec.*, ¶ 10, Ex. 8.

With regard to the various old posters and text books produced as support that the public associates the CRUSH mark with Opposer, in fact the evidence supports Applicant’s position

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<sup>3</sup> *Nike, Inc. (substituted for Official Starter LLC) n1 v. WNBA Enterprises, LLC, 85 U.S.P.Q.2D 1187 (TTAB 2008)* (“Finally, while Ms. Kain states that opposer's goods are currently being sold in general retail stores and on the websites of K-Mart, Wal-Mart and www.gifts.com, we have no evidence of the number of stores (other than in Texas) in which the products are currently sold or the length of time the products have been sold on these websites.”)

that consumers only recognize the mark as ORANGE CRUSH, not CRUSH. *Springate Dec.*, ¶¶ 23, 26-27, 35, Exs. 4-23, 26.

Opposer also stresses the common licensing of its CRUSH brand. Again the evidence only supports use of ORANGE CRUSH. Also, while mentioning sales and royalty figures, Opposer has advanced no evidence that the alleged fame of the ORANGE CRUSH mark has followed such product extensions. *Springate Dec.*, ¶¶ 21-25.

**(e) Fame Conclusion**

In a recent case regarding GULPY for animal water dishes and container versus GULP / BIG GULP for soft drinks, the Board considered the following evidence of public recognition and renown for GULP alone to be lacking for the purposes of fame in a likelihood of confusion analysis:

1. Opposer's sales of its "Gulp" line of fountain drinks have averaged in excess of \$ 180,000,000 per year from 1985 through 2001;
2. Opposer has spent millions of dollars in advertising and promoting its "Gulp" line of products since 1983;

This type of evidence provided in the *Gulp* case is required to prove fame.

In the *Gulp* case, the evidence supported use of BIG GULP as opposed to GULP alone. Likewise, DPSU has presented evidence that only applies to ORANGE CRUSH, not CRUSH alone. There is simply no evidence to the contrary that the mark being referenced is CRUSH alone. In fact, nearly every advertisement, book reference among other references, indicates the mark to be ORANGE CRUSH, not CRUSH. *Springate Dec.*, ¶¶ 23, 26-27, 35, Exs. 4-23, 26.

The evidence supplied by DPSU is less in all aspects that that supplied in the *Gulp* case. ORANGE CRUSH, no less CRUSH alone, as applied to sodas or concentrates is simply not famous.<sup>4</sup>

#### **4. Goods/Services Are Distinguishable.**

As for the goods/services themselves, they are also distinguishable. KGL's restaurants sell healthy food and beverages to health conscious consumers. *Learmond Dec.*, ¶¶ 6, Exs. 8-10. On the other hand, carbonated soda is considered by most to be an unhealthy beverage, containing little or no orange juice and "high levels of sodium benzoate." *Wright Dec.*, ¶ 4, Exs. 2-3. Orange soda is consumer mostly by children.

Interestingly, and quite telling, recently DPSU consented to the use (and registration in Cl. 43 for restaurant services) of the trademark and service mark CRUSH 29 for restaurant services and wine. *Confidential Wright Dec.*, ¶ 14, Ex. 12. CRUSH is the prominent part of the trademark in CRUSH 29. The same discerning patrons who visit a CRUSH 29 restaurant and are not confused with ORANGE CRUSH, would visit a CRUSSH restaurant and not be confused with ORANGE CRUSH. Opposer's co-existence with CRUSH 29 is an acknowledgement that Opposer believes that the goods/services (restaurant / carbonated soda) are distinguishable.

#### **5. Different Channels of Trade.**

There is no evidence of an overlap in trade channels. In fact, the markets to whom and through which KGL offers its restaurant services are entirely different from those to whom DPSU offers its soft drinks and soft drink concentrates. DPSU sells it carbonate beverages

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<sup>4</sup> See, *Parfums de Coeur, Ltd. v. Lory Lazarus* 83 U.S.P.Q.2d 1012 ("opposer's sales of BOD/BOD MAN products amounted to under \$ 8.6 million in 2001, under \$ 9.7 million in 2002, almost \$ 12 million in 2003 and under \$ 17 million in 2004, and since the inception of the product line opposer has spent \$ 23 million in advertising, including \$ 2.5 to \$ 6 million annually on television advertising. These figures indicate that opposer, which has used its marks since 2000, has achieved some degree of success with its BOD/BOD MAN brand. However, the evidence falls far short of demonstrating that its marks are famous.")

“through the following beverage channels: big-box general merchandisers (such as Wal-mart and Target), supermarkets, grocery stores, bodegas, Outlets, vending machines and the Internet. *Wright Dec.*, ¶ 12, Ex. 10, (*Interrog Resp. No. 12.*) From the evidence produced by Opposer, it appears as though in the 40 percent of the country where ORANGE CRUSH is actually sold, it appears to be primarily non-metropolitan settings. *Wright Dec.*, ¶ 10, Ex. 8; *Confidential Wright Dec.*, ¶ 15, Ex. 13.

In contrast, KGL’s services are not available to the public through general retail outlets or supermarkets. *See In re Shoe Works, Inc.*, 6 U.S.P.Q.2d 1890 (TTAB 1998) (no likelihood of confusion where PALM BAY was used for “shoes sold solely through applicant’s retail shoe store outlets.”) Rather, since 1998 KGL sells its services in the U.K., exclusively through its 24 restaurants. Each restaurant is a stand-alone facility located in busy, high traffic, metropolitan locations – frequented mostly during the day by business professionals looking to grab a healthy breakfast, lunch or smoothie. *Learmond Dec.*, ¶ 7. KGL does not sell its juice products in the U.K. in third party retail locations since to sell it as packaged goods would require pasteurization, which it finds unacceptable. *Learmond Dec.*, ¶ 11. There is no reason to believe KGL would deviate from this in the U.S. *Learmond Dec.*, ¶ 13.

DPSU argues that a number of third parties that sell food products in mass-market chains and supermarkets have extended them to restaurant style services, such as Ben & Jerrys and Starbucks. However, as the Federal Circuit has noted:

It is not unusual for restaurants to be identified with particular food or beverage items that are produced by the same entity that provides the restaurant services or are sold by the same entity under a private label. Thus, for example some restaurants sell their own private label ice cream, while others sell their own private label coffee. But that does not mean that any time a brand of ice cream or coffee has a trademark that is similar to the registered trademark of some restaurant, consumers are likely to assume

that the coffee or ice cream is associated with that restaurant. *In re Coors Brewing Co.*, 68 U.S.P.Q.2d 1059, 1063 (Fed. Cir. 2003).

**6. No Cross Over in Purchasers - Purchasers Take Great Care in Purchasing Applicant's Services.**

There is little if any cross-over in consumers for Opposer's and Applicant's respective goods and services. Orange soda is consumed mostly by children. On the other hand, CRUSH restaurants were designed for "the busy health conscious urban professional." *Learmond Dec.*, ¶¶ 8-9. Great care went into the design of the 24 restaurants. They were designed to be fresh, uplifting, and energetic. *Learmond Dec.*, ¶ 7, *Ex. 1*. Applicant's patrons are health conscious and are visiting CRUSSH stores in search of a healthy alternative food product. Health conscious consumers are probably the most discerning purchasers, regardless of cost. Accordingly, they would take great care before making a health food purchase. *Learmond Dec.*, ¶ 9.

Soda is inherently unhealthy. A person would not buy a smoothie when they really want soda and vice versa. To the extent a CRUSSH patron might make an association with ORANGE CRUSH, they would analyze CRUSSH products more thoroughly to make sure they are fresh as opposed to sugar enhanced or carbonated. In fact, many CRUSSH patrons may not buy a CRUSSH food item if it had an association with ORANGE CRUSH. *Learmond Dec.*, ¶ 26.

**7. Bad Faith.**

DPSU would like the Board to believe that it selected the CRUSSH trademark and logo in bad faith. FANTA, not CRUSH is the best selling orange soda in Europe. *Learmond Dec.*, ¶ 25. Further, there would have been no reason for KGL to associate itself with a carbonated soda drink. *Learmond Dec.*, ¶ 26.

As discussed above, KGL chose the term “crush” due to the multitude of meanings of the term. *Learmond Dec.*, ¶¶ 17-21, Exs. 3-8. As for the CRUSSH logo, KGL began to use the logo in 1998, prior to DPSU’s claimed date of first use for the same logo in 1999, so there can be no bad faith. *Learmond Dec.*, ¶¶ 14-15, Ex. 2; *Wright Dec.*, ¶ 3, Ex. 1. Regardless, the logos do not look alike. *Wright Dec.*, ¶ 13, Ex. 11.

### III. CONCLUSION

Opposer has not demonstrated likelihood of confusion, and should not be permitted to expand the scope of its existing ORANGE CRUSH mark to block registration of a unique “crush” variant for an unrelated service, sold in different channels of trade, to consumers who would take the time and care to distinguish between goods before purchase, especially when Opposer has failed to establish “something more” between carbonated soda on the one hand and restaurant services on the other.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing APPLICANT/REGISTRANT'S OPPOSITION TO OPPOSER/PETITIONER'S MOTION FOR SUMMARY JUDGMENT (AND SUPPORTING DECLARATIONS) was served by First Class Mail, with sufficient postage prepaid, on this 12 day of December, 2008, upon Opposer/Petitioner counsel at:

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