

ESTTA Tracking number: **ESTTA299439**

Filing date: **08/06/2009**

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

Proceeding	91180742
Party	Plaintiff Dr Pepper/Seven Up, Inc.
Correspondence Address	Laura Popp-Rosenberg Fross Zelnick Lehrman & Zissu, P.C. 866 United Nations Drive New York, NY 10017 UNITED STATES lpopp-rosenberg@fzlz.com,bsolomon@fzlz.com
Submission	Motion to Strike
Filer's Name	Laura Popp-Rosenberg
Filer's e-mail	l_popp@yahoo.com
Signature	/Laura Popp-Rosenberg/
Date	08/06/2009
Attachments	Motion to Strike Evidence (F0496608).PDF (9 pages)(378198 bytes)

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

-----X		
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 MOTION TO STRIKE CERTAIN EVIDENCE

Pursuant to Trademark Rule of Practice 2.127, 37 C.F.R. § 2.127, Opposer/Petitioner Dr Pepper/Seven Up, Inc. (“Opposer”) hereby moves to strike certain evidence sought to be introduced in these consolidated proceedings by Applicant/Registrant Krush Global Limited (“Applicant”) on the grounds that such evidence does not confirm to the requirements of Trademark Rule of Practice 2.122, 37 C.F.R. § 2.122.

STATEMENT OF FACTS

During its testimony period in these consolidated proceedings, Applicant served Opposer with (i) the Trial Declaration of William C. Wright (“First Wright Trial Declaration”), dated July 15, 2009; (ii) the Trial Declaration of James Learmond (“Learmond Trial Declaration”), dated July 22, 2009;¹ (iii) Applicant/Registrant’s Notice of Reliance on Printed Publications and Office Records (“Notice of Reliance”), dated July 29, 2009; (iv) Applicant/Registrant’s Confidential Notice of Reliance on Discovery Responses, Printed Publications and Office Records (“Confidential Notice of Reliance”), dated July 29, 2009;² (v) the Trial Declaration on Cross-

¹ The parties stipulated that the direct testimony of its witnesses would be entered by declaration rather than through oral deposition. The Trial Declarations of William C. Wright and James Learmond are covered by this stipulation.

² Although the Confidential Notice of Reliance is entitled “Applicant/Registrant’s Confidential Notice of Reliance on Discovery Responses, Printed Publications and Office Records,” it in fact attaches only discovery responses.

Examination of William C. Wright (“Wright Cross-Examination Declaration”), dated July 30, 2009;³ and (vi) the Supplemental Trial Declaration of William C. Wright (“Supplemental Wright Trial Declaration”), dated July 30, 2009.⁴ Except for the Confidential Notice of Reliance and the Wright Cross-Examination Declaration, each of Applicant’s submissions in part fails to conform to the applicable rules.

1. First Wright Trial Declaration and Supplemental Wright Trial Declaration

The First Wright Trial Declaration and the Supplemental Wright Trial Declaration both seek to introduce the same documents into evidence, as follows:

<u>Exhibit</u>	<u>Description per First and Supplemental Wright Trial Declarations</u>
1	“[A]rticle[] downloaded from the Internet on December 8, 2008”
2	“[A]rticle[] downloaded from the Internet on December 8, 2008”
3	“[P]ortions of a pdf document downloaded from Opposer’s website [drpeppersnapplegroup.com] in December 2008”
4	“[P]age from Opposer’s website downloaded from the Internet on December 9, 2008”
5	“[P]ages downloaded from Opposer’s website on December 9, 2008”
6	“[P]ortions of a pdf document downloaded from Opposer’s website [drpeppersnapplegroup.com] in December 2008”
7	“[P]age downloaded from Opposer’s website in December, 2008”
8	“[P]age downloaded from Opposer’s website on December 9, 2008”
9	“[T]rue and correct copies of sample images downloaded from the Internet in December 2008”
10	“[E]vidence I downloaded from the Internet (home page of crush29.com)”

³ In lieu of an oral cross-examination, the parties stipulated that Mr. Wright’s cross-examination testimony would be submitted by declaration.

⁴ The parties stipulated that if the Wright Cross-Examination Declaration were not accepted by the Board, then the First Wright Trial Declaration would be stricken from the record. The Supplemental Wright Trial Declaration was submitted solely to replace the First Wright Trial Declaration in the event the latter is stricken from the record.

Exhibit Description per First and Supplemental Wright Trial Declarations

11 “[C]opy of the U.S. Registration for 3,269,628”

2. Learmond Trial Declaration

The Learmond Trial Declaration, *inter alia*, seeks to introduce as evidence the following documents:

Exhibit Description per Learmond Trial Declaration

- 1 “[A]rticle from 1999 on the architectural design of CRUSSH restaurants”
- 2 “[P]rint-out from the U.K. Trademark Office showing the registration information” for a U.K. CRUSSH logo registration
- 3 “[E]xample dictionary definitions”
- 4 “[E]xample dictionary definitions”
- 5 “[A]rticle discussing CRUSSH restaurants”
- 6 Examples of “crush” drink recipes
- 7 “[E]xamples of references to the ‘crush blender’ category”
- 8 “[E]xamples of references to . . . the Black & Decker Crush Master”

3. Notice of Reliance

The Notice of Reliance seeks to introduce the same exhibits offered with the Wright Declarations, numbered as Exhibit DX003 through DX013, as well as the following documents:

Exhibit Description per Notice of Reliance

PX 201 “All documents produced by Applicant in this proceeding”

n/a “All documents produced by Opposer/Petitioner in this proceeding”

ARGUMENT

By this motion, Opposer moves to strike certain of the above-referenced exhibits as not properly entered into evidence under the applicable rules.⁵

1. Exhibits 1 through 10 of the First Wright Trial Declaration Have Not Been Properly Authenticated and Should Be Stricken

According to the First Wright Trial Declaration, the first nine exhibits to the declaration are printouts from the Internet. Because such materials are not self-authenticating, *see* TBMP § 704.08 at 700-70, they can be admitted into evidence only if they are properly authenticated through the testimony of a witness with knowledge. *Id.* However, the First Wright Trial Declaration does not properly authenticate these documents. In his declaration, Mr. Wright does not attest that he personally visited the websites at issue and made the printouts. Without such information verifying the printouts are true and accurate copies of the materials available on the websites at issue, the printouts have not been properly authenticated. *See id.* (Internet printouts require testimony of person who can “clearly and properly authenticate and identify the materials.”)

In addition, the First Wright Trial Declaration does not identify the specific source url for Exhibits 1 through 10. Without this information, the materials have not been properly authenticated. *Id.* (authentication of Internet printouts requires, among other things, identification of the source of the materials). This omission is particularly egregious with respect to Exhibits 3, 6 and 7, for which the printouts do not provide the location url. In addition, for at least one of the exhibits – Exhibit 10 – neither Mr. Wright’s testimony nor the printout itself identifies the date the printout was made, information which is also required for proper

⁵ Opposer does not raise at this point any objections to any of the referenced exhibits on substantive grounds, such as relevance and hearsay, which objections it will raise in its forthcoming trial brief. Trademark Trial and Appeal Board Manual of Procedure (“TBMP”), § 707.02(c).

authentication of transitory Internet materials. *Id.* (authentication of Internet printouts requires, among other things, identification of the date of the materials).

Because Exhibits 1 through 10 of the First Wright Trial Declaration must be stricken for lack of proper authentication, all paragraphs of the Declaration referencing Exhibits 1 through 10 (namely, paragraphs 2-11) must also be stricken.

2. Exhibits 1 through 10 of the Supplemental Wright Trial Declaration Have Not Been Properly Authenticated and Should Be Stricken

As explained above, *see* Statement of Facts Section 1, the First Wright Trial Declaration and the Supplemental Wright Trial Declaration both seek to introduce into evidence the same exhibits and use the same identifying language. Therefore, for the same reasons that Exhibits 1 through 10 of the First Wright Trial Declaration should be stricken, *see* Argument Section 1 *supra*, so too should Exhibits 1 through 10 of the Supplemental Wright Trial Declaration.

3. Exhibits DX003 through DX013 of the Notice of Reliance Should Be Stricken

Exhibits DX003 through DX012 to Applicant's Notice of Reliance are printouts from the Internet identical to the exhibits submitted with the First and Supplemental Wright Trial Declarations. However, the fact that the exhibits are sought to be introduced by Notice of Reliance rather than by testimony does not lessen the requirement that they be authenticated. Indeed, Trademark Rule of Practice 2.122(e) specifically requires that any publications submitted by Notice of Reliance be authenticated.

Moreover, while Trademark Rule of Practice 2.122(e) provides that certain publications are self-authenticating and therefore may be entered into evidence by notice of reliance, Internet printouts do not fall within this rule. *See* TBMP § 704.08 at 700-70 (“The element of self-authentication cannot be presumed to be capable of being satisfied by information obtained and printed out from the Internet.”). Thus, Exhibits DX003 through DX012 have not been properly

submitted by Applicant's Notice of Reliance, *see Plyboo Am. Inc. v. Smith & Fong Co.*, 51 U.S.P.Q.2d 1633, 1634 n.3 (T.T.A.B. 1999), and should be stricken.

Even if such Internet materials could be made of record through notice of reliance, they would have to be stricken due to Applicant's failure to indicate the relevance of the proffered materials to the case at hand, as required by Trademark Rule of Practice 2.122(e). *See Weyerhaeuser Co. v. Katz*, 24 U.S.P.Q.2d 1230, 1253 (T.T.A.B. 1992).

Likewise, Exhibit DX013, which consists of a record of a third party trademark registration, must also be stricken for Applicant's failure to indicate the registration's relevance or significance. *See* TBMP § 704.03(b)(1)(b) at 700-52-53 ("A party that wishes to make a third-party registration of record in a Board inter partes proceeding may do so by filing, during its testimony period, a plain copy of the registration together with a notice of reliance thereon specifying the registration *and indicating generally its relevance.*") (emphasis added).

4. Exhibits 3, 4, 6, 7 and 8 of the Learmond Declaration Should Be Stricken as Not Properly Authenticated

Exhibits 3, 4, 6, 7 and 8 of the Learmond Trial Declaration purport to be printouts from the Internet. However, nowhere in the declaration does Mr. Learmond suggest that he made the printouts themselves, or even visited the websites at issue to see whether the exhibits were accurate representations of the materials on those sites. And at his deposition, Mr. Learmond confirmed that he had not taken any such action to verify the authenticity of the documents. Moreover, even if Mr. Learmond could verify the accuracy of the printouts, Mr. Learmond did not in his declaration identify the source of any of the printouts, information which is also required for proper authentication of Internet printouts. *See* TBMP § 704.08 at 700-70. In addition, with respect to Exhibits 3, 4, 6 and 7, neither Mr. Learmond's testimony nor the documents comprising the exhibits themselves indicate the date of the Internet printouts. *See id.*

(noting that date information is required for Internet printouts). Since these exhibits were not properly authenticated, they must be stricken.

Because Exhibits 3, 4, 6, 7 and 8 of the Learmond Trial Declaration must be stricken for lack of proper authentication, all paragraphs of the Declaration referencing those exhibits (namely, paragraphs 17-21) must also be stricken.

5. Applicant Cannot Be Permitted to Rely on Opposer's Produced Documents Submitted Only By Notice of Reliance

Through paragraph 12 of the Notice of Reliance, Applicant proposes to rely on “[a]ll documents produced by Opposer/Petitioner in this proceeding number DPSU 000001 through DPSU 002324.” However, Applicant does not attach *any* of these documents to its Notice of Reliance.

Opposer does not have an objection to Applicant using a Notice of Reliance to indicate that it intends to rely on Opposer's produced documents since the parties stipulated that produced documents are made of record in order to avoid the authentication procedures set forth in TBMP 704.11(1). However, Applicant cannot rely on documents that it has not actually *physically* entered into evidence in the proceedings. Otherwise, how will the Board know what the evidence is? If Applicant in its trial brief refers to one of Opposer's produced documents by production number, the Board will have no way of knowing what that documents consists of and no way of verifying whether Opposer's characterization of that document is accurate.

Accordingly, Opposer must be prohibited from relying on any of Opposer's produced documents that it attempted to make of record by Notice of Reliance alone.⁶

⁶ Certain of Opposer's produced documents have been made part of the record by other means, such as by through Opposer's witnesses' declarations or during Applicant's oral cross-examination of Opposer's witness.

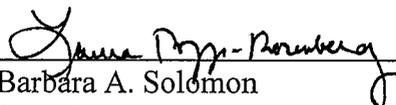
CONCLUSION

In sum, Opposer requests that Exhibits 1 through 10 of the First Wright Trial Declaration and the corresponding paragraphs 2 through 11 of the First Wright Trial Declaration be stricken; that Exhibits 1 through 10 of the Supplemental Wright Trial Declaration be stricken; that Exhibits DX003 through DX012 of the Notice of Reliance be stricken, along with the documents referred to in paragraph 12 thereof; and that Exhibits 3, 4, 6, 7 and 8 of the Learmond Trial Declaration and the corresponding paragraphs 17 through 21 of the Learmond Trial Declaration be stricken, all as not properly introduced into evidence under the standards set forth in the applicable Trademark Rules of Practice.

Respectfully submitted,

Dated: New York, New York
August 6, 2009

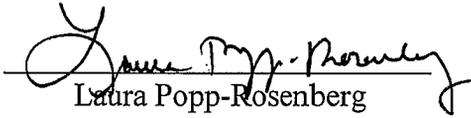
FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: 
Barbara A. Solomon
Laura Popp-Rosenberg
866 United Nations Plaza
New York, New York 10017
Tel: (212) 813-5900
Email: bsolomon@frosszelnick.com
lpopp-rosenberg@frosszelnick.com

*Attorneys for Opposer/Petitioner Dr Pepper/
Seven Up, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Opposer/Petitioner's Motion to Strike Certain Evidence to be served by prepaid, First Class mail on Applicant/Registrant's attorney, Jason M. Drangel, Esq., Epstein Drangel Bazerman & James LLP, 60 East 42nd Street, Suite 820, New York, New York 10165, this 6th day of August, 2009.


Laura Popp-Rosenberg