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

Proceeding	91180742
Party	Defendant Krush Global Limited
Correspondence Address	William C. Wright Epstein Drangel Bazerman & James, LLP 60 East 42nd Street, Suite 820 New York, NY 10165 UNITED STATES wwright@ipcounselors.com,jdrangel@ipcounselors.com
Submission	Opposition/Response to Motion
Filer's Name	William C. Wright
Filer's e-mail	mail@ipcounselors.com
Signature	/William C. Wright/
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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.	:	
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Opposer/Petitioner,	:	
	:	
v.	:	Consolidated Proceedings
	:	Opposition No. 91180742
	:	Cancellation No. 92048446
KRUSH GLOBAL LIMITED,	:	
	:	
Applicant/Registrant	:	
	:	
-----X	:	

RESPONSE TO OPPOSER’S MOTION TO STRIKE CERTAIN EVIDENCE

Opposer/Petitioner filed a motion to strike certain evidence made of record by Applicant during Applicant’s testimony period. As Opposer has indicated, the parties stipulated that the direct testimony of each party’s testimony witnesses and accompanying exhibits would be entered in the record by declaration rather than oral deposition during each testimony period. Applicant submitted the Trial declarations of William C. Wright and James Learmond pursuant to this stipulation.

Each declaration contained a limited number of exhibits (eleven (11) and eight (8) respectively). The declarations and the exhibits were identical to the declarations and exhibits produced in connection with Applicant’s response to Opposer’s motion for summary judgment. Opposer did not object to the exhibits during the summary judgment motion and should not be allowed to do so now.

Nevertheless, Opposer now seeks to strike ten (10) of the eleven (11) exhibits attached to the Wright Trial Declarations and five (5) of eight (8) exhibits accompanying the Learmond Trial Declaration. Opposer also seeks to strike eleven (11) of the exhibits

which accompany Applicant's Notice of reliance. Each objection is discussed directly below. However, to summarize, none of the documents should be stricken from the record.

Wright Trial Declarations and Exhibits

The Wright Trial Declaration and Supplemental Wright Trial Declarations were submitted primarily for entering the exhibits in the record during Applicant's testimony period since the parties agreed that no direct testimony depositions would be taken by either party. Six (6) of the ten (10) documents that Opposer tries to strike from the Wright Declaration are documents obtained from Opposer's own website: drpeppersnapple.com (*See, Wright Trial Declaration, Exhibit Nos. 3 through 8*). Opposer does not challenge the authenticity of the documents or that the documents do not originate from Opposer's website.

As indicated in footnote 2 of Opposer's Notice of Allowance, "the parties have agreed that all produced documents and things are made of record for the proceedings, so that the parties can avoid the authentication procedure set forth in Trademark Board manual of procedure Section 704.11(1)." Accordingly, Opposer acknowledges that the documents are authentic. Furthermore, each document should have been produced in response to a document request from Plaintiff, namely Request Nos. 6, 10, 12, 19. Since Plaintiff failed to produce the documents which were later downloaded from Opposer's website and were responsive to discovery requests but never produced, Opposer should not now be allowed to prevent the entry of the documents in the record. *Carefirst of Md., Inc. v. FirstHealth of the Carolinas, Inc.*, 77 U.S.P.Q.2d 1492 (TTAB 2005) ("Because it

is unclear whether this document should have been provided by way of a supplemental discovery response when it was later discovered, the item will not be stricken.”)

As for the exhibits, Exhibits 3 and 7 to the Wright Trial Declaration were pdf documents downloaded from Opposer’s own drpeppersnapple.com website in December, 2008. Opposer attempts to argue that the documents should not be allowed because they are downloaded from the internet and are not self-authenticating. The documents are not your standard non-self authenticating documents associated with internet webpages. Exhibits 3 and 7 are pdf downloads from Opposer’s own drpeppersnapple.com website. The documents are the equivalent of “printed publications” – since while downloaded from the website, they are pdf documents that can not be revised. As indicated on the cover of each document, the pdf documents were distributed by Opposer as hand-outs or shown as power point presentations to investors at a shareholder meeting in New York and an industry conference in Boston. The links to the pdf documents are still there today. The documents are no different from newspapers published on the internet that mirror a printed newspaper. *Sea Island Co. v. Kroehler Corp.*, 2002 TTAB LEXIS 541, fn. 8 (TTAB 2002) (“some websites may be merely Internet versions of printed publications, such as daily newspapers. To the extent that these websites mirror the printed publication and are not subject to changes in subject matter without notice, such excerpts would be analogous to print publications and amenable to submission by notice of reliance.”)

Likewise, Exhibits 4 through 6 and 8 to the Wright Declaration, were downloaded from Opposer’s drpeppersnapple.com website. The Wright Trial Declaration indicates that the documents were each downloaded from Opposer’s website and the date

they were downloaded. Also, each document (all except for the press release (which itself is dated and time stamped) contains a website link on the bottom of the page with the link and date of download. The pages are all still at the same location and identical. The documents are being submitted as exhibits to an agreed upon trial declaration. The parties expressly agreed that this would be the appropriate method to make documents of record. Opposer has done so for a few hundred documents, including a number of downloaded pages from the Internet and Applicant did not object to any. Each document should have been produced in response to discovery demands (Request No. 6, 10, 12, 19), they are relevant, and Opposer does not challenge their authenticity nor can they.

As for Exhibit 1 -2, and 9-10, each document bears the web address from where the documents were downloaded from and the date. Exhibit 1 is an encyclopedia entry and Exhibit 2 is a Wikipedia entry. The documents are self-authenticating and can be examined by the Board at any time by following the identified link on the bottom of the exhibits. *Sea Island Co. v. Kroehler Corp.*, 2002 TTAB LEXIS 541, fn. 8 (TTAB 2002) (“While a publication on CD-ROM is not a “printed” publication because it may not also appear on paper, it may be self-authenticating if it is analogous to a printed publication by being an identifiable version of the publication that is only subject to change by the issuance of a new version that is identifiably different from the previous version (e.g., the 2000 edition of an encyclopedia versus the 2005 edition of the same encyclopedia)”

Exhibits DX003 through DX013 of Applicant’s Notice of Reliance

Applicant submitted the same documents that accompany the Trial Declarations of William Wright for belt and suspender purposes. Applicant anticipated that Opposer

might object to the Trial declaration exhibits although not entitled to do so. Accordingly, the same documents were submitted by notice of allowance. For the same reason identified above, the documents should be allowed now.

Opposer also moved to strike the notice of reliance documents because Applicant does not indicate the general relevance of the documents. This is simply not true. Since the document at issue are duplicative of the documents that were produced per the Wright Trial declaration and the Wright Trial declaration indicates why the document were produced, the relevance is known to Opposer and the Board. *McDonald's Corp. v. Zbell B.V.*, 2002 TTAB LEXIS 450 (TTAB 2002) (“Although website materials are not admissible by notice of reliance as explained above, these materials are of record because they have been introduced into evidence through the testimony of Mr. Bergold.”)

Learmond Exhibits 3,4,6,7 & 8

Exhibits 3, 4, 6, 7 & 8 to the Learmond Declaration were downloaded from the Internet. All the documents were produced during discovery and pursuant to an agreement between the parties, all produced documents are considered to be authentic. All five (5) documents are submitted to provide common definitions for the term “crush.” The Board can take judicial notice of the definitions as submitted and also from any other dictionary or encyclopedia sources. The definitions will be the same regardless of source. Nevertheless, Mr. Learmond was cross examined on these documents and they are of record in connection with his cross-examination testimony.

Opposer's Produced Documents

As discussed above and confirmed by Opposer (*see, Opposer's Motion to Strike, Pg. 7, Sec. 5*), the parties have agreed that all documents produced in this action are authentic for the purposes of this matter. Opposer's objection is simply that Applicant did not make all of the 2,324 documents of record in this matter. Given the breath of documents, Applicant was simply trying to save bandwidth. To the extent the documents are required in connection with the Applicant's Trial Brief, they would be produced. Each document is appropriately Bates stamped and can be confirmed as authentic by Opposer at any time. If this is not acceptable to the Board, we would be happy to make the documents (most of which are stamped confidential) of record immediately. *PC Club v. Enpower Servs., Inc.*, 2003 TTAB LEXIS 599 (TTAB 2003) ("Opposer responds that 'many of these documents were produced by Applicant. It is disingenuous for Applicant to now argue they are inadmissible.' The documents do appear to have been produced in response to opposer's interrogatory and applicant does not allege anything to the contrary. Therefore, we will consider these exhibits. See 37 CFR 2.120(j)(3)(i); *M-Tek Inc. CVP Systems Inc.*, 17 USPQ2d 1070, 1073 (TTAB 1990)."); *Kohler Co. v. Baldwin Hardware Corp.*, 82 U.S.P.Q.2d 1100 (TTAB 2007) ("In responding to petitioner's interrogatories; that is, respondent provided documents in response to certain of petitioner's interrogatories. Further, inasmuch as respondent admitted that the documents it produced in response to petitioner's discovery requests were true and correct copies of authentic documents, they are admissible by way of a notice of reliance. Trademark Rule 2.120(j)(3)(i).")

Respectfully submitted,

**EPSTEIN DRANGEL BAZERMAN
& JAMES, LLP**
Attorneys for Registrant

Dated: August 20, 2009

By: _____

Jason M. Drangel
Robert L. Epstein
William C. Wright
60 East 42nd Street, Suite 820
New York, New York 10165
Tel: (212) 292-5390
Fax: (212) 292-5391

Our Ref.: 2422-003

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **RESPONSE TO OPPOSER'S MOTION TO STRIKE CERTAIN EVIDENCE** was served by First Class Mail, with sufficient postage prepaid, on this 20th day of August, 2009, upon Petitioner's attorney:

Barbara A. Solomon
Laura Popp-Rosenberg
FROSS ZELNICK
866 United Nations Plaza
New York, NY 10017

By: _____

William C. Wright

CERTIFICATE OF MAILING

I hereby certify that the foregoing **RESPONSE TO OPPOSER'S MOTION TO STRIKE CERTAIN EVIDENCE** is being filed electronically with the T.T.A.B., on August 20, 2009.

By: _____

William C. Wright