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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., :
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 Opposer/Petitioner, : Consolidated Proceedings
 : Opposition No. 91180742
 - against - : Cancellation No. 92048446
 :
 :
 KRUSH GLOBAL LIMITED, :
 :
 :
 Applicant/Registrant. :
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**OPPOSER/PETITIONER’S REPLY BRIEF
IN FURTHER SUPPORT OF MOTION TO STRIKE CERTAIN EVIDENCE**

Opposer/Petitioner Dr Pepper/Seven Up, Inc. (“Opposer”) submits this reply brief pursuant to Trademark Rule of Practice 2.127(a) in further support of its Motion to Strike Certain Evidence.

In its moving brief, Opposer requested the Board strike certain evidence sought to be introduced in these consolidated proceedings by Applicant/Registrant Krush Global Limited (“Applicant”) on the grounds that such evidence was not properly authenticated (among other reasons) and thus does not conform to the applicable Trademark Rules of Practice or the Federal Rules of Evidence.¹ In response to Opposer’s motion to strike, Applicant submits a number of excuses for its failure to meet its evidentiary burden, none of which overcome Opposer’s objections. Accordingly, for the reasons set forth in Opposer’s moving brief and herein, Opposer requests that the relief sought in Opposer/Petitioner’s Motion to Strike Certain Evidence

¹ Pursuant to a stipulation between the parties filed with the Board on September 3, 2009, Opposer withdraws its objections on the basis of authenticity to Exhibits 3 through 8 of the Trial Declaration of William C. Wright (“First Wright Trial Declaration) and to Exhibits 3 through 8 of the Supplemental Trial Declaration of William C. Wright (“Supplemental Wright Trial Declaration”). Opposer maintains its objections on the basis of authenticity to Exhibits 1, 2, 9 and 10 of the First Wright Trial Declaration and the Supplemental Wright Trial Declaration.

("Moving Br.") be granted (except with respect to the withdrawn objections set forth in footnote 1, *supra*).

ARGUMENT

1. **Exhibits 1, 2, 9 and 10 of the First Wright Trial Declaration Have Not Been Properly Authenticated and Should Be Stricken**

In its moving brief, Opposer requested the Board strike Exhibits 1, 2, 9 and 10 of the First Wright Trial Declaration on the basis that Applicant failed to properly authenticate the exhibits. Tellingly, in response to Opposer's objection, Applicant does not try to argue that the documents at issue have, in fact, been properly authenticated through Mr. Wright's declaration. Instead, Applicant asserts a number of baseless theories as to why, despite Mr. Wright's failure to properly authenticate the documents, the Board should nonetheless deem the documents authenticated. Opposer addresses these theories in turn.

A. Opposer Has Not Waived Its Objections

Applicant first argues that because Opposer did not object to Mr. Wright's exhibits when Applicant submitted them in connection with its opposition to Opposer's motion for summary judgment, Opposer cannot object to them now. (Applicant's Br. at 1.) This argument must fail. Opposer's decision not to object to exhibits submitted by Applicant in response to Opposer's summary judgment motion has no bearing on the present question as to whether the exhibits at issue have been properly authenticated for purposes of trial. Tellingly, Applicant cites no rule or case law for the proposition that it asserts. In fact, the rules are clear that the submission of evidence in connection with a summary judgment motion has no bearing on the submission of evidence at trial. *See* Trademark Board Manual of Procedure ("TBMP") § 528.05(a) at 500-109 ("Evidence submitted in connection with a motion for summary judgment is ordinarily of record only for purposes of that motion. If the case goes to trial, the summary judgment evidence may

not form part of the evidentiary record to be considered at final hearing *unless it is properly introduced in evidence during the appropriate testimony period.*") (emphasis added).

Because the exhibits have not been properly introduced during Applicant's testimony period, they cannot be relied upon and should be stricken.

B. Wikipedia Entries Are Far From Self-Authenticating

Applicant contends that printouts from Wikipedia and an online encyclopedia site (Exhibits 1 and 2 to the First Wright Trial Declaration) are self-authenticating. (Applicant's Br. at 4.) Alternatively, Applicant contends that the Board can take judicial notice of them. (*Id.*)

Applicant's only support for the proposition that such Internet printouts are self-authenticating is a citation to a case holding that material on certain CD-ROMs, though not technically a "printed publication," nonetheless may fall under the rule providing that printed publications are self-authenticating because the CD-ROMs at issue presented "an identifiable version of a 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)." (*See* Applicant's Br. at 4, citing *Sea Island Co. v. Kroehler Corp.*, Opp. No. 91120712 and 91121447, <http://des.uspto.gov/Foia/ReterivePdf?flNm=91120712-03-31-2005&system=TTABIS>, available at 2005 WL 847431 (T.T.A.B. March 31, 2005)²). But the online encyclopedia and Wikipedia entries that Applicant seeks to submit into evidence are nothing like CD-ROMs that have an identifiable and non-mutable form. In fact, Wikipedia is repeatedly criticized for being subject to constant change by almost anyone. *See, e.g., Monaco Coach Corp. v. Mitsubishi Motors North Am., Inc.*, Canc. No. 92041358, <http://ttabvue.uspto.gov/ttabvue/v?pno=92041358&pty=CAN&eno=150>, available at 2008 WL

² Applicant mistakenly cites this decision as 2002 TTAB LEXIS 541 (T.T.A.B. 2002), an earlier decision in the same case.

3917511, *16 (T.T.A.B. Aug. 11, 2008) (“[T]here are inherent problems regarding the reliability of Wikipedia entries because Wikipedia is a collaborative website that permits anyone to edit the entries.”). Applicant also has not shown that its alleged Internet encyclopedia reference is not subject to the same problems as Wikipedia or that the encyclopedia reference otherwise bears the hallmarks of hard copy (or even CD-ROM) encyclopedias. Accordingly, such documents are not self-authenticating, and Applicant’s failure to properly authenticate them is not excusable. *Cf. Zabars & Co., Inc. v. Zabas Grill, LLC*, Opp. No. 91163191, <http://des.uspto.gov/Foia/ReterivePdf?flNm=91163191-07-10-2008&system=TTABIS>, available at 2008 WL 2817087, *3 fn.8 (T.T.A.B. July 10, 2008).

Applicant also cannot request the Board to take judicial notice of such materials. The Board has repeatedly made clear that it does not take judicial notice of Internet-based materials, including Wikipedia and encyclopedia references. *See Embotelladora Aga del Pacifico, SA de CV v. Gonzalez*, Opp. No. 91175952, <http://des.uspto.gov/Foia/ReterivePdf?flNm=91175952-12-03-2008&system=TTABIS>, available at 2008 WL 5246394 (T.T.A.B. Dec. 3, 2008) (“we will not take judicial notice of evidence from Wikipedia or other sources which are available only online”) (citing *In re CyberFinancial.Net, Inc.*, 65 U.S.P.Q.2d 1789, 1791 n.3 (T.T.A.B. 2002)).

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

As explained in Opposer’s moving brief, Exhibits DX003 through DX012 of Applicant/Registrant’s Notice of Reliance on Printed Publications and Office Records (“Notice of Reliance”) (which mirror Exhibits 1 through 10 of the First Wright Trial Declaration and the Supplemental Wright Trial Declaration) should be stricken because they have not been properly authenticated and/or because Applicant has not indicated the relevance of the materials as it is required to do under Trademark Rule of Practice 2.122(e). (Moving Br. at 5-6.)

In response to Opposer's objections regarding authenticity, Applicant merely relies on the same arguments addressed above. (Applicant's Br. at 5.)

In response to Opposer's objections regarding Applicant's failure to indicate the relevance of the documents, Applicant contends that because the relevance of the documents was explained in the First Wright Trial Declaration, the explanation need not be repeated in the Notice of Reliance. (*Id.*) However, Trademark Rule of Practice 2.122(e) does not permit a party to "borrow" relevance explanations from another submission. The rule is clear that the Notice of Reliance itself must explain the document's relevance. 37 C.F.R. §2.122(e) ("The notice [of reliance] shall . . . indicate generally the relevance of the material being offered.") Since Applicant's Notice of Reliance does not include the required explanations, it does not comport with the rules and the exhibits must be stricken.

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

Applicant's response to Opposer's motion to strike Exhibits 3, 4, 6, 7 and 8 of the Trial Declaration of James Learmond ("Learmond Trial Declaration") on the grounds of lack of authentication echo the arguments made in connection with the Wright exhibits. Again, Applicant argues that Opposer has waived its objections because Opposer did not object to the same exhibits when Applicant submitted them in connection with its opposition to Opposer's motion for summary judgment. (Applicant's Brief at 1.) For the reasons set forth in Section 1.A., *supra*, this argument has no merit.

Applicant's further arguments – first, that the documents were produced during discovery and therefore are deemed authentic by virtue of the parties' agreement concerning produced documents, and, second, that Mr. Learmond authenticated the documents during his oral cross-examination (Applicant's Br. at 5) – likewise have no merit.

Although Applicant did produce the documents at issue in production, the parties' agreement concerning the authenticity of produced documents applied only to the authenticity of the *adversary's* documents, not to the authenticity of a party's *own* documents. Specifically, the parties' agreement provided that "all produced documents 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)." The referenced Section 704.11(1) provides:

A party that has obtained documents under Fed. R. Civ. P. 34 may serve on its adversary requests for admission of authenticity of the documents, and then, during its testimony period, file a notice of reliance, under 37 C.F.R. § 2. 120(j)(3)(i), on the requests for admission, the exhibits thereto, and its adversary's admissions . . .

Since Section 704.11(1) of the TBMP is limited to a method of authenticating an *adversary's* produced documents, the parties' agreement herein that produced documents are deemed authentic for purposes of the proceeding can apply only to an adversary's produced documents, not to a party's own produced documents. Therefore, Applicant cannot rely upon the parties' agreement as a supposed means of authenticating its own documents.

As to Applicant's reliance on Mr. Learmond's deposition testimony as a means of authenticating the documents at issue, this is severely misplaced, as Mr. Learmond actually confirmed under oath that he did not and cannot authenticate the documents. Specifically, Mr. Learmond testified that he did not print the exhibits at issue from the Internet, did not visit the websites to ascertain whether the exhibits were accurate or authentic, and likely did not even visit the websites at issue himself at any time. (*See* Exhibit 1 attached hereto, containing relevant excerpts from Mr. Learmond's deposition.)

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

In lieu of identifying which of Opposer's documents Applicant seeks to include in the record at trial, Applicant instead seeks to enter more than 2,000 pages of Opposer's produced documents into evidence *en masse* through a bare statement in its Notice of Reliance that Applicant proposes to rely upon "[a]ll documents produced by Opposer/Petitioner in this proceeding," and without attaching *any* of the documents at issue. In its response, Applicant makes no excuse for its unacceptable attempted short-cut, other than stating that it "was simply trying to save bandwidth" (Applicant's Br. at 6), and provides no cases, rules or other support that would allow Applicant to proceed in this way.³

Applicant's attempt to enter Opposer's produced documents *en masse* into the record robs Opposer of fair warning of the specific evidence Applicant intends to rely upon during the briefing stage of these proceedings, robs Opposer of its ability and right to meet such evidence during the rebuttal period, robs Opposer of the ability to address all of the record evidence in its trial brief, and will rob the Board of any ability to judge the evidence that Applicant may eventually seek to rely upon, and makes it impossible to accurately determine at trial or in any subsequent appeal precisely what is or is not in evidence in these proceedings. Applicant should not be permitted in this manner to thwart the careful procedure under which Board trials are conducted.

CONCLUSION

In sum, for the reasons stated above in Opposer's moving brief, Opposer requests that Exhibits 1, 2, 9 and 10 of the First Wright Trial Declaration and the corresponding paragraphs 2,

³ The cases that Applicant relies upon – both of which refer to the admissibility of documents specified in response to interrogatories (*see* Applicant's Br. at 6) which is not the case here – have no bearing on the issue.

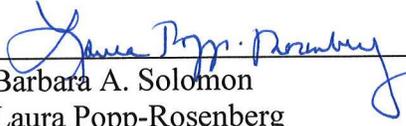
10 and 11 of the First Wright Trial Declaration be stricken; that Exhibits 1 through 10 of the Supplemental Wright Trial Declaration be stricken; that Exhibits DX003 through DX012 of the Notice of Reliance be stricken, along with the documents referred to in paragraph 12 thereof; and that Exhibits 3, 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
September 3, 2009

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EXHIBIT 1

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

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

TELEPHONIC DEPOSITION OF JAMES PETER NEEDHAM

LEARMOND

VOLUME I

Friday, July 31, 2009

AT:

Taken at: 1:10 p.m. (U.K. time)

Newland House
 Newland
 Gloucestershire
 GL16 8NN
 United Kingdom

Court Reporter:

Georgina Ford, MBIVR
 Accredited Real-time Reporter

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A P P E A R A N C E S

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1 Reporter could pull out the document that has the
2 cover sheet A on it. Let's go off the record for
3 just one second.

4 (Off the record.)

5 BY MS. POPP-ROSENBERG

6 Q. We can go back on the record. I'm
7 not going to mark this as an exhibit since it's
8 already been entered in the proceeding. Mr.
9 Learmond, if you can just look through it, if you
10 want to look through the document, but let me know
11 when you are ready for me to ask questions about
12 the document.

13 A. Okay.

14 Q. Could you identify what's been
15 handed to you just so I make sure we're both
16 looking at same thing?

17 A. It says "Trial declaration of James
18 Learmond."

19 Q. If you could slip to, I guess --
20 the second page that is numbered 5 that has
21 a signature on it.

22 A. Yes.

23 Q. Is that your signature?

24 A. Yes, it is.

25 Q. Did you yourself draft this trial

1 declaration?

2 A. No.

3 Q. Do you know who did?

4 A. I don't, no. I assume Jason.

5 Q. And there's a number of exhibits
6 that are attached to the declaration. Did you put
7 those exhibits together?

8 A. No.

9 Q. Do you know who put those together?

10 A. No. My counsel -- well, my
11 counsel.

12 Q. I assume that you are familiar with
13 the statement and the exhibits in the declaration
14 and, as you sit here today, are there any
15 statements in the declaration that you believe to
16 be inaccurate?

17 A. No.

18 Q. So are there any statements in the
19 declaration that you would like to change for any
20 reason?

21 A. No.

22 Q. And are there any statements in the
23 declaration that you'd like to clarify at this
24 point?

25 A. No.

1 If there was another chain of juice bars
2 called "Crush" we would not do it, no. I think
3 that would be very unlikely. If there was
4 a single restaurant called "Crush" somewhere
5 geographically far, far away we might have done
6 but we didn't have that knowledge at the time.
7 There was nothing called CRUSSH. We were trying
8 to build a very distinct separate brand.

9 Q. But if there were other juice bars
10 with "Crush" with a single S you would not have
11 adopted CRUSSH with the double S --

12 A. I don't think so, no. I personally
13 wouldn't but, I mean, it would seem a silly thing
14 to do but there you go.

15 Q. Sorry, I didn't hear that end of
16 that. It would seem ...?

17 A. It would seem a silly thing to do
18 if there was already an existing load of juice
19 bars called "Crush" to call another one "Crussh".

20 Q. Now I would like to just talk about
21 some of the exhibits to your declaration. I think
22 you said before that you didn't put together the
23 exhibits. Is that right?

24 A. Yes, that's right.

25 Q. If you answered, we didn't hear

1 you.

2 A. Sorry. That's right, yes.

3 Q. So let us look if you would, if you
4 could look with me at the exhibit attached to your
5 declaration marked exhibit 3. It is headed at the
6 top:

7 "Crush -- definitions from
8 Dictionary.com."

9 Can you identify exhibit 3 for me?

10 A. It says a dictionary of
11 definitions. Definitions from Dictionary.com.

12 Q. So you would say that this is a
13 printout from Dictionary.com; is that correct?

14 A. Yes. It appears to be, yes.

15 Q. Did you actually go to the
16 Dictionary.com website and print out this page?

17 A. I don't think so. I don't
18 remember. But, no, I don't think so.

19 Q. Have you ever gone to the
20 Dictionary.com website and typed in the word
21 "crush" and seen what's come up?

22 A. I don't know. I don't know.
23 I can't remember whether I did or Jason did.
24 I presumably at some point put it in when all this
25 came up to see what came up.

1 Q. Do you personally know whether
2 exhibit 3 is an accurate printout, that it
3 accurately represents the information on the
4 Dictionary.com website?

5 A. I have no idea. No, I don't know.

6 Q. Let's turn to exhibit 4. Let me
7 know when you are ready.

8 A. Exhibit 4 ... yes.

9 Q. Can you just identify what's in
10 your declaration as exhibit 4?

11 A. "Definition of fruit crush by Free
12 Online Dictionary, Thesaurus and ..."
13 encyclopedia, presumably.

14 Q. And this page also appears to be an
15 Internet printout; is that correct?

16 A. Yes.

17 Q. If you answered, we didn't hear it
18 over here.

19 A. Yes.

20 Q. Did you yourself print out this
21 page that's been marked as exhibit 4 of your
22 declaration?

23 A. No, I don't think so. Again,
24 I can't remember who printed these out.

25 Q. Do you personally know whether the

1 printout that's exhibit 4 is an accurate
2 representation of the information on the Free
3 Dictionary website?

4 A. I don't know, no.

5 Q. Now, if we could skip to exhibit 6
6 of your declaration and let me know when you're
7 ready.

8 A. Yes.

9 Q. To me, these appear to be printouts
10 from several different websites. Would you agree?

11 A. Yes.

12 Q. Did you actually these print out
13 what are attached as exhibit 6 yourself?

14 A. No.

15 Q. Did you go to any of these websites
16 and confirm that the information in these
17 printouts is an accurate representation of the
18 website?

19 A. Yes, I think I went to the website,
20 yes. Sorry, I thought you were saying whether
21 I actually printed them out.

22 Q. That was my first question.

23 A. Okay. No, I didn't actually print
24 them out but I think I went to the websites and
25 looked at them, yes, to see what they said on

1 crush.

2 Q. Which websites did you go to?

3 A. Well, I assume these ones but
4 I can't specifically remember.

5 Q. Do you have a recollection that
6 you -- well, let us look at the first page that
7 you went to. Well, first of all, do you know what
8 website this is that's represented in the first
9 pages of exhibit 6?

10 A. What, the cocktail one?

11 Q. The cocktail: UK.

12 A. Yes.

13 Q. What website is it?

14 A. It says: "Cocktail: UK" at the
15 top.

16 Q. Sorry, go ahead.

17 A. It says "Cocktail: UK."

18 Q. Do you know what the website
19 address is?

20 A. No.

21 Q. Skipping to the next printout that
22 has the words Blueberry Crush on it.

23 A. So the next one.

24 Q. Yes. Well, it's the third page
25 into exhibit 6. It says Blueberry Crush.

1 A. Blueberry Crush, yes.

2 Q. Do you know what website this
3 printout is from?

4 A. I don't, no.

5 Q. Turning to the Grapefruit Crush
6 recipe, do you see that page?

7 A. Yes, I do.

8 Q. Do you know what website that's
9 from?

10 A. No, I don't.

11 Q. Turning to the following page, that
12 is a Grape Crush drink recipe. Do you know what
13 website that is from?

14 A. I don't, no.

15 Q. Let us turn now to exhibit 7 and
16 let me know when you are ready?

17 A. Yes.

18 Q. Can you tell me what exhibit 7 is?

19 A. Crush drink blenders. Blenders
20 from BizRate:

21 "Compare prices, reviews & buy --
22 price -- review."

23 Q. Would you agree that this appears
24 to be an Internet printout?

25 A. Yes, it is I think.

1 Q. Did you make this Internet printout
2 yourself?

3 A. No.

4 Q. We didn't hear you if you answered.

5 A. Sorry. No.

6 Q. Do you personally know whether this
7 printout is an accurate representation of what's
8 on -- I don't know -- whatever website this is?

9 A. No.

10 Q. If we turn back to exhibit 3, and
11 let me know when you're ready?

12 A. Okay.

13 Q. Looking at the first page of
14 exhibit 3 -- and I think you said before these are
15 entries from the Dictionary.com website -- the
16 first one that I see says "Dictionary.com
17 Unabridged". Do you see that on first page of
18 exhibit 3?

19 A. At the top?

20 Q. Kind of one-third the way down the
21 page where it says "Dictionary.com Unabridged."

22 A. Yes.

23 Q. I assume you're familiar with
24 dictionary entries. They talk about words in
25 different forms; so in this case there's "verb

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Reply Brief in Further Support of 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 3rd day of September, 2009.



Laura Popp-Rosenberg