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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.
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	Other Motions/Papers
Filer's Name	Laura Popp-Rosenberg
Filer's e-mail	lpopp-rosenberg@frosszelnick.com,bsolomon@fzlz.com
Signature	/Laura Popp-Rosenberg/
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Attachments	Statement of Evidentiary Objections (F0541229).PDF (12 pages)(755880 bytes)

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

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

**OPPOSER/PETITIONER’S STATEMENT OF OBJECTIONS
TO APPLICANT/REGISTRANT’S PROFFERED EVIDENCE**

Pursuant to Trademark Rule of Practice 2.123(k) and Trademark Trial and Appeal Board Manual of Procedure Section 801.03, Opposer/Petitioner Dr Pepper/Seven Up, Inc. (“Dr Pepper”) hereby states its objections to certain evidence sought to be introduced in these consolidated proceedings by Applicant/Registrant Krush Global Limited (“Krush Global”).

BACKGROUND

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;¹ (ii) the Trial Declaration of James Learmond (“Learmond Trial Declaration”), dated July 22, 2009; (iii) Applicant/Registrant’s Notice of Reliance on Printed Publications and Office Records (“Notice of Reliance”), dated July 29, 2009;² (iv) 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. (See Notice of Reliance on Applicant’s/Registrant’s Discovery Responses, Exh. PX205.) The Trial Declarations of William C. Wright and James Learmond are covered by this stipulation.

² Applicant also introduced Applicant/Registrant’s Confidential Notice of Reliance on Discovery Responses, Printed Publications and Office Records, dated July 29, 2009. Opposer does not object to that Notice of Reliance, which, in fact, attaches only discovery responses.

Examination of William C. Wright (“Wright Cross-Examination Declaration”), dated July 30, 2009;³ and (v) the Supplemental Trial Declaration of William C. Wright (“Supplemental Wright Trial Declaration”), dated July 30, 2009.⁴

Dr Pepper objects to certain of the evidence proffered by Krush Global. Dr Pepper previously submitted its objections to Krush Global’s evidence based on procedural deficiencies following the close of Krush Global’s testimony period. *See* Opposer/Petitioner’s Motion to Strike Certain Evidence, dated August 6, 2009 (“Motion to Strike” or “Mot. Strike”); Opposer/Petitioner’s Reply Brief in Further Support of Motion to Strike Certain Evidence, dated September 3, 2009 (“Reply Strike”). *See* TBMP § 707.02(b)(2) (procedural objections to notices of reliance “should be raised promptly, preferably by motion to strike if the defect is one that can be cured”); TBMP § 707.03 (procedural objections to deposition evidence should also be raised promptly). Despite Dr Pepper’s prompt filing of its Motion to Strike advising Krush Global of procedural deficiencies in its evidence, Krush Global made no efforts to correct those deficiencies. The motion remains pending.

Dr Pepper also objects to Krush Global’s evidence on substantive grounds, as set forth below. *See* TBMP § 707.02(c) (objections of a substantive nature to notices of reliance should be raised with or in the objecting party’s brief on the case rather than by motion to strike); TBMP § 707.03(c) (relating to substantive objections to trial testimony). For the convenience of the Board, Dr Pepper also restates below its procedural objections to Krush Global’s evidence.

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.

EVIDENTIARY OBJECTIONS

1. **First Wright Trial Declaration and Supplemental Wright Trial Declaration**

Dr Pepper’s procedural and substantive objections to the First Wright Trial Declaration are set forth in the table below:

<i>Wright Paragraph</i>	<i>Statement at Issue</i>	<i>Dr Pepper’s Evidentiary Objections</i>
2	Entire paragraph	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402.) • Hearsay, not falling within any exception. (Fed. R. Evid. 802.)
3	Entire paragraph	<ul style="list-style-type: none"> • Irrelevant, as not reflecting current data. (Fed. R. Evid. 401, 402; <i>see</i> Rebuttal Trial Declaration of Andrew D. Springate, dated August 31, 2009 (“Springate Rebuttal Decl.”), ¶¶ 6-8; <i>see R.J. Reynolds Tobacco Co. v. Am. Brands, Inc.</i>, 493 F.2d 1235, 1237-38, 181 U.S.P.Q. 459 (C.C.P.A. 1974) (likelihood of confusion assessed at time of decision) (citations omitted).)
4	Entire paragraph	<ul style="list-style-type: none"> • Irrelevant, as not reflecting current data. (Fed. R. Evid. 401, 402; <i>see</i> Springate Rebuttal Decl., ¶¶ 7-8; <i>see R.J. Reynolds Tobacco Co.</i>, 493 F.2d at 1237-38.)
5	Entire paragraph	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402.)
6	Entire paragraph	<ul style="list-style-type: none"> • Irrelevant, as not reflecting current data. (Fed. R. Evid. 401, 402; <i>see</i> Springate Rebuttal Decl. ¶ 10; <i>see R.J. Reynolds Tobacco Co.</i>, 493 F.2d at 1237-38.)

7	Entire paragraph	<ul style="list-style-type: none"> Best Evidence Rule: Witness misquotes and mischaracterizes Exhibit, which uses “Core 4” terminology having specific meaning to Dr Pepper. (Fed. R. Evid. 1002; <i>see</i> Transcript of May 28, 2009 Deposition of Andrew D. Springate (“Springate Tr.”) at 44:13 – 46:6 (explaining Dr Pepper’s use of terminology “Core 4”); Springate Rebuttal Decl., ¶ 11 (same).)
8	Entire paragraph	<ul style="list-style-type: none"> Irrelevant, as not reflecting current data. (Fed. R. Evid. 401, 402; <i>see</i> Trial Declaration of Andrew D. Springate, dated May 20, 2009 (“Springate Trial Decl.”), ¶ 22; Springate Rebuttal Decl., ¶ 12; <i>see R.J. Reynolds Tobacco Co.</i>, 493 F.2d at 1237-38.)
10	Entire paragraph	<ul style="list-style-type: none"> Lack of foundation: Krush Global has set forth no facts supporting statement that referenced brands are actually sold in the U.S. (other than CRUSH).
11	Entire paragraph	<ul style="list-style-type: none"> Lack of foundation: Exhibit does not establish actual use of CRUSH 29 mark for either restaurant services or wine.

Dr Pepper’s procedural and substantive objections to the exhibits attached to the First Wright Trial Declaration and Supplemental Wright Trial Declaration⁵ are set forth in the table below:

<i>Wright Exhibit</i>	<i>Dr Pepper’s Evidentiary Objections</i>
1	<ul style="list-style-type: none"> Failure to authenticate. (<i>See</i> Mot. Strike at 4-5; Reply Strike at 3). Irrelevant. (Fed. R. Evid. 401.) Hearsay, not falling within any exception. (Fed. R. Evid. 802.)

⁵ The First Wright Trial Declaration and the Supplemental Wright Trial Declaration both seek to introduce the same documents into evidence.

<i>Wright Exhibit</i>	<i>Dr Pepper's Evidentiary Objections</i>
2	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 4-5; Reply Strike at 3.)
3	<ul style="list-style-type: none"> • Irrelevant, as not reflecting current data. (Fed. R. Evid. 401, 402; <i>see</i> Springate Trial Decl., ¶ 22; Springate Rebuttal Decl., ¶ 12; <i>see R.J. Reynolds Tobacco Co.</i>, 493 F.2d at 1237-38.)
4	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402.)
5	<ul style="list-style-type: none"> • Irrelevant, as not reflecting current data. (Fed. R. Evid. 401, 402; <i>see</i> Springate Rebuttal Decl., ¶ 10; <i>see R.J. Reynolds Tobacco Co.</i>, 493 F.2d at 1237-38.)
6	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402; <i>see</i> Springate Tr. at 44:13 – 46:6 (explaining Dr Pepper's use of terminology "Core 4"); Springate Rebuttal Decl., ¶ 11 (same).)
7	<ul style="list-style-type: none"> • Irrelevant, as not reflecting current data. (Fed. R. Evid. 401, 402; <i>see see</i> Trial Declaration of Andrew D. Springate, dated May 20, 2009, ¶ 22; Springate Rebuttal Decl., ¶ 12; <i>see R.J. Reynolds Tobacco Co.</i>, 493 F.2d at 1237-38.)
9	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 4-5.)
10	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 4-5.)

2. Learmond Trial Declaration

Dr Pepper's procedural and substantive objections to the Learmond Trial Declaration are set forth in the table below:

<i>Learmond Paragraph</i>	<i>Statement at Issue</i>	<i>Dr Pepper's Evidentiary Objections</i>
2	Entire paragraph	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402.)
3	Entire paragraph	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402.)
5	Entire paragraph	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402.)

<i>Learmond Paragraph</i>	<i>Statement at Issue</i>	<i>Dr Pepper’s Evidentiary Objections</i>
6	“CRUSSH restaurants sell seasonal, healthy food and beverages to health conscious consumers.”	<ul style="list-style-type: none"> • Irrelevant: Application and registration at issue are not limited either to healthy food or servicing health conscious consumers. (Fed. R. Evid. 401, 402; <i>see</i> Transcript of July 31, 2009 Deposition of James Learmond (“Learmond Tr.”) at 46:17 – 47:16); <i>Octocom Sys., Inc. v. Houston Computer Svcs. Inc.</i>, 918 F.2d 937, 16 U.S.P.Q.2d 1783, 1787 (Fed. Cir. 1990) (only services identified in application are relevant).) • Lack of personal knowledge. (Fed. R. Evid. 602; <i>see</i> Learmond Tr. at 34:5-16; 41:24 – 43:7; 43:20 – 44:3.)
7	Entire paragraph	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402.)
8	Entire paragraph	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402.)
9	“Most of our customers are choosing between a coffee or a smoothie: [sic] not a smoothie or a soda.”	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402.) • Lack of personal knowledge. (Fed. R. Evid. 602; <i>see</i> Learmond Tr. at 49:22 – 50:1.)
17	“[The term ‘crush’] can mean crushed fruit or crushed ice (more commonly associated with a smoothie drink). See example dictionary definitions attached hereto as Exhibit 3 .”	<ul style="list-style-type: none"> • Best evidence rule: None of the definitions in Exhibit 3 define crush to mean “crushed fruit” or “crushed ice.” (Fed. R. Evid. 1002.)
18	“Fruit crush’ [sic] is defined as a ‘drink produced by squeezing or crushing fruit.”	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402.)
20	Entire paragraph	<ul style="list-style-type: none"> • Lack of foundation, lack of personal knowledge. (Fed. R. Evid. 602; <i>see</i> Learmond Tr. at 74:6 – 75:4; 81:13 – 82:8; 83:3, 5-10.)
21	Entire paragraph	<ul style="list-style-type: none"> • Lack of foundation, lack of personal knowledge. (Fed. R. Evid. 602; <i>see</i> Learmond Tr. at.)

<i>Learmond Paragraph</i>	<i>Statement at Issue</i>	<i>Dr Pepper’s Evidentiary Objections</i>
22	“Given the common usage of the term for fruit related drinks and the mechanisms to make them . . .”	<ul style="list-style-type: none"> • Lack of foundation, lack of personal knowledge. (Fed. R. Evid. 602; <i>see</i> Learmond Tr. at 74:6 – 75:4; 77:15 – 78:9; 80:9 – 82:8; 83:3, 5-10; 88:3-14; 87:14 – 91:1.)
25	“FANTA is the best known orange soda in Europe.”	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402) • Lack of personal knowledge. (Fed. R. Evid. 602; <i>see</i> Learmond Tr. at 94:11 – 96:3.)

Dr Pepper’s procedural and substantive objections to the exhibits attached to the Learmond Trial Declaration are set forth in the table below:

<i>Learmond Exhibit</i>	<i>Dr Pepper’s Evidentiary Objections</i>
1	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402.) • Hearsay, not falling within any exception. (Fed. R. Evid. 802.)
2	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402.) • Hearsay, not falling within any exception. (Fed. R. Evid. 802.)
3	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 6-7; Reply Strike at 5-6.) • Lack of foundation. (Learmond Tr. at 73:3 – 74:5)
4	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 6-7; Reply Strike at 5-6.). • Lack of foundation. (Learmond Tr. at 74:6 – 75:4.)
5	<ul style="list-style-type: none"> • Irrelevant. (Fed. R. Evid. 401, 402) • Hearsay, not falling within any exception. (Fed. R. Evid. 802.)

<i>Learmond Exhibit</i>	<i>Dr Pepper's Evidentiary Objections</i>
6	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 6-7; Reply Strike at 5-6.) • Lack of foundation. (Learmond Tr. at 75:5 – 77:14.) • Irrelevant. (Fed. R. Evid. 401, 402.) • Hearsay, not falling within any exception. (Fed. R. Evid. 802.)
7	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 6-7; Reply Strike at 5-6.) • Lack of foundation. (Learmond Tr. at 77:15 – 78:9; 88:3-14.) • Irrelevant. (Fed. R. Evid. 401, 402.) • Hearsay, not falling within any exception. (Fed. R. Evid. 802.)
8	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 6-7; Reply Strike at 5-6.) • Irrelevant. (Fed. R. Evid. 401, 402.)

3. Notice of Reliance

Dr Pepper's procedural and substantive objections to the Exhibits set forth in the Notice of Reliance are set forth in the table below :

<i>Notice of Reliance Exhibit</i>	<i>Dr Pepper's Evidentiary Objections</i>
DX003	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 5-6; Reply Strike at 4-5.) • Failure to indicate relevance as required by 37 C.F.R. § 2.122(e). (<i>See</i> Mot. Strike at 6; Reply Strike at 4-5.) • Irrelevant. (Fed. R. Evid. 401.) • Hearsay, not falling within any exception. (Fed. R. Evid. 802.)
DX004	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 5-6; Reply Strike at 4-5.) • Failure to indicate relevance as required by 37 C.F.R. § 2.122(e). (<i>See</i> Mot. Strike at 6; Reply Strike at 4-5.)

<p><i>Notice of Reliance Exhibit</i></p>	<p><i>Dr Pepper’s Evidentiary Objections</i></p>
<p>DX005</p>	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 5-6; Reply Strike at 4-5.) • Failure to indicate relevance as required by 37 C.F.R. § 2.122(e). (<i>See</i> Mot. Strike at 6; Reply Strike at 4-5.) • Irrelevant, as not reflecting current data. (Fed. R. Evid. 401, 402; <i>see</i> Springate Trial Decl., ¶ 22; Springate Rebuttal Decl., ¶ 12; <i>see R.J. Reynolds Tobacco Co.</i>, 493 F.2d at 1237-38.)
<p>DX006</p>	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 5-6; Reply Strike at 4-5.) • Failure to indicate relevance as required by 37 C.F.R. § 2.122(e). <i>See</i> Mot. Strike at 6; Reply Strike at 4-5.) • Irrelevant. (Fed. R. Evid. 401, 402.)
<p>DX007</p>	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 5-6; Reply Strike at 4-5.) • Failure to indicate relevance as required by 37 C.F.R. § 2.122(e). (<i>See</i> Mot. Strike at 6; Reply Strike at 4-5.) • Irrelevant, as not reflecting current data. (Fed. R. Evid. 401, 402; <i>see</i> Springate Rebuttal Decl., ¶ 10; <i>see R.J. Reynolds Tobacco Co.</i>, 493 F.2d at 1237-38.)
<p>DX008</p>	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 5-6; Reply Strike at 4-5.) • Failure to indicate relevance as required by 37 C.F.R. § 2.122(e). (<i>See</i> Mot. Strike at 6; Reply Strike at 4-5.) • Irrelevant. (Fed. R. Evid. 401, 402; <i>see</i> Springate Tr. at 44:13 – 46:6 (explaining Dr Pepper’s use of terminology “Core 4”); Springate Rebuttal Decl., ¶ 11 (same).)
<p>DX009</p>	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 5-6; Reply Strike at 4-5.) • Failure to indicate relevance as required by 37 C.F.R. § 2.122(e). (<i>See</i> Mot. Strike at 6; Reply Strike at 4-5.) • Irrelevant, as not reflecting current data. (Fed. R. Evid. 401, 402; <i>see</i> Springate Trial Decl., ¶ 22; Springate rebuttal Decl., ¶ 12; <i>see R.J. Reynolds Tobacco Co.</i>, 493 F.2d at 1237-38.)

<i>Notice of Reliance Exhibit</i>	<i>Dr Pepper's Evidentiary Objections</i>
DX010	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 5-6; Reply Strike at 4-5.) • Failure to indicate relevance as required by 37 C.F.R. § 2.122(e). (<i>See</i> Mot. Strike at 6; Reply Strike at 4-5.)
DX011	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 5-6; Reply Strike at 4-5.) • Failure to indicate relevance as required by 37 C.F.R. § 2.122(e). (<i>See</i> Mot. Strike at 6; Reply Strike at 4-5.)
DX012	<ul style="list-style-type: none"> • Failure to authenticate. (<i>See</i> Mot. Strike at 5-6; Reply Strike at 4-5.) • Failure to indicate relevance as required by 37 C.F.R. § 2.122(e). (<i>See</i> Mot. Strike at 6; Reply Strike at 4-5.)
DX013	<ul style="list-style-type: none"> • Failure to indicate relevance as required by TBMP § 704.03(b)(1)(b) at 700-52-53. (<i>See</i> Mot. Strike at 6; Reply Strike at 4-5.)
All of Dr Pepper's produced documents	<ul style="list-style-type: none"> • Failure to proffer evidence. (<i>See</i> Mot. Strike at 7; Reply Strike at 7.)

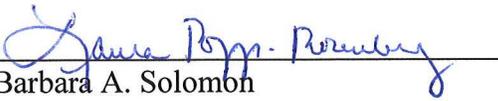
CONCLUSION

For the reasons set forth above, Dr Pepper respectfully requests that the Board strike the above-referenced testimony and exhibits sought to be entered into the record in this proceedings by Krush Global.

Respectfully submitted,

Dated: New York, New York
November 12, 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 Statement of Objections to Applicant/Registrant's Proffered 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 12th day of November, 2009.


Laura Popp-Rosenberg