

ESTTA Tracking number: **ESTTA316596**

Filing date: **11/12/2009**

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	Brief on Merits for Plaintiff
Filer's Name	Laura Popp-Rosenberg
Filer's e-mail	lpopp-rosenberg@frosszelnick.com,bsolomon@fzlz.com
Signature	/Laura Popp-Rosenberg/
Date	11/12/2009
Attachments	Trial Brief for Dr Pepper REDACTED (F0541386-2).PDF ( 89 pages )(432906 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		

**TRIAL BRIEF FOR OPPOSER/PETITIONER**

Barbara A. Solomon  
Laura Popp-Rosenberg  
FROSS ZELNICK LEHRMAN & ZISSU, P.C.  
866 United Nations Plaza  
New York, New York 10017

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

## TABLE OF CONTENTS

I.	INTRODUCTION .....	7
II.	FACTUAL RECORD .....	7
	A. Stipulations of the Parties .....	7
	B. Dr. Pepper’s Evidence .....	8
	C. Krush Global’s Evidence .....	9
III.	EVIDENTIARY OBJECTIONS TO KRUSH GLOBAL’S EVIDENCE.....	10
IV.	STATEMENT OF THE PROCEEDINGS .....	11
V.	STATEMENT OF FACTS .....	11
	A. Opposer and the Origins of the CRUSH Brand.....	11
	B. The CRUSH Brand Today .....	12
	1. Beverage Product Line.....	12
	2. Distribution .....	13
	3. Sales .....	14
	4. Extension of the CRUSH Mark .....	15
	5. Direct Advertising and Promotion of the CRUSH Mark.....	16
	6. Indirect Advertising and Promotion of the CRUSH Mark .....	17
	7. Consumer Awareness of the CRUSH Brand .....	18
	8. Dr. Pepper’s Policing Efforts.....	19
	9. Registration of the CRUSH Mark.....	20
	C. Krush Global and its CRUSSH Marks .....	20
	1. Krush Global’s Applications for the CRUSSH Marks .....	20
	2. Krush Global’s Selection of CRUSSH .....	22
	3. Krush Global’s Intended Use of the CRUSSH Marks.....	23
	4. Presentation of the CRUSSH Marks.....	24

D. United States Marketplace .....	24
VI. QUESTION PRESENTED .....	25
VII. ARGUMENT: KRUSH GLOBAL’S CRUSSH MARKS ARE CONFUSINGLY SIMILAR TO DR. PEPPER’S CRUSH MARK .....	26
A. Application of the <i>du Pont</i> Factors .....	26
1. Opposer’s CRUSH Mark is Strong and Entitled to a Broad Scope of Protection .....	27
a. <i>The CRUSH Mark is Distinctive, Not Descriptive</i> .....	28
b. <i>Survey Evidence of Consumer Awareness of the CRUSH Mark</i> .....	29
c. <i>The CRUSH Mark Has Been Used and Advertised Extensively</i> .....	30
d. <i>CRUSH is a Successful Brand</i> .....	30
e. <i>The CRUSH Brand Enjoys Wide Appreciation in Popular Culture</i> .....	31
2. The Parties’ Marks are Virtually Identical .....	33
a. <i>CRUSSH Word Mark</i> .....	33
b. <i>CRUSH Logo Mark</i> .....	36
3. Krush Global’s Services are Closely Related to Dr. Pepper’s Goods .....	38
4. The Parties’ Trade Channels and Customers Overlap .....	46
5. The Parties’ Consumers are Not Sophisticated or Careful .....	47
6. There is No Evidence of Third Party Uses That Weaken the CRUSH Mark .....	48
7. Krush Global Has Acted in Bad Faith .....	50
8. Other Probative Evidence .....	51
B. Balancing the <i>du Pont</i> Factors .....	54
VIII. CONCLUSION .....	54

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>In re 1st USA Realty Professionals, Inc.</i> , 84 U.S.P.Q. 1581 (T.T.A.B. 2007) .....	37
<i>AMF Inc. v. American Leisure Products, Inc.</i> , 177 U.S.P.Q. 268 (C.C.P.A. 1973).....	49
<i>In re Albert Trostel &amp; Sons Co.</i> , 29 U.S.P.Q.2d 1783 (T.T.A.B. 1993).....	43
<i>Amcor, Inc. v. Amcor Industries, Inc.</i> , 210 U.S.P.Q. 70 (T.T.A.B. 1981).....	39
<i>American Funds Distributors Inc. v. Texas International Properties Associates</i> , WIPO Case No. D2007-0994 (Sept. 7, 2007).....	35
<i>Anciennes Manufacturers Cason Et Montgolfer, S.A. v. Anson, Inc.</i> , 170 U.S.P.Q. 238 (T.T.A.B. 1971) .....	35
<i>In re Appetito Provisions Co.</i> , 2 U.S.P.Q.2d 1553 (T.T.A.B. 1987) .....	37
<i>In re Azteca Restaurant Enterprises, Inc.</i> , 50 U.S.P.Q.2d 1209 (T.T.A.B. 1999).....	43, 44, 46
<i>Baker v. Master Printers Union</i> , 47 U.S.P.Q. 69 (D.N.J. 1940) .....	7
<i>In re Bercut-Vandervoort &amp; Co.</i> , 229 U.S.P.Q. 763 (T.T.A.B. 1986) .....	40
<i>Blansett Pharmacal Co. v. Carmrick Laboratories, Inc.</i> , 25 U.S.P.Q.2d 1473 (T.T.A.B. 1992) .....	35
<i>Bose Corp. v. QSC Audio Productions, Inc.</i> , 63 U.S.P.Q.2d 1303 (Fed. Cir. 2002).....	28, 30, 31
<i>Charette Corp. v. Bowater Communication Papers, Inc.</i> , 13 U.S.P.Q.2d 2040 (T.T.A.B. 1989) .....	49
<i>In re Comexa Ltda.</i> , 60 U.S.P.Q.2d 1118 (T.T.A.B. 2001) .....	45
<i>In re Concordia International Forwarding Corp.</i> , 222 U.S.P.Q. 355 (T.T.A.B. 1983).....	39
<i>In re Constellation Wines U.S., Inc.</i> , Serial No. 78/803,750 (T.T.A.B. 2008).....	<i>passim</i>
<i>In re Coors Brewing Co.</i> , 68 U.S.P.Q.2d 1059 (Fed. Cir. 2003).....	33, 43, 53
<i>In re Cox Enterprises, Inc.</i> , 82 U.S.P.Q.2d 1040 (T.T.A.B. 2007) .....	37
<i>Cunningham v. Laser Golf Corp.</i> , 55 U.S.P.Q.2d 1842 (Fed. Cir. 2000).....	25
<i>DC Comics v. Pan American Grain Manufacturing Co.</i> , 77 U.S.P.Q.2d 1220 (T.T.A.B. 2005) .....	50
<i>In re Decombe</i> , 9 U.S.P.Q.2D 1813 (T.T.A.B. 1988).....	38

<i>In re DiLegge</i> , Serial No. 75/425,118 (T.T.A.B. 2000).....	45
<i>In re E. I. du Pont de Nemours &amp; Co.</i> , 177 U.S.P.Q. 563 (C.C.P.A. 1973).....	<i>passim</i>
<i>Economic Laboratories Inc. v. Scott’s Liquid Gold, Inc.</i> , 224 U.S.P.Q.2d 512 (T.T.A.B. 1971) .....	35
<i>In re Elbaum</i> , 211 U.S.P.Q. 639 (T.T.A.B. 1981) .....	46
<i>Everyready Battery Co. v. Green Planet, Inc.</i> , 91 U.S.P.Q.2d 1511 (T.T.A.B. 2009).....	34
<i>Frisch’s Restaurants v. Elby’s Bid Boy</i> , 214 U.S.P.Q. 15 (6th Cir. 1982) .....	48
<i>In re G.B.I. Tile &amp; Stone, Inc.</i> , 92 U.S.P.Q.2d 1366 (T.T.A.B. 2009) .....	42
<i>Gillette Canada Inc. v. Kivy Corp.</i> , Opposition No. 91116804 (T.T.A.B. 2003).....	52
<i>Gillette Canada Inc. v. Ranir Corp.</i> , 23 U.S.P.Q.2d 1768 (T.T.A.B. 1992) .....	27
<i>In re Ginc UK Ltd.</i> , 90 U.S.P.Q.2d 1472 (T.T.A.B. 2007).....	37
<i>In re Golden Griddle Pancake House Ltd.</i> , 17 U.S.P.Q.2d 1074 (T.T.A.B. 1990).....	45
<i>H-D Mich. LLC v. Broehm</i> , Opposition No. 91177156 (T.T.A.B. 2009).....	31
<i>HSN LP v. Chan</i> , Opposition Nos. 91173579 and 91177186 (T.T.A.B. 2009).....	29
<i>Hancock v. American Steel &amp; Wire Co.</i> , 97 U.S.P.Q. 330 (C.C.P.A. 1953) .....	27
<i>Hasbro, Inc. v. Braintrust Games, Inc.</i> , Opposition No. 91169603 (T.T.A.B. 2009) .....	32, 40, 49
<i>In re Heartland Design Associates, LLC</i> , Serial No. 77/245,616 (T.T.A.B. 2009).....	45
<i>Hewlett-Packard Development Co. v. Vudu, Inc.</i> , Opposition No. 91185393 (T.T.A.B. 2009) .....	34
<i>In re Hub Distributors, Inc.</i> , 218 U.S.P.Q. 284 (T.T.A.B. 1983).....	49
<i>In re Hutchinson</i> , Serial No. 78/594,227 (T.T.A.B. 2006).....	41
<i>Interlego AG v. Abrams/Gentile Entertainment Inc.</i> , 63 U.S.P.Q.2d 1862 (T.T.A.B. 2002) .....	35
<i>Jacobs v. Internationall Multifoods Corp.</i> , 212 U.S.P.Q. 641 (C.C.P.A. 1982) .....	41
<i>Kabushiki Kaisha Harroti Tokeiten v. Scuotto</i> , 228 U.S.P.Q. 461 (T.T.A.B. 1985).....	37
<i>Kenner Parker Toys, Inc. v. Rose Art Industries</i> , 22 U.S.P.Q.2d 1453 (Fed. Cir. 1992) .....	27, 28
<i>L.A. Gear, Inc. v. Calcados Ferracini Ltda.</i> , Opposition No. 91168866, (T.T.A.B. 2009) .....	52

<i>In re Lamson Oil Co.</i> , 6 U.S.P.Q.2d 1041 (T.T.A.B. 1988) .....	33
<i>Lever Brothers Co. v. American Bakeries Co.</i> , 216 U.S.P.Q. 177 (2d Cir. 1982).....	48
<i>In re MBNA American Bank N.A.</i> , 67 U.S.P.2d 1778 (Fed. Cir. 2003) .....	29
<i>In re ML Management, Inc.</i> , Serial No. 76/564,139 (T.T.A.B. 2007).....	35, 36, 39, 44
<i>In re Mack</i> , 197 U.S.P.Q. 755 (T.T.A.B. 1977).....	33
<i>In re Martin’s Famous Pastry Shoppe, Inc.</i> , 223 U.S.P.Q. 1289 (Fed. Cir. 1984).....	48
<i>Maids to Order of Ohio, Inc. v. Maid-to-Order Inc.</i> , 78 U.S.P.Q.2d 1899 (T.T.A.B. 2006) .....	36
<i>In re Melville Corp.</i> , 18 U.S.P.Q.2d 1386 (T.T.A.B. 1991) .....	38
<i>Motion Picture Association of America, Inc. v. Respect Sportwear, Inc.</i> , 83 U.S.P.Q.2d 1555 (T.T.A.B. 2007) .....	29
<i>In re Mucky Duck Mustard Co.</i> , 6 U.S.P.Q.2d 1467 (T.T.A.B. 1988) .....	45
<i>National Aeronautics &amp; Space Administration v. Record Chemical Co.</i> , 185 U.S.P.Q. 563 (T.T.A.B. 1975) .....	49
<i>Nina Ricci S.A.R.L. v. E.T.F. Enterprises, Inc.</i> , 12 U.S.P.Q.2d 1901 (Fed. Cir. 1989) .....	27
<i>In re O.C. Seacrets, Inc.</i> , Cancellation No. 92,042,854 (T.T.A.B. 2008) .....	34, 43
<i>Octocom Systems, Inc. v. Houston Computer Services, Inc.</i> , 16 U.S.P.Q.2d 1783 (Fed. Cir. 1990).....	40
<i>Opryland USA Inc. v. Great American Music Show</i> , 23 U.S.P.Q.2d 1471 (Fed. Cir. 1992).....	26
<i>In re Opus One Inc.</i> , 60 U.S.P.Q.2d 1812 (T.T.A.B. 2001) .....	41, 44, 49
<i>Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772</i> , 73 U.S.P.Q.2d 1689 (Fed. Cir. 2005).....	31, 32, 48
<i>Park ‘N Fly v. Dollar Park &amp; Fly, Inc.</i> , 469 U.S. 189 (1985).....	28
<i>Pictionary Inc. v. Spark Games LLC</i> , Opposition No. 91167236 (T.T.A.B. 2007) .....	32
<i>Pocono Rubber Cloth Co. v. J.A. Livingston, Inc.</i> , 79 F.2d 446 (3d Cir. 1935).....	34
<i>Recot, Inc. v. Becton</i> , 54 U.S.P.Q.2d 1894 (Fed. Cir. 2000) .....	47
<i>Renuzit Home Products Co. v. Remwood Chemical Co.</i> , 158 U.S.P.Q. 169 (T.T.A.B. 1968).....	35
<i>Riviana Foods, Inc. v. Romero-Nunez</i> , Opposition No. 91167098 (T.T.A.B. 2007) .....	43
<i>Roush Bakery Products Co. v. Ridlen</i> , 190 U.S.P.Q. 445 (T.T.A.B. 1976).....	44

<i>In re Sage Dining Services, Inc.</i> , Serial No. 75/789,623 (T.T.A.B. 2003) .....	45, 53
<i>In re Scripps Health</i> , Serial No. 76/077,292 (T.T.A.B. 2006) .....	38
<i>Sealed Air Corp. v. Scott Paper Co.</i> , 190 U.S.P.Q. 106 (T.T.A.B. 1975) .....	33
<i>In re Shell Oil Co.</i> , 26 U.S.P.Q.2d 1687 (Fed. Cir. 1993) .....	39
<i>Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.</i> , 223 U.S.P.Q.1289 (Fed. Cir. 1984) .....	47, 53
<i>In re Strathmore Products, Inc.</i> , 171 U.S.P.Q. 766 (T.T.A.B. 1971) .....	38
<i>In re Sunland, Inc.</i> , Opposition Nos. 77/310,231 & 77/307,289 (T.T.A.B. 2009) .....	39, 43
<i>TBC Corp. v. Holsa, Inc.</i> , 44 U.S.P.Q.2d 1315 (Fed. Cir. 1997) .....	27
<i>In re Time Warner Entertainment Co., L.P.</i> , Serial No. 75/100,922 (T.T.A.B. 2000) .....	28
<i>In re Total Quality Group Inc.</i> , 51 U.S.P.Q.2d 1474 (T.T.A.B. 1999) .....	36
<i>Uncle Ben’s, Inc. v. Stubenberg International, Inc.</i> , 47 U.S.P.Q.2d (T.T.A.B. 1998) .....	52
<i>Venture Out Properties LLC v. Wynn Resorts Holdings, LLC</i> , 81 U.S.P.Q.2d 1887 (T.T.A.B. 2007) .....	25
<i>Western Sizzlin Corp. v. Hi Mountain Jerky, Inc.</i> , Opposition No. 91165983 (T.T.A.B. 2008) ..	45
<i>In re White Swan Ltd.</i> , 9 U.S.P.Q.2d 1534 (T.T.A.B. 1988) .....	33

**FEDERAL STATUTES**

15 U.S.C. § 1052(d) .....	7, 26
---------------------------	-------

**U.S. TRADEMARK RULES OF PRACTICE**

37 C.F.R. § 2.122(b) .....	20
----------------------------	----

**TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE**

TBMP § 801.03 .....	10
---------------------	----

## I. INTRODUCTION

CRUSH brand soda, immortalized in the fabric of America by Norman Rockwell, has been quenching consumers' thirst for over a century. Manufactured and marketed by opposer/petitioner Dr Pepper/Seven Up, Inc. ("Dr Pepper," as defined further herein) and its predecessors, CRUSH brand soda is one of the top selling flavored sodas in the United States. Against this storied history – and perhaps to take advantage of it – applicant/registrant Krush Global, Inc. ("Krush Global") seeks to open in the United States cafés selling a variety of take-out beverages, including soda, and food under the essentially identical mark CRUSSH. While one court has observed that "few would be stupid enough to make exact copies of another's mark," *Baker v. Master Printers Union*, 47 U.S.P.Q. 69, 72 (D.N.J. 1940), this case seems to be an exception to that golden rule.

In light of the strength of the CRUSH mark, the virtual identity of that mark to the proposed mark CRUSSH, and the relatedness of the parties' goods and services offered under their respective CRUSH and CRUSSH marks, Krush Global's registration and use of the CRUSSH mark in connection with restaurant services undoubtedly will cause confusion, mistake or deception in the marketplace. Therefore, under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), Krush Global's application to register CRUSSH & Design (Application Serial No. 79/033,050) must be denied and its registration for CRUSSH (Registration No. 3,275,548) must be cancelled.

## II. FACTUAL RECORD

### A. Stipulations of the Parties

The parties stipulated that documents produced in discovery from their respective files shall be deemed authentic. (*See* Notice of Reliance on Applicant's/Registrant's Discovery

Responses, Exh. PX205.) The parties stipulated to the submission of testimony by declaration, subject to the opposing party's right to take oral cross-examination. (*See id.*) The parties also stipulated that certain cross-examination testimony would be submitted by declaration, in lieu of oral cross-examination. (*See* Stipulation Regarding Submission of Declaration in Lieu of Cross-Examination and Supplemental Trial Declaration of William C. Wright, dated July 30, 2009 (Dkt. #42); Stipulation to Submission of Supplemental Rebuttal Trial Declaration of Andrew D. Springate in Lieu of Cross-Examination, dated September 3, 2009 (Dkt. #50).)

## **B. Dr Pepper's Evidence**

Dr Pepper submitted testimony and exhibits through the following witnesses:

(1) Andrew D. Springate, Senior Vice-President of Brand Marketing of Dr Pepper Snapple Group, the parent corporation of Dr Pepper/Seven Up, Inc., by Trial Declaration dated May 20, 2009 ("Springate Decl."), and Rebuttal Trial Declaration dated August 31, 2009 ("Springate Rebuttal Decl."). Mr. Springate's duties include overseeing the sales and marketing of Dr Pepper's CRUSH-branded products. On May 28, 2009, Krush Global cross-examined Mr. Springate, the transcript of which ("Springate Tr.") has been submitted to the Board. By stipulation of the parties, in lieu of being cross-examined as to the facts raised in his Rebuttal Trial Declaration, Mr. Springate submitted a Supplemental Rebuttal Declaration dated September 3, 2009 ("Springate Supp. Rebuttal Decl.").

(2) Mario Ortiz, paralegal, Fross Zelnick Lehrman & Zissu, P.C., attorneys for Dr Pepper in these proceedings, by Trial Declaration dated May 15, 2009 ("Ortiz First Decl."), Second Trial Declaration dated June 1, 2009 ("Ortiz Second Decl.") and Rebuttal Trial Declaration dated September 1, 2009 ("Ortiz Rebuttal Decl."). Krush Global chose not to cross-examine Mr. Ortiz.

A description of each exhibit made of record by the foregoing witness as part of their respective trial declarations is included in Appendix A hereto.

Dr Pepper also submitted during its testimony period a Notice of Reliance on Official Records dated May 15, 2009 (“ONR1”) and a Notice of Reliance on Applicant’s/Registrant’s Discovery Responses dated June 1, 2009 (“ONR2”), and submitted during its rebuttal period a Notice of Reliance on Printed Publications dated September 1, 2009 (“ONR3”). A description of each exhibit made of record through Dr Pepper’s Notices of Reliance is included in Appendix A hereto.

**C. Krush Global’s Evidence**

Krush Global submitted testimony and exhibits through the following witnesses:

(1) James Learmond, founder, chairman and director of Krush Global, by Trial Declaration dated July 22, 2009 (“Learmond Decl.”). On July 31, 2009, Dr Pepper cross-examined Mr. Learmond, the transcript of which (“Learmond Tr.”) was submitted to the Board on October 13, 2009.

(2) William C. Wright, attorney, Epstein Drangel Bazerman & James, LLP, attorneys for Krush Global in these proceedings, by Trial Declaration dated July 15, 2009 (“Wright Decl.”). By stipulation of the parties, in lieu of being cross-examined as to the facts raised in his Trial Declaration, Mr. Wright submitted a Trial Declaration on Cross-Examination dated July 30, 2009 (“Wright Cross Decl.”).<sup>1</sup>

---

<sup>1</sup> Krush Global also submitted a Supplemental Trial Declaration of William C. Wright, dated July 30, 2009, which, by stipulation of the parties, is to be considered operative only if the Board rejects the Wright Cross Declaration. (See Stipulation Regarding Submission of Declaration in Lieu of Cross-Examination and Supplemental Trial Declaration of William C. Wright, dated July 31, 2009 (Dkt. #42).)

Krush Global also submitted a Notice of Reliance on Printed Publications and Office Records dated July 29, 2009 (“ANR1”) and a Confidential Notice of Reliance on Discovery Responses, Printed Publications and Office Records dated July 29, 2009 (“ANR2”).

### **III. EVIDENTIARY OBJECTIONS TO KRUSH GLOBAL’S EVIDENCE**

Dr Pepper has objected to the Learmond and Wright declarations, and the exhibits attached thereto, on various procedural grounds. (*See* Opposer/Petitioner’s Motion to Strike Certain Evidence, dated August 6, 2009 (Dkt. #43); Opposer/Petitioner’s Reply Brief in Further Support of Motion to Strike Certain Evidence, dated September 3, 2009 (Dkt. #49); *see also* Opposer/Petitioner’s Objections to Applicant/Registrant’s Pretrial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(3)(B), dated June 25, 2009 (Dkt. #37).) Krush Global could have cured the procedural deficiencies noted in Dr Pepper’s Motion to Strike, but failed to do so.

Additional substantive objections to the admissibility of Krush Global’s evidence are set forth in Opposer/Petitioner’s Statement of Objections to Applicant/Registrant’s Proffered Evidence, dated November 12, 2009 (Dkt. #56).<sup>2</sup>

Because the Board has not yet had an opportunity to rule on Dr Pepper’s evidentiary objections, for purpose of this brief, Dr Pepper has assumed that all of Krush Global’s evidence is part of the record. By treating Krush Global’s evidence as properly made of record for purposes of this brief, Dr Pepper does not waive any of its evidentiary objections.

---

<sup>2</sup> *See* TBMP § 801.03 at 800-531 (“evidentiary objections that may properly be raised in a party’s brief on the case may instead be raised . . . by way of a separate statement of objections”).

#### IV. STATEMENT OF THE PROCEEDINGS

Dr Pepper timely opposed Krush Global's Application Serial No. 79/033,050 on November 12, 2007, and the Board instituted the proceeding as Opposition No. 91180742 on November 14, 2007. Dr Pepper petitioned to cancel Krush Global's Registration No. 3,275,548 on November 12, 2007, and the Board instituted the proceeding as Cancellation No. 92048446 on November 16, 2007. The Board granted Dr Pepper's unopposed motion to consolidate the proceedings on January 22, 2008.

Following the close of discovery, on November 7, 2008, Dr Pepper moved for summary judgment on all of its claims in the consolidated proceedings. In a decision dated February 12, 2009 (the "February 12 Decision"), the Board granted in part and denied in part Dr Pepper's summary judgment motion. The Board granted Dr Pepper judgment as to the Class 29 and 32 goods which had been deleted from Krush Global's Application Serial No. 79/033,050 after commencement of the opposition proceeding. (Feb. 12 Dec. at 4.) The Board also granted Dr Pepper judgment as to standing and priority. (*Id.* at 4, 5, 14.) Finding that there were material issues of fact for trial, the Board denied Dr Pepper judgment with respect to likelihood of confusion. (*Id.* at 14.)

#### V. STATEMENT OF FACTS

##### A. Opposer and the Origins of the CRUSH Brand

Dr Pepper/Seven Up, Inc. is a subsidiary of Dr Pepper Snapple Group ("DPSG"). (Springate Decl., ¶ 1.) (DPSG and its subsidiaries, and the predecessors of any of them, are referred to collectively herein as "Dr Pepper.") Today, Dr Pepper is the third largest North American non-alcoholic beverage company in North America. (*Id.* at ¶ 6.) The company, which generates nearly \$6 billion in annual revenue, manufactures, bottles, markets and distributes more

than 50 brands of carbonated soft drinks, juices, ready-to-drink teas, mixers and other premium beverages across the United States, Canada, Mexico and the Caribbean. (*Id.*)

The CRUSH brand had its beginnings in the early part of the last century. Orange-flavored CRUSH soda was invented in Chicago in 1906 and later perfected by Clayton J. Howell and Neil C. Ward, who partnered to incorporate the Orange Crush Company in 1916. (*Id.* at ¶ 8.) Other flavors soon followed, and by the 1920s CRUSH beverages were being marketed nationwide. (*Id.* at ¶¶ 9-10.)

The sale and marketing of CRUSH beverages has continued without interruption through today. In fact, sales of CRUSH beverages were reinvigorated beginning in 2009 when Dr Pepper entered into broader distribution agreements with Pepsi Bottling Group and Pepsi/Americas (together, the “Pepsi Bottlers”). (Springate Decl., ¶ 21; Springate Tr. at 40:4-14.) Both the Pepsi Bottlers and Dr Pepper recognized that the CRUSH brand had huge market appeal owing to its long pedigree and popularity. (Springate Tr. at 40:4-18; 72:11 – 73:18; 76:10-22.) While CRUSH beverages have always sold well, since the advent of the Pepsi Bottlers distribution agreement, CRUSH is now the second best selling brand of orange-flavored soda in the market, with a █% market share and with retail sales on track to reach nearly \$█ million in 2009 alone. (Springate Decl., ¶ 24; Springate Tr. at Exh. KGL 3.)

## **B. The CRUSH Brand Today**

### **1. Beverage Product Line**

Although orange was the first flavor of CRUSH beverages, the CRUSH product line in the United States today also includes diet orange-, strawberry-, grape-, cherry-, peach- and pineapple-flavored beverages. (Springate Decl., ¶ 12.) While orange-flavored CRUSH soda is the most popular flavor, it represents only about █% of Dr Pepper’s CRUSH beverage sales. (*Id.* at ¶ 12.)

Ice-based slushy beverages also are available under the CRUSH mark. (Springate Tr. 23:12-18.) None of the CRUSH beverages contain fruit juice nor have they for some time, and none of the CRUSH beverages, regardless of flavor, are made by crushing or otherwise extracting juice from fruit. (*Id.* at ¶ 13.)

On all packaging and labels for CRUSH soda, the CRUSH mark appears in a consistent color (white) and a consistent stylized presentation. (Springate Decl., ¶ 14.) The different flavors are indicated by the addition of the flavor name appearing below the mark CRUSH, as shown in the following examples:



(*see id.* at ¶ 14 and Exh. PX169.) The mark CRUSH has appeared above the flavor designation on packaging and labels for at least the last ten years. (Springate Tr. at 37:10-21.) Dr Pepper places CRUSH above rather than below the flavor designation because the brand is CRUSH, not “Orange Crush” or “Grape Crush.” (*Id.*)

## 2. Distribution

Dr Pepper largely sells its CRUSH beverages in concentrate form to a network of bottlers, most of whom are independent of Dr Pepper. (Springate Decl., ¶ 15.) These bottlers turn the CRUSH concentrate into consumer-ready CRUSH-branded beverages, which they then sell to wholesalers. (*Id.*) The wholesalers, in turn, sell the finished CRUSH beverage products to retailers. (*Id.*)

CRUSH beverages are marketed and made available to virtually every consumer in the nation. (*Id.* at ¶ 18.) CRUSH beverages are sold throughout the fifty United States through every

channel of trade in which consumers would expect to find soft drinks, including through big-box general merchandisers (such as Wal-Mart and Target), grocery stores, drug stores, convenience stores, food and beverage service outlets (such as restaurants) and vending machines, as well as over the Internet. (*Id.* at ¶ 17.) The penetration of CRUSH beverages in each of these trade channels is extensive. For example, CRUSH beverages are sold in nearly █████ Wal-Mart stores, nearly █████ Kroger supermarkets, over █████ Safeway supermarkets, over █████ Kmart stores and nearly █████ Food Lion supermarkets, to name just a few specific retailers. (*Id.* at ¶ 17.) Total U.S. distribution exceeds █████ grocery or large format retail stores and █████ food outlets. (*Id.* at ¶ 33; Springate Tr. at 17:6-13.) In the past eleven years, more than the equivalent of 3.0 billion 12-ounce cans of CRUSH beverages have been sold, all in packaging prominently displaying the CRUSH mark. (Springate Decl., ¶ 20; Springate Tr. at 17:15-18:1.)

At the retail level, CRUSH soda is available to consumers in 12-ounce cans (sold individually and in multi-count packages), 12-ounce glass bottles (sold individually and in multi-count packages), 16.9-ounce plastic bottles sold in six-packs, 20-ounce plastic bottles, 1-liter plastic bottles, and 2-liter plastic bottles, as well as at select fountain locations. (*Id.* at ¶ 15 and Exh. PX170; Springate Tr. at 17:2-4.) Regardless of the packaging, the display of the CRUSH mark is consistent. (Springate Decl., ¶ 14.) CRUSH beverages are a low-cost item priced similarly to other national soda brands. CRUSH soda sold in 20-ounce plastic bottles retails for approximately \$1.20, and 12-packs of CRUSH cans retail for approximately \$3.25. (*Id.* at ¶ 16.)

### 3. Sales

From 2001 through 2008, Dr Pepper's net U.S. revenue from its wholesale sales of CRUSH concentrate and finished beverages exceeded \$ █████. (Springate Decl., ¶ 19.) Retail revenue from sales of CRUSH are much higher – █████

██████████. For example, for the period from 2005 through 2008, retail sales levels of CRUSH exceeded \$ ██████████, compared to \$ ██████████ in net revenues to Dr Pepper during the same period. (*Id.* at ¶¶ 19-20; Springate Tr. at 17:15 – 18:1.) Sales of CRUSH beverages have skyrocketed in 2009. Retail sales of CRUSH beverages for the first four and half months of 2009 alone exceeded \$ ██████████ (Springate Tr. at Exh. KGL 3), putting CRUSH on track to generate nearly \$ ██████████ in retail sales for the full year 2009, ██████████ (Springate Decl., ¶ 20; Springate Tr. at 17:15-18:1.)

#### **4. Extension of the CRUSH Mark**

While the CRUSH mark is used primarily in connection with beverages, Dr Pepper also conducts an active, extensive and successful licensing program for the CRUSH brand. (Springate Decl., ¶¶ 26-30.) In fact, owing to its long history and popularity among consumers, CRUSH is one of Dr Pepper’s most popular licensed marks. (*Id.* at ¶ 26; Springate Tr. at 78:18 – 79:4.) Dr Pepper licenses the CRUSH mark for a variety of food products – including donuts, popsicles, candy, cakes and dessert toppings – as well as for clothing, accessories, stationery, home décor, and cosmetics. (Springate Decl., ¶ 27 and Exh. PX171.) The CRUSH mark is used prominently on the licensed goods – either displayed on the good itself (such as in the case of clothing and stationery items), or on the packaging for the goods (such as in the case of food items). (*See Id.* at ¶ 28 and Exh. PX171.) Some licensed goods bear the current CRUSH logo, while others bear historic CRUSH logos. (*Id.* at ¶ 28 and Exh. PX172.)

Dr Pepper’s royalty revenues from licensing the CRUSH brand have exceeded \$ ██████████ for each of the last two years (*id.* at ¶ 29), and Dr Pepper estimates that retail sales of licensed CRUSH goods greatly exceeded \$ ██████████ a year during that period. (*Id.* at ¶ 30.)

Sales of licensed CRUSH goods serve to extend awareness of the brand to an even larger audience of consumers than would be familiar with the brand through its use in connection with beverages alone.

### **5. Direct Advertising and Promotion of the CRUSH Mark**

Throughout the history of the CRUSH brand, CRUSH beverages have been advertised in a variety of media. From a 1919 CRUSH advertisement by beloved American artist Norman Rockwell (*see* Springgate Decl., Exh. 173) to Dr Pepper's 2009 website (*see id.* at Exh. 1993), CRUSH beverages have been advertised in national and local publications (both consumer and trade), billboards, radio, television and the Internet. (*Id.* at ¶¶ 31-32, 35-37 and Exhs. PX173-PX192.) The CRUSH mark is the centerpiece of all such advertising. (*See id.* at Exhs. PX173-PX191.) Because the majority of finished CRUSH products are made by bottlers and sold by third parties, most of the advertising expenses for CRUSH are incurred by these entities, which advertise and promote CRUSH in media such as the Internet, weekly circulars, radio, billboards and in-store promotions. (*Id.* at ¶ 37 and Exhs. PX193-PX196.) Dr Pepper contributes millions of dollars per year to bottlers to be spent on CRUSH marketing. (*Id.* at ¶ 38.) The bottlers' and retailers' further expenditures are substantial. (*Id.*) In-store placement also is a key marketing tool for CRUSH beverages, and CRUSH beverages have recently been featured in unique and eye-catching displays, in which CRUSH beverages were used to create replicas of things such as a swimming pool, a bunny and a car, further drawing attention to the brand at the point of sale, where it has the most impact. (Springgate Decl., ¶ 37 and Exh. PX195.)

Even though the vast majority of advertising for CRUSH is undertaken by the bottlers and retailers, with support from Dr Pepper, Dr Pepper still spent nearly \$ [REDACTED] marketing the CRUSH brand from 2001 through 2008. (*Id.* at ¶ 34.) To maximize the increased distribution

taking place with the Pepsi Bottlers, Dr Pepper has increased its marketing support. It plans to spend \$ [REDACTED] on advertising related to the CRUSH brand in 2009, with an additional \$ [REDACTED] for trade marketing. (Springate Tr. at 18:11-14.) These efforts include consumer promotions (such as under-the-cap sweepstakes) and point-of-sale materials (Springate Decl., ¶ 35), all for the purpose of driving consumer interest and creating consumer awareness.

#### **6. Indirect Advertising and Promotion of the CRUSH Mark**

The CRUSH brand receives exposure not only through traditional advertising and promotional activities undertaken by Dr Pepper and its bottlers and retailers, but also through third-party references to the brand. (Springate Decl., ¶ 39.)

Owing to the reputation, popularity and long history of the CRUSH brand, Dr Pepper regularly receives requests to use the CRUSH brand in films, television programs, and in books. (*Id.* at ¶ 39.) For example, orange-flavored CRUSH beverages were prominently featured in the popular 1990 movie *Joe Versus the Volcano*, starring Tom Hanks and Meg Ryan. (*Id.*) Dr Pepper also has recently granted third parties permission to show CRUSH beverages in the films *Leatherheads* (2008), *The Shortcut* (projected release 2009), and *Bolden!* (projected release 2010), and in the prime time television show *Swingtown* on CBS. (*Id.*) Dr. Pepper also has granted permission for CRUSH to be referenced in books. (*Id.*)

Of course, not every third party who references the CRUSH brand seeks or needs to seek permission from Dr Pepper to do so. Multitudes of fictional and non-fictional works reference CRUSH beverages. A search of Amazon for books referencing “Crush Soda” produced 102 results, and a search for “orange crush” also produced extensive results. (Ortiz Decl., ¶¶ 20-21 and Exhs. PX162-164.) These references include novels by such popular writers as Stephen

King, Joyce Carol Oates, Jack Kerouac, Hunter S. Thompson, Wally Lamb, Flannery O'Connor, Sue Grafton, Michael Chabon, Ray Bradbury and Dean Koontz. (*Id.*)

The CRUSH brand also has received considerable attention recently through an incredibly popular YouTube video in which a comedian performs his routine in a CRUSH t-shirt. (*Id.* at ¶ 40.) The video has been viewed by 120 million people, making it the number one most-viewed YouTube video of all time, the number one favorite YouTube video of all time, and the number one most discussed YouTube video of all time. (*Id.*)

The CRUSH mark also enjoys the attention of collectors. Due in part to the fact that none other than Norman Rockwell created advertisements for CRUSH, there is an active trade in historical CRUSH advertisements (Ortiz Decl., ¶ 22 and Exh. PX165), which speaks volumes about the brand's enduring legacy.

Not only do the unpaid references extend the reach of the CRUSH brand beyond soda consumers, but also the prevalence of the CRUSH brand beyond beverages – in movies, television shows, books and the Internet – is a testament to the renown of the brand, its history and its place in American culture. In fact, the CRUSH brand is so well known that it has appeared as an answer in a New York Times crossword puzzle. (*See* ONR3 at PX223-PX224.)

## **7. Consumer Awareness of the CRUSH Brand**

Consumers recognize Dr Pepper's brand as CRUSH, not solely as ORANGE CRUSH as Krush Global has argued (without any evidentiary support) in previous stages of this proceeding. Dr Pepper advertises and sells the brand as CRUSH. In fact, labels and packaging read "CRUSH ORANGE" (or "CRUSH GRAPE" or "CRUSH STRAWBERRY," etc.), not "ORANGE CRUSH." (Springate Decl., ¶ 14 and Exh. PX169; Springate Tr. at 37:10-21.) Dr Pepper's CRUSH website ([www.crushsoda.com](http://www.crushsoda.com)) and its corporate website also make clear that the brand

is CRUSH. (Springate Decl., Exh. PX192; Wright Decl., Exh. 8.) Moreover, consumers refer to the brand as CRUSH, even if they may also sometimes refer to the orange-flavored CRUSH beverage colloquially as ORANGE CRUSH. (Springate Decl., ¶ 43 and Exh. PX 197.)

In fact, the CRUSH brand is well-known among consumers. Dr Pepper regularly performs consumer surveys that, among other things, test consumer awareness of some of Dr Pepper's brands. (Springate Decl., ¶¶ 44-45; Springate Tr. at 18:15 – 19:6.) Recent surveys show that awareness of Dr Pepper's CRUSH brand among the general population has consistently been above [REDACTED]. (Springate Decl. ¶ 45; Springate Tr. at 18:15 – 19:6; Springate Rebuttal Decl., ¶ 9 and Exh. PX211.) [REDACTED]

[REDACTED]. (Springate Decl., ¶ 45.)

## **8. Dr Pepper's Policing Efforts**

In recognition of the value of the CRUSH brand, Dr Pepper actively polices the marketplace and the federal trademark registry to prevent the use or registration of marks that could infringe or otherwise injure the CRUSH brand. (*See* Springate Decl., ¶¶ 46-48.) Dr Pepper's policing efforts have proved successful. For example, since 2000, Dr Pepper has initiated over 17 challenges to trademark applications based on its rights in CRUSH. (*Id.* at ¶ 47 and Exh. PX198.) As a result of Dr Pepper's efforts, nine third-party applications were abandoned. Most of the other matters were resolved through coexistence agreements; a very small number are still outstanding. (*Id.* at ¶ 47.)

Of course, Dr Pepper does not limit its policing efforts to the United States Patent and Trademark Office. In the past year alone, Dr Pepper has sent out four cease-and-desist letters based

on its CRUSH rights, and, as of the trial period, had resolved three out of four with the infringer agreeing to stop use of the mark.<sup>3</sup> (*Id.* at ¶ 48.)

## **9. Registration of the CRUSH Mark**

Because the CRUSH mark represents a significant asset to the company, Dr Pepper has protected its investment by registering the mark. (Springate Decl., ¶ 49.) Dr Pepper first registered a CRUSH mark in the United States in 1924, and now owns nine federal registrations for CRUSH or marks that include CRUSH: four registrations in Class 32, three registrations in Class 30, one registration in Class 25 and one registration in Class 1. (*Id.*) Six of these registrations, including five for CRUSH alone, are incontestable.

### **C. Krush Global and its CRUSSH Marks**

#### **1. Krush Global's Applications for the CRUSSH Marks<sup>4</sup>**

On October 5, 2006, Krush Global filed an application under Section 66A of the Lanham Act to register the word mark CRUSSH for “restaurant, catering, snack bar and cafe services; provision of prepared food; food and drink preparation and presentation services; bar services; catering services for the provision of food and drink; preparation of food stuffs or meals for consumption off the premises; sandwich and salad bar services; wine bar services” in International Class 43 (Application Serial No. 79/030,220). Krush Global's U.S. application for the CRUSSH word mark was based on international trademark registration IR 0901853 issued by the World Intellectual Property Organization (“WIPO”) on October 5, 2006. The U.S.

---

<sup>3</sup> Subsequent to the trial period in these proceedings, Dr Pepper resolved the fourth matter involving a juice bar operating under the name Crush Juice Bar & Fro-Yo Café. The entity agreed to change its name to BaliSlush.

<sup>4</sup> Application Serial No. 79/033,050 herein opposed and Registration No. 3,275,548 herein sought to be cancelled are both made of record pursuant to Trademark Rule of Practice 2.122(b), 37 C.F.R. § 2.122(b).

application for the CRUSSH word mark matured into Registration No. 3,275,548 on August 7, 2007. No claim of use has been made in connection with the application and, in fact, no use has been made of the mark in the United States. (Admission 18; Doc. Resp. 26; Learmond Tr. at 28:4-9.)<sup>5</sup>

On October 10, 2006, Krush Global filed another application under Section 66A of the Lanham Act (Application Serial No. 79/033,050) to register a compound mark as follows:



(the “CRUSSH Logo Mark”), based on international trademark registration IR 0908909, issued by WIPO on October 10, 2006. (Krush Global’s CRUSSH word mark and CRUSSH Logo Mark will be referred to together herein as the “CRUSSH Marks.”) As is self-evident, the word CRUSSH is the dominant part of the CRUSSH Logo Mark. The background design is not distinctive and, as Krush Global itself has admitted, is merely an amorphous blob with “no meaning or purpose” (Learmond Decl., ¶ 16) and therefore no source-identifying significance.

Krush Global originally sought to register the CRUSSH Logo Mark in connection with the same services in Class 43 as identified in its word mark application, as well as for a variety of food and beverages in Classes 29 and 32. However, after Dr Pepper initiated the opposition

---

<sup>5</sup> References to “Admission” are to the indicated numbered response(s) in Krush Global’s Response to Opposer/ Petitioner’s First Set of Requests for Admission to Applicant/Registrant, attached as Exhibit PX200 to ONR2, or to the indicated numbered response(s) in Krush Global’s Response to Opposer/ Petitioner’s Second Set of Requests for Admission to Applicant/Registrant, attached as Exhibit PX201 to ONR2. References to “Doc. Resp.” are to the indicated numbered response(s) in Krush Global’s Response to Opposer/Petitioner’s First Set of Requests for the Production of Documents and Things to Applicant/ Registrant, attached as Exhibit PX204 to ONR2. References to “Interrogatory Resp.” are to the indicated numbered response(s) in Krush Global’s Response to Opposer/Petitioner’s First Set of Interrogatories to Applicant/Registrant, attached as Exhibit PX202 to ONR2.

proceeding against the CRUSSH Logo Mark, Krush Global deleted the Class 29 and 32 goods from the application, resulting in a final judgment in these proceedings against Krush Global as to those goods. *See* Decision and Order dated February 12, 2009 (“Feb. 12 Decision”), at 4.

As with the CRUSSH word mark, no claim of use was made in connection with the application and no use has been made of the mark in the United States. (Admission 18; Doc. Resp. 26; Learmond Tr. at 28:4-9.)

Neither Krush Global’s application nor registration at issue contain any limitation on the channels of trade, channels of advertising, geographic location, target consumers, or type of food and drinks to be offered under the CRUSSH Marks.

## **2. Krush Global’s Selection of CRUSSH**

Krush Global asserts that it “selected the term ‘crush’” for its restaurant services “because [the term] has a number of different meanings.” (Learmond Decl., ¶ 17.) Krush Global claims that it then added an extra “s” to “crush” to make its mark CRUSSH to “have more distinction in sound and appearance.” (*Id.* at ¶ 22.) Such a claim is dubious in light of Krush Global’s subsequent admission that the extra “s” does not actually make CRUSSH distinctive from CRUSH. For example, Krush Global’s founder, chairman and director admitted that it would have been “a silly thing to do” to select CRUSSH as the company’s mark if there were already a chain called CRUSH in existence. (Learmond Tr. at 72:9-19.)<sup>6</sup> Mr. Learmond also admitted that the extra “s” in the company’s CRUSSH Marks does not actually make any

---

<sup>6</sup> At the time Krush Global adopted CRUSSH, they should have known about Dr Pepper’s CRUSH mark, not only as a result of Dr Pepper’s registration and use but also because one of the co-founders came up with the concept for CRUSSH cafés while working in the United States. (*See* Learmond Tr. at Exh. DP/6 at 4.)

difference whatsoever to the sound of the mark, and that CRUSSH and CRUSH are pronounced exactly the same way. (*Id.* at 63:15 – 64:14.)

### **3. Krush Global's Intended Use of the CRUSSH Marks**

Krush Global admits that it has not yet offered any services under the CRUSSH Marks in the United States (Admission 18; Doc. Resp. 26; Learmond Tr. at 28:4-9.), and, in fact, has not even entered into any contracts to operate any CRUSSH restaurants in the United States, whether directly or indirectly. (Admission 20; Learmond Tr. at 26:23 – 28:9.) However, Krush Global does offer restaurant services under the CRUSSH Marks in the United Kingdom, and has stated that it intends to use its CRUSSH Marks in the United States in the same manner that it has used them in the United Kingdom. (Admission 6; Learmond Decl., ¶ 3; Learmond Tr. at 25:20 – 26:7.)

Krush Global's CRUSSH restaurants in the United Kingdom offer a variety of beverages, including fresh juices, smoothies, coffee, tea, Coca-Cola and water, as well as food items such as muffins and other baked goods, fruit, yogurt, soup, salads, sandwiches, snacks and desserts to be consumed on or off premises. (Ortiz Decl., Exh. PX166; Learmond Tr. at 28:10 – 29:1.) The price of items sold in the CRUSSH restaurants range from £0.85 to £5.82 (approximately \$1.40 to \$9.20.) (Ortiz Decl., Exh. PX166.) Although the U.K. CRUSSH restaurants sell a variety of food products, they are at heart beverage bars: juices and smoothies represent about 50% of Krush Global's business. (Learmond Tr. at 51:17-24.)

Krush Global asserts that it is in the business of serving healthy food and drinks to health-conscious consumers. (Learmond Decl., ¶ 6.) However, Krush Global's fare – including but not limited to Coca-Cola and desserts – is admittedly not limited to healthy products.

(Learmond Tr. at 34:5-13, 41:24 – 42:24.) Nor does Krush Global limit its clientele to health-conscious consumers. (*Id.* at 42:25 – 43:6, 43:20 – 44:3.)

Krush Global also does not limit its offerings to its own CRUSSH restaurants. For example, in the past, it has sold food products to third-party restaurants. (Learmond Tr. 54:9 – 55:2.) In addition, Krush Global has in the past considered, and would in the future again consider, selling packaged beverage products in third-party retail outlets. (*Id.* at 55:21 – 59:4 and Exh. DP/6 at 2.)

#### **4. Presentation of the CRUSSH Marks**

In connection with its United Kingdom restaurants and the advertising and promotion thereof, Krush Global's CRUSSH Marks are consistently presented in an orange color that is indistinguishable, in terms of both tone and saturation, from the orange color that Dr Pepper itself uses as the primary color of its CRUSH brand. (*Compare, e.g.,* Springate Decl., Exh. PX170 *with* ONR2 at PX206.) This orange color permeates everything from the interior of Krush Global's restaurant (*see* Learmond Decl., Exh. 1), to its packaging (*see* ONR2 at PX206), to its website (*see* Ortiz Decl., Exh. PX166).

#### **D. United States Marketplace**

In the United States, it is very common for companies to use or license a single mark both in connection with restaurant services and in connection with food or beverage items sold at third-party retailers. In fact, Dr Pepper itself sells two beverage brands that are also used as restaurant brands: A&W and STEWART'S. (Springate Decl. ¶¶ 52-54; *see also* ONR1 at Exhs. PX100-PX104.) In addition, each of the marks identified below are widely used (directly or through licensees) and registered by the same owner for both food and/or beverages and for restaurant services:

BEN & JERRY'S	GODIVA	STARBUCKS
BOB EVANS	HÄAGEN-DAZS	TACO BELL
BOSTON MARKET	HOOTERS	T.G.I. FRIDAY'S
CALIFORNIA PIZZA KITCHEN	MARGARITAVILLE	WHITE CASTLE
CARVEL	MRS. FIELDS	WOLFGANG PUCK
DUNKIN' DONUTS	NATHAN'S FAMOUS	

(Ortiz Decl., ¶¶ 2-20 and Exhs. PX105-PX161; ONR1 at Exhs. PX1-PX37; Springate Decl., ¶ 52.)

Moreover, the federal trademark register is replete with use-based registrations for marks covering both restaurant services and beverages. As of May 15, 2009, the federal trademark register included 102 use-based registrations covering both International Class 32 (excluding beer) and International Class 42 (including within the services identification the term restaurant, catering, snack, bar and/or café) (Ortiz Decl., ¶ 24 and Exh. PX167; ONR1 at Exhs. PX38-PX68), and 100 use-based registrations covering both International Class 32 and International Class 43 (including within the goods or services identification the term restaurant, catering, snack, bar and/or café). (Ortiz Decl., ¶ 25 and Exh. PX168; ONR1 at Exhs. PX69-PX99.) This does not even include the hundreds of use-based registrations covering both food and restaurant services.

## VI. QUESTION PRESENTED

In order to succeed on its claims in these consolidated proceedings, Dr Pepper must establish its standing and then prove both priority and likelihood of confusion. *Cunningham v. Laser Golf Corp.*, 55 U.S.P.Q.2d 1842, 1844 (Fed. Cir. 2000); *Venture Out Props. LLC v. Wynn Resorts Holdings, LLC*, 81 U.S.P.Q.2d 1887, 1891 (T.T.A.B. 2007). The Board already has ruled that Dr Pepper has established standing and priority for purposes of these proceedings. (Feb. 12 Dec. at 4, 5, 14.) Thus, the only issue for trial is whether Krush Global's CRUSSH

Marks, when used in connection with restaurant services, are likely to cause confusion, mistake or deception as to the source or sponsorship of those services given Dr Pepper’s long-established and well-known CRUSH mark used for beverages and other licensed goods.

**VII. ARGUMENT:  
KRUSH GLOBAL’S CRUSSH MARKS ARE  
CONFUSINGLY SIMILAR TO DR PEPPER’S CRUSH MARK**

**A. Application of the *du Pont* Factors**

Section 2(d) of the Lanham Act states in pertinent part that a trademark shall be refused registration if it so resembles a prior used or registered mark “as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). In determining likelihood of confusion, the Board weighs the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973), to the extent those factors are relevant to the case at hand. *See Opryland USA Inc. v. Great Am. Music Show, Inc.*, 23 U.S.P.Q.2d 1471, 1473 (Fed. Cir. 1992) (“[n]ot all of the *duPont* [sic] factors are relevant or of similar weight in every case”). Here the relevant *du Pont* factors are: (i) the renown of Dr Pepper’s CRUSH mark; (ii) the virtual identity of the parties’ marks; (iii) the relatedness of the parties’ respective goods and services; (iv) the overlap of the parties’ trade channels and consumers; (v) the lack of sophistication of the parties’ consumers; (vi) the lack of third-party use of similar marks; (vii) Krush Global’s bad faith; and (viii) the parties’ use of similar color and design elements and the parties’ mutual focus on beverages.<sup>7</sup>

---

<sup>7</sup> There are several *du Pont* factors that are not relevant here. For example, since Krush Global has not yet used the CRUSSH Marks in the United States, there cannot have been either actual confusion or concurrent use of the parties’ marks without evidence of confusion, *du Pont*, 177 U.S.P.Q. at 567, and these factors therefore are not relevant. For the same reason, there can be no laches or estoppel issue, *id.*, nor can Krush Global have a right to exclude others from use of

The analysis of the *du Pont* factors must be guided by two broad principles. First, all doubts about whether confusion is likely must be resolved in favor of Dr Pepper, the acknowledged prior user. *Nina Ricci S.A.R.L. v. E.T.F. Enters., Inc.*, 12 U.S.P.Q.2d 1901, 1904 (Fed. Cir. 1989); *Hancock v. Am. Steel & Wire Co.*, 97 U.S.P.Q. 330, 333 (C.C.P.A. 1953); *see TBC Corp. v. Holsa Inc.*, 44 U.S.P.Q.2d 1315, 1318 (Fed. Cir. 1997); *Gillette Canada Inc. v. Ranir Corp.*, 23 U.S.P.Q.2d 1768, 1774 (T.T.A.B. 1992). Second, Krush Global, as the newcomer, is obligated to avoid selecting a mark close to Dr Pepper's established CRUSH mark in order to protect Dr Pepper's goodwill and investment and to protect consumers from confusion. *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 22 U.S.P.Q.2d 1453, 1456 (Fed. Cir. 1992); *Nina Ricci S.A.R.L.*, 12 U.S.P.Q.2d at 1904.

With the above principles in mind, analysis of the relevant *du Pont* factors leads to the inevitable conclusion that Krush Global's CRUSSH Marks so clearly resemble Dr Pepper's prior used CRUSH mark as to be likely, when used on or in connection with Krush Global's services, to cause confusion, or to cause mistake, or to deceive. Therefore, it is beyond doubt that Krush Global's application to register and registration of the CRUSSH Marks violates Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), and that Application Serial No. 79/033,050 must be refused registration and Registration No. 3,275,548 must be cancelled and judgment in these proceedings must be entered against Krush Global.

### **1. Opposer's CRUSH Mark is Strong and Entitled to a Broad Scope of Protection**

The first *du Pont* factor considers the strength of the CRUSH mark. *du Pont*, 177 U.S.P.Q. at 567. The greater the public recognition and renown of a mark, the greater the legal

---

the mark. *Id.* Likewise, none of the "market interface" factors mentioned in *du Pont* are relevant here. *Id.*

protection to which it is entitled. *Kenner Parker Toys Inc.*, 22 U.S.P.Q.2d at 1456 (“the Lanham Act’s tolerance for similarity between competing marks varies inversely with the fame of the prior mark”). As the Board has explained, “[a] strong mark . . . casts a long shadow which competitors must avoid.” *Id.* (citation omitted).

The fame of a mark can be shown directly, through consumer surveys, or indirectly, through such things as the length of use and advertising of the mark, volume of sales under the mark, advertising expenditures, and the general reputation of products sold under the mark. *Bose Corp. v. QSC Audio Prods. Inc.*, 63 U.S.P.Q.2d 1303, 1305-06, 1309 (Fed. Cir. 2002). Here, the undisputed record abounds with evidence demonstrating the renown and strength of the CRUSH mark, entitling it to a broad scope of protection.

*a. The CRUSH Mark is Distinctive, Not Descriptive*

Krush Global has submitted various evidence of dictionary definitions, hoping to suggest that the CRUSH mark is merely descriptive and therefore weak. (*See, e.g.*, Learmond Decl., ¶¶ 17-19 and Exh. 3) This evidence is legally irrelevant. Dr Pepper’s CRUSH mark is the subject of incontestable registrations, and therefore cannot be challenged as merely descriptive. *Park ‘N Fly v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 196 (1985) (“The language of the Lanham Act . . . refutes any conclusion that an incontestable mark may be challenged as merely descriptive.”); *In re Time Warner Entm’t Co., L.P.*, Ser. No. 75/100,922, 2000 TTAB LEXIS 229, at \*12 (T.T.A.B. Mar. 31, 2000) (“acquired distinctiveness is conclusively presumed for a mark with an incontestable registration”) (citation omitted). The evidence also is factually irrelevant, since neither the CRUSH beverages nor anything else sold under the CRUSH mark are created by any process that involves crushing fruit or other items. (Springate Decl., ¶ 13.) In fact, contrary to Krush Global’s apparent argument that Dr Pepper’s CRUSH mark signals to consumers a drink

made by crushing fruit, consumer surveys show that the majority of consumers understand that CRUSH brand beverages do not contain fruit juice. (Springate Rebuttal Decl., ¶ 9 and Exh. PX211; Springate Tr. at 30:24 – 31:5; *see also* Springate Tr. at 30:24 – 31:5 (consumers recognize CRUSH as a brand, not as the name of a process for making the beverage).) While the word “crush” may have descriptive properties in some settings, in the context of Dr Pepper’s products, it has none. *In re MBNA Am. Bank N.A.*, 67 U.S.P.Q.2d 1778, 1780 (Fed. Cir. 2003) (a “mark is merely descriptive if the ultimate consumers immediately associate it with a quality or characteristic of the product”).

*b. Survey Evidence of Consumer Awareness of the CRUSH Mark*

According to surveys commissioned by Dr Pepper and conducted regularly over the past few years, the CRUSH mark enjoys a very high level of consumer recognition among the general population. Consumer awareness levels for the CRUSH brand have been tracking over [REDACTED] (Springate Decl., ¶ 45; Springate Tr. at 18:15 – 19:6; Springate Rebuttal Decl., ¶ 9 and Exh. PX211.) These consumer awareness figures are well above those recorded for other known beverage brands [REDACTED]. (Springate Decl., ¶ 45; Springate Rebuttal Decl., ¶ 9 and Exh. PX211.) *See Motion Picture Ass’n of Am., Inc. v. Respect Sportswear, Inc.*, 83 U.S.P.Q.2d 1555, 1561 (T.T.A.B. 2007) (finding RATED R mark to be famous for *du Pont* analysis purposes based, *inter alia*, on annual business survey showing 74% of respondents familiar with RATED R mark in connection with movies or movie ratings); *HSN LP v. Chan*, Opp. Nos. 91173579 and 91177186, slip op. at 11 (*available at* <http://des.uspto.gov/Foia/RetrievePdf?flNm=91173579-06-15-2009&system=TTABIS>), 2009 WL 1896060, at \*5 (T.T.A.B. June 15, 2009) (relying heavily on brand awareness survey conducted in ordinary course of business).

*c. The CRUSH Mark Has Been Used and Advertised Extensively*

The high consumer awareness figures for CRUSH are not surprising considering that CRUSH beverages have been sold and marketed extensively for over a century. As explained in detail in the Statement of Facts, Dr Pepper first introduced CRUSH-branded beverages in the U.S. more than a century ago, and has continuously sold and advertised CRUSH beverages ever since. Krush Global has admitted the long use and advertising pedigree of the CRUSH brand. (See Applicant/Registrant's Opposition to Opposer/Petitioner's Motion for Summary Judgment ("SJ Opp. Br.") at 13, 17.) Today, CRUSH beverage products are sold throughout the United States, in over [REDACTED] grocery and large-format retail stores and over [REDACTED] food service outlets, as well as over the Internet. (Springate Decl., ¶ 17, 33; Springate Tr. at 17:6-13.) In addition, due to the popularity of the CRUSH brand, Dr Pepper has licensed use of the CRUSH mark for numerous varieties of food, clothing, accessories, stationery, home décor and cosmetic products, and has authorized the CRUSH brand to appear in movies, books and television programs. (Springate Decl., ¶¶ 26-30, 39.) Through the combined efforts of Dr Pepper, bottlers and retailers, advertising of CRUSH products has extended to all types of media – including print, television, Internet, outdoor media and in-store activities. (Id. at ¶¶ 31-37) In short, the evidence conclusively establishes that Dr Pepper's CRUSH mark has been used and advertised extensively and broadly, a key consideration in assessing the renown of the mark. *Bose Corp.*, 63 U.S.P.Q.2d at 1308-09.

*d. CRUSH is a Successful Brand*

As detailed more fully in the Statement of Facts, sales of CRUSH beverages remain strong and continue to grow nearly a century after the brand's introduction. Literally billions of bottles and cans of CRUSH-branded beverages have been distributed in U.S. commerce, with Dr

Pepper's own sales of CRUSH concentrate exceeding \$ [REDACTED] in the past eight years alone, and retail sales exceeding \$ [REDACTED] in half that time. (Springate Decl., ¶¶ 19-20; Springate Tr. at 17:15-18:1.) Sales of CRUSH beverages have skyrocketed in 2009 due to an increased marketing and distribution push, and CRUSH currently is the second best-selling brand of orange-flavored soda on the market, enjoying a [REDACTED] market share and on track to exceed \$ [REDACTED] in retail sales for the year. (Springate Decl., ¶¶ 4, 24; Springate Tr. at Exh. KGL 3.)

There can be little question that a brand that has endured for more than a century and is still near the top of its category is a successful brand, another key consideration in assessing the renown of the mark. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1375 (Fed. Cir. 2005) (VEUVE CLICQUOT found famous based on, *inter alia*, evidence that brand was second-best selling champagne).

*e. The CRUSH Brand Enjoys Wide Appreciation in Popular Culture*

Considering that CRUSH beverages have been sold and advertised for more than a century, it is perhaps not surprising that the CRUSH brand is frequently referenced in books, movies, television programs, crossword puzzles and the Internet. (Springate Decl., ¶¶ 39-40; Ortiz Decl., ¶¶ 20-21 and Exhs. PX162-164; ONR3 at Exhs. PX223-PX224.) All of these references are further evidence that the CRUSH mark is widely known and respected and is a strong mark. *See Bose Corp.*, 63 U.S.P.Q.2d at 1309; *H-D Mich. LLC v. Broehm, Opp. No.* 91177156, slip op. at 12-13 (*available at* <http://des.uspto.gov/Foia/RetrievePdf?flNm=91177156-04-28-2009&system=TTABIS>), 2009 WL 1227921, at \*5 (T.T.A.B. Apr. 28, 2009).

\* \* \* \* \*

In sum, multiple factors point to the strength and renown of the CRUSH mark, including the length and extent of the mark's use and advertising, the sales success of products sold under

the mark, broad-based cultural and media references to the mark and consumer awareness levels reaching [REDACTED]. Given all of this evidence, the Board should hold that the CRUSH mark is strong and famous and entitled to a wide ambit of protection.

Even if the Board determines that the CRUSH mark is not “famous,” the Board should still give substantial weight to Dr Pepper’s extensive evidence showing long use of the CRUSH mark, diversification of the CRUSH mark for multiple products, and the substantial sales and advertising figures, and on the basis of that evidence conclude that CRUSH “is a well-known and strong mark, and enjoys considerable renown, . . . entitl[ing] the mark to an enhanced scope of protection.” *Hasbro, Inc. v. Braintrust Games, Inc.*, Opp. No. 91169603, slip op. at 9-10 (available at <http://des.uspto.gov/Foia/ReterivePdf?flNm=91169603-08-24-2009&system=TTABIS>), 2009 TTAB LEXIS 543, at \*12 (T.T.A.B. Aug. 24, 2009); see *Pictionary Inc. v. Spark Games LLC*, Opp. No. 91167236, slip op. at 8 (available at <http://des.uspto.gov/Foia/ReterivePdf?flNm=91167236-11-16-2007&system=TTABIS>), 2007 WL 4135852, at \*3 (T.T.A.B. Nov. 16, 2007) (although evidence insufficient to prove fame, sufficient to prove mark was a strong mark “accord[ing] it a commensurate higher level of protection”); see also *Palm Bay Imports*, 73 U.S.P.Q.2d at (“While dilution fame is an either/or proposition – fame either does or does not exist – likelihood of confusion fame ‘varies along a spectrum from very strong to very weak.’”) (citing *In re Coors Brewing Co.*, 68 U.S.P.Q.2d 1059, 1694 (Fed. Cir. 2003)).

Regardless of whether the Board determines that the CRUSH mark is “famous” or merely “well-known and strong,” this *du Pont* factor clearly weighs in Dr Pepper’s favor and the CRUSH mark should be given a high level of protection.

## 2. The Parties' Marks are Virtually Identical

Another key *du Pont* factor focuses on the similarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *du Pont*, 177 U.S.P.Q. at 567. Any one of these dimensions may be critical in finding the marks to be similar in a particular case. *In re White Swan Ltd.*, 9 U.S.P.Q.2d 1534, 1535 (T.T.A.B. 1988); *In re Lamson Oil Co.*, 6 U.S.P.Q.2d 1041, 1042 (T.T.A.B. 1988); *In re Mack*, 197 U.S.P.Q. 755, 757 (T.T.A.B. 1977) (“It is . . . well settled that similarity in any one of the elements of sound, appearance or meaning is sufficient to indicate likelihood of confusion.”). In comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether they are sufficiently similar to be likely to cause confusion as to the source of the goods or services offered under the respective marks. *Sealed Air Corp. v. Scott Paper Co.*, 190 U.S.P.Q. 106, 108 (T.T.A.B. 1975). As such, the focus of the inquiry must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Id.*

The similarity of two marks at issue here – the word mark CRUSSH and the CRUSSH Logo Mark – to Dr Pepper’s CRUSH mark is analyzed separately below.

### *a. CRUSSH Word Mark*

With regard to Krush Global’s CRUSSH word mark that is the subject of Registration No. 3,275,548, the near-identity of the parties’ marks is obvious.<sup>8</sup> In fact, Krush Global admitted that it set out to adopt CRUSH, but then added an extra internal letter “s” in an effort to distinguish its mark from CRUSH. (Learmond Decl. at ¶¶ 17, 22 (“We selected the term ‘crush’” but “we wanted our crush name to have more distinction in sound and appearance” “[s]o we decided to

---

<sup>8</sup> The TTAB has previously held that the fact that Dr Pepper may present its mark in different logo forms has “little probative valued” since Dr Pepper has registered CRUSH in standard character form. (Feb. 12 Dec. at 10 n.16.)

add an S to CRUS\_H.”) The admission that Krush Global adopted Dr Pepper’s CRUSH mark should end the inquiry as to the confusingly similarity of the marks. *Compare Hewlett-Packard Development Co. v. Vudu, Inc.*, Opp. No. 91185393, slip op. at 5 (available at <http://des.uspto.gov/Foia/ReterivePdf?flNm=91185393-10-26-2009&system=TTABIS>), 2009 WL 3519704, at \*2 (T.T.A.B. Oct. 26, 2009) (precedential) (despite arguments regarding the differences in the parties’ marks, finding that applicant admitted the confusing similarity between VUDU and VOODOO by stating that the commercial effect is that “HP’s mark directly recalls the mysterious religion, while VUDU’s mark merely suggests it”). To the extent that such admission does not end the inquiry, the admission that CRUSSH is not in fact distinctive from CRUSH by virtue of the extra letter “s” should. At trial, Krush Global’s founder, chairman and director admitted that CRUSH and CRUSSH do not make a significantly different commercial impression. (Learmond Tr. at 72:9-19.) Mr. Learmond also admitted that CRUSSH is generally pronounced the same as CRUSH and without an unduly long emphasis on the “s,” except perhaps as a joke. (Learmond Tr. at 63:15 – 65:17.) *See Pocono Rubber Coth Co. v. J.A. Livingston, Inc.*, 79 F.2d 446, 448 (3d Cir. 1935) (“It is absolutely impossible for the defendant to control the pronunciation which the trade would give to the word.”); *cf. Eveready Battery Co. v. Green Planet, Inc.*, 91 U.S.P.Q.2d 1511, 1518 (T.T.A.B. 2009) (“it certainly is reasonable to pronounce SCHICK in a very similar manner to SLICK”).

The Board has repeatedly held that a newcomer’s addition, change or deletion of a letter from an existing mark to create the newcomer’s mark is not sufficient to overcome a likelihood of confusion. *See, e.g., O.C. Seacrets, Inc. v. Coryn Group*, Cancellation No. 92,042,854, slip op. at 15 (available at <http://des.uspto.gov/Foia/ReterivePdf?system=TTABIS&flNm=92042854-08-20-2008>), 2008 WL 4155529, at \*6 (T.T.A.B. Aug. 20, 2008) (finding SECRETS

and SEACRETS highly similar where “the marks differ only by the presence of the silent letter ‘A’” and are phonetically identical); *Interlego AG v. Abrams/Gentile Entm’t Inc.*, 63 U.S.P.Q.2d 1862, 1868 (T.T.A.B. 2002) (LEGO v. MEGO); *Blansett Pharmacal Co. v. Carmrick Labs., Inc.*, 25 U.S.P.Q.2d 1473, 1477 (T.T.A.B. 1992) (NALEX v. NOLEX); *Econ. Lab., Inc. v. Scott’s Liquid Gold, Inc.*, 224 U.S.P.Q. 512, 515 (T.T.A.B. 1984) (“[I]t is obvious that FINIS and FINISH are visually similar having only one letter difference.”); *Anciennes Manufacturers Cason Et Montgolfier, S.A. v. Anson Inc.*, 170 U.S.P.Q. 238, 239 (T.T.A.B. 1971) (CANSON v. ANSON); *Renuzit Home Prods. Co. v. Remwood Chem. Co.*, 158 U.S.P.Q. 169, 170 (T.T.A.B. 1968) (“RE NZ-IT v. RENUZIT”).<sup>9</sup>

As the Board noted in another case involving two marks differing by the letter “s,” “[e]ven discerning consumers may easily overlook that minor distinction. Phonetically as well as visually, the absence of the letter ‘s’ is likely to be unnoticed.” *In re Constellation Wines U.S., Inc.*, Ser. No. 78/803,750, slip op. at 5 (*available at* <http://des.uspto.gov/Foia/ReterivePdf?flNm=78803750-04-17-2008&system=TTABIS>), 2008 TTAB LEXIS 377, at \*5 (T.T.A.B. Apr. 17, 2008) (finding BRICKSTONES and BRICKSTONE “effectively identical in appearance and sound”). This is especially true in the case of a repeated letter in the middle of the word. *In re ML Mgm’t, Inc.*, Ser. No. 76/564,139, slip op. at 5 (*available at* <http://des.uspto.gov/Foia/ReterivePdf?flNm=76564139-05-30-2007&system=TTABIS>), 2007

---

<sup>9</sup> Automated spell check functions, such as those in Microsoft Word, Microsoft Outlook and on BlackBerry phones, assume that “crussh” is a misspelling of “crush.” In other settings such as domain name proceedings and infringement actions, the adoption of a mark that is merely a misspelling of an established mark would be deemed a particularly egregious form of infringement, designed to trade on an established mark by taking advantage of common typing or spelling errors. *See, e.g., Am. Funds Distribs. Inc. v. Texas Int’l Prop. Assocs.*, WIPO Case No. D2007-0994 at § 6 (Sept. 7, 2007) (“where a Domain Name constitutes a common misspelling of a protected mark, typosquatting has often been held to be inherently parasitic and of itself evidence of bad faith”) (internal citations and quotations omitted).

WL 1676774, at \*2 (T.T.A.B. May 30, 2007) (MAMA LUCIA and MAMMA LUCIA “virtually identical). Because consumers are unlikely to notice the difference in the number of “s”s between the marks CRUSH and CRUSSH, the marks have the same commercial impression. *See In re Constellation Wines U.S., Inc.*, Ser. No. 78/803,750, slip op. at 5, 2008 TTAB LEXIS 377, at \*5 (“With such highly similar marks the resulting commercial impression is also likely to be the same.”); *In re ML Mgm’t, Inc.*, Ser. No. 76/564,139, slip op. at 3-4, 2007 WL 1676774 at \*2 (single repeated letter does not change the commercial impression of the mark) (citing *In re Total Quality Group Inc.*, 51 U.S.P.Q.2d 1474, 1476 (T.T.A.B. 1999) (STRATEGYN and STRATEGEN “marks engender virtually identical commercial impressions)); *Maids to Order of Ohio Inc. v. Maid-to-Order Inc.*, 78 U.S.P.Q.2d 1899, 1909 (T.T.A.B. 2006) (“when considered in their entireties, the marks MAIDS TO ORDER and MAID TO ORDER project essentially the same commercial impression”).

Given Mr. Learmond’s admissions, and the fact that the marks at issue differ only by a repetition of an internal letter “s”, the Board must conclude that Dr Pepper’s CRUSH mark and Krush Global’s CRUSSH word mark are virtually identical and indistinguishable for all intents and purposes. Accordingly, this *du Pont* factor must weigh heavily in Dr Pepper’s favor.

*a. CRUSH Logo Mark*

Application Serial No. 79/033,050 includes the same CRUSSH word mark discussed above together with a background design element consisting of an amorphous shape, as follows:



The addition of the design and stylization elements does not erase the virtual identity of the CRUSSH Logo Mark to Dr Pepper’s CRUSH mark.

First, because Dr Pepper’s mark is registered in standard character form, the Board must assume that Dr Pepper’s mark can be displayed in any stylization, including the stylization employed by Krush Global. *In re Cox Enters. Inc.*, 82 U.S.P.Q.2d 1040, 1044 (T.T.A.B. 2007) (“We must also consider that applicant’s mark, presented in typed or standard character form, is not limited to any special form or style as displayed on its goods.”) (citations omitted).

Second, as Krush Global itself has admitted, the amorphous design element has no purpose or meaning. (Learmond Decl., ¶ 16.) Indeed, when spoken or heard, the mark simply is CRUSSH, *see In re 1st USA Realty Prof’ls, Inc.*, 84 U.S.P.Q.2d 1581, 1587 (T.T.A.B. 2007) (word portion of composite mark used by purchasers to request the goods or service), which Krush Global has admitted sounds identical to CRUSH. (Learmond Tr. at 63:15 – 65:17.) Consequently, the design element has no independent significance and cannot override the dominant CRUSSH word mark. “[I]t has consistently been held that where a mark comprises a word portion and a design portion it is the word features which are controlling.” *Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 U.S.P.Q. 461, 462 (T.T.A.B. 1985); *In re Appetito Provisions Co.*, 3 U.S.P.Q.2d 1553, 1554 (T.T.A.B. 1987); *In re Ginc UK Ltd.*, 90 U.S.P.Q.2d 1472, 1478 (T.T.A.B. 2007) (citations omitted). This is particularly true here “where the design element in [applicant]’s mark consists of ordinary geometric shapes that serve essentially as background for the display of the word and it does little to affect or change the commercial impression created by [the word] alone.” *In re Ginc UK Ltd.*, 90 U.S.P.Q.2d at 1478 (finding that the background design elements did not override the confusing similarity between ZOGGS and ZOG).

Third, because the CRUSSH word mark, which is incorporated in the CRUSSH Logo Mark, is confusingly similar to CRUSH, the composite mark by extension must also be

confusingly similar. *In re Strathmore Prods., Inc.*, 171 U.S.P.Q. 766, 767 (T.T.A.B. 1971) (where design portion of composite mark was merely background and incidental to dominant word, marks held confusingly similar because of phonetic and meaning identity between words); *In re Scripps Health*, Ser. No. 76/077,292, slip op. at 9 (available at <http://des.uspto.gov/Foia/RetrievePdf?flNm=76077292-12-28-2006&system=TTABIS>), 2006 WL 3862636, at \*3 (T.T.A.B. Dec. 28, 2006) (“the design elements are unlikely to be remembered when the consumers is confronted with substantially similar word marks”) (citing *In re Decombe*, 9 U.S.P.Q.2d 1813, 1814 (T.T.A.B. 1988)). To hold otherwise would allow newcomers to steal established marks as long as they are presented on a new background. Krush Global cannot avoid confusion by “dressing up” a confusingly similar mark.

Because Dr Pepper’s CRUSH mark can be presented in any stylization, and because the design element of the CRUSSH Logo Mark has no commercial significance or meaning – which Krush Global itself has admitted – the Board must focus on the CRUSSH word element. As discussed above, there is no avoiding the conclusion that CRUSH and CRUSSH are virtually identical and indistinguishable. Therefore, the similarity of the marks factor also heavily favors Dr Pepper with respect to the CRUSSH Logo Mark.

### **3. Krush Global’s Services are Closely Related to Dr Pepper’s Goods**

Another critical *du Pont* factor is the similarity of the parties’ goods and services offered under their respective marks. *du Pont*, 177 U.S.P.Q. at 567. The goods or services at issue need not be identical for confusion to be likely; there need only be some similarity or relatedness between the goods or services. *In re Melville Corp.*, 18 U.S.P.Q.2d 1386, 1388 (T.T.A.B. 1991). In addition, a key axiom in considering the relatedness of goods and services is that “the greater the degree of similarity in the marks, the lesser the degree of similarity that is required of the

products or services on which they are being used.” *In re Concordia Int’l Forwarding Corp.*, 222 U.S.P.Q. 355, 356 (T.T.A.B. 1983); *see In re Sunland, Inc.*, Opp. Nos. 77/310,231 & 77/307,289, slip op. at 10 (*available at* <http://des.uspto.gov/Foia/ReterivePdf?flNm=77307289-08-07-2009&system=TTABIS>), 2009 TTAB LEXIS 525, at \*10 (T.T.A.B. Aug. 7, 2009) (where marks differed by only one character and were therefore “virtually identical, the relationship between the respective goods need not be as close to find a likelihood of confusion as might apply where there are significant differences between the respective marks”) (citing *Ancor, Inc. v. Ancor Indus., Inc.*, 210 U.S.P.Q. 70, 78 (T.T.A.B. 1981)). In fact, where marks are “virtually identical,” as here, “contemporaneous use of the marks can lead to the assumption that there is a common source or sponsorship ‘even when [the] goods or services are not competitive or intrinsically related.’” *In re ML Management, Inc.*, Ser. No. 76/564,139, slip op. at 5, 2007 WL 1676774, at \*2 (T.T.A.B. May 30, 2007) (quoting *In re Shell Oil Co.*, 26 U.S.P.Q.2d 1687, 1689 (Fed. Cir. 1993)). This axiom comes into play here given the virtual identity of CRUSH and CRUSSH.

In considering whether the parties’ goods and services are related, it is critical to note what goods and services are at issue. The CRUSH mark is registered for “non-alcoholic, maltless beverages and concentrates and compounds for making the same” (Registration Nos. 187,791 and 683,361), “soft drinks and concentrates for making the same” (Registration Nos. 2,418,245 and 2,418,266); confectionery, namely soft candies and candy (Registration Nos. 2,536,979 and 2,895,772, respectively); “frozen novelties, namely frozen confections” (Registration No. 3,289,137); “clothing, namely, shirts, visors, t-shirts, jackets, caps” (Registration No. 1,424,931); and “cosmetic products, namely lip balm and lip gloss” (Registration No. 3,209,282). The evidence of record also shows that Dr Pepper uses its mark in

connection with all of the goods identified in its registrations, as well as in connection with baking goods, dessert toppings, additional items of clothing, stationery items such as pens, notebooks and stickers, and home décor items such as clocks, mugs and bar stools. (Springate Decl., ¶¶ 26-30 and Exh. PX171.)

Krush Global’s CRUSSH Marks cover “restaurant, catering, snack bar and café services; provision of prepared food; food and drink preparation and presentation services; bar services; catering services for the provision of food and drink; preparation of food stuffs or meals for consumption off the premises; sandwich and salad bar services; wine bar services.” While Krush Global’s trial submissions try hard to limit Krush Global’s services to providing only healthy foods and beverages to only health-conscious consumers (*e.g.*, Learmond Decl., ¶ 6), that attempt must fail as a matter of law. “The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application, regardless of what the record may reveal as to the particular nature of an applicant’s goods . . . or the class of purchasers to which the sales of goods are directed.” *Octocom Sys., Inc. v. Houston Computer Svcs. Inc.*, 16 U.S.P.Q.2d 1783, 1787 (Fed. Cir. 1990) (citations omitted). Thus, “an applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence.” *Hasbro, Inc.*, Opp. No. 91169603, slip op. at 12, 2009 TTAB LEXIS 543, at \*14 (citing *In re Bercut-Vandervoort & Co.*, 229 U.S.P.Q. 763, 764 (T.T.A.B. 1986) (“In other words, when we are considering a claim of likelihood of confusion as between an application and a cited registration, our analysis is limited to the goods or services as set out in the respective application and registrations. Evidence showing the more specific actual nature of the parties’ goods or services will not be considered to limit the language of the application or registration.”)).

There are *no* limits in the application or registration at issue as to the types of restaurant, catering, snack bars and café services to be provided under the CRUSSH Marks. There are *no* limits in the application or registration as to the type of food or drink to be served at Krush Global's proposed CRUSSH cafés. There are *no* limits in the application or registration as to the type of consumers to be served at Krush Global's proposed CRUSSH cafés. Thus, in assessing the relatedness of the parties' goods and services, the Board must compare Dr Pepper's various beverage and food products against the unlimited restaurant services set forth in the CRUSSH application and registration at issue.

Turning, then, to a comparison of the parties' respective goods and services actually at issue, the Board has held that there is no *per se* rule of relatedness even where, as here, the marks at issue are used by Dr Pepper for a wide array of beverages and food and intended to be used by Krush Global for restaurant services serving the very products sold by Dr Pepper. Instead, the Board requires a party seeking to establish likelihood of confusion to show "something more" than simply that a similar or even identical mark is used for both food or beverages and for restaurant services. See *Jacobs v. Int'l Multifoods Corp.*, 212 U.S.P.Q. 641, 642 (C.C.P.A. 1982). Here, the undisputed evidence of record unquestionably provides the requisite "something more."

First, the parties' marks are essentially identical. See *In re Constellation Wines*, Ser. No. 78/803,750, slip op. at 11, 2008 TTAB LEXIS 377, at \*12 (finding "something more" requirement satisfied through, *inter alia*, "the high degree of similarity" between the parties' marks).

Second, the CRUSH mark is a strong mark deserving of broad protection. See *In re Opus One Inc.*, 60 U.S.P.Q.2d 1812, 1814 (T.T.A.B. 2001); *In re Hutchinson*, Ser. No. 78/594,227,

slip op. at 8-9 (*available at* <http://des.uspto.gov/Foia/ReterivePdf?flNm=78594227-07-07-2006&system=TTABIS>), 2006 WL 1968612, at \*3 (T.T.A.B. July 7, 2006).

Third, Dr Pepper has shown that its primary goods – beverages – and Krush Global’s proposed restaurant services are related by offering evidence that Dr Pepper itself has rights in marks that are used for both beverages and restaurant services, namely, A&W and STEWART’S. (Springate Decl., ¶¶ 52-54; *see also* ONRI at Exhs. PX100-PX104.) Thus, Dr Pepper’s own customers are accustomed to seeing Dr Pepper’s brands used both for beverages and for restaurants. It stands to reason, therefore, that consumers viewing Krush Global’s proposed CRUSSH restaurants would believe that Dr Pepper had extended its CRUSH brand much in the same way that the A&W and STEWART’S brands have been extended.

Fourth, Dr Pepper has submitted direct evidence of multiple third parties that offer both beverage or food products and restaurant services under a single mark, including but not limited to Ben & Jerry’s, Dunkin’ Donuts, Godiva, Starbucks and Taco Bell. (Ortiz Decl., ¶¶ 2-20 and Exhs. PX105-PX161; ONRI at Exhs. PX1-PX37, Springate Decl., ¶ 52.) *Compare In re Constellation Wines*, Ser. No. 78/803,750, slip op. at 7 n.6, 2008 TTAB LEXIS 377, at \*9 (relying on examining attorney’s Internet-based evidence of restaurants that offer “private label” wine under the name and mark of the restaurant); *see also In re G.B.I. Tile & Stone, Inc.*, 92 U.S.P.Q.2d 1366, 1370 (T.T.A.B. 2009) (relying on Internet evidence of four third-party companies offering both applicant’s and registrant’s respective goods). With so many prominent cross-over marks in the marketplace, consumers are accustomed to seeing a single company use or license the same mark for both beverage and food goods and for restaurant services. Consumers seeing a casual restaurant chain named CRUSSH would therefore immediately believe it to be related to Dr Pepper’s long-used and well-known CRUSH mark.

Fifth, Dr Pepper has offered evidence of dozens of third-party registrations covering both beverage and restaurant service identifications under the same mark. (Ortiz Decl., ¶¶ 24-25 and Exhs. PX167-PX168; ONRI at Exhs. PX38-PX99). The Board has repeatedly held that such third-party registrations have probative value to suggest that the goods and services listed in the registrations emanate from a single source. *E.g.*, *In re Constellation Wines*, Ser. No. 78/803,750, slip op. at 7 n.6, 2008 TTAB LEXIS 377, at \*9 (relying on examining attorney's evidence of 16 third-party registrations covering both wine and restaurant services); *In re Azteca Restaurant Enters. Inc.*, 50 U.S.P.Q.2d 1209, 1211 (T.T.A.B. 1999) (relying on evidence of ten third-party registrations covering both restaurant services and food items); *Riviana Foods Inc. v. Romero-Nunez*, Opp. No. 91167098, slip op. at 8 (*available at* <http://des.uspto.gov/Foia/ReterivePdf?flNm=91167098-07-24-2007&system=TTABIS>), 2007 WL 2219709, at \*3 (T.T.A.B. July 24, 2007) (relying on evidence of third-party registrations covering both restaurant services and food products); *In re Albert Trostel & Sons Co.*, 29 U.S.P.Q.2d 1783, 1785-86 (T.T.A.B. 1993) (third-party registrations suggest that different goods at issue can emanate from a single source); *O.C. Seacrets, Inc.*, Cancellation No. 92,042,854, slip op. at 18, 2008 TTAB LEXIS 507, at \*21 (same) (citation omitted).

Sixth, the “something more” also is evidenced by the fact that Krush Global itself included beverages in its application for the CRUSSH Logo Mark, deleting them only after these proceedings were commenced. This is a further admission that Dr Pepper's goods and Krush Global's services are related. *See In re Sunland, Inc.*, Opp. Nos. 77/310,231 & 77/307,289, slip op. at 16-17, 2009 TTAB LEXIS 525, at \*18-19 (fact that registrant deleted applicant's goods from its registration supported, rather than contradicted, argument that goods of parties were related); *cf. In re Coors Brewing Co.*, 68 U.S.P.Q.2d at 1064 (in case where Circuit court

concluded that the registrant had not provided enough evidence to show that beer and restaurant services were connected, noting that the outcome would have been different if the application at issue covered both restaurant services and beer).

Seventh, the “something more” is also shown by Krush Global’s admission that soda – Dr Pepper’s primary CRUSH-branded product – would be sold at its CRUSSH restaurants. Krush Global has stated that its intended U.S. CRUSSH restaurants will duplicate the existing U.K. CRUSSH restaurants (Admission 6; Learmond Decl., ¶ 3; Learmond Tr. at 25:20 – 26:7), and those U.K. restaurants serve soda. (Learmond Tr. at 34:5-13, 36:5-8; Ortiz Decl., Exh. PX166.) Krush Global’s own sales of Dr Pepper’s goods further evidence the similarity of the parties’ goods and services. *See In re ML Management, Inc.*, Ser. No. 76/564,139, slip op. at 9, 2007 WL 1676774, at \*4 (something more shown by fact that applicant served goods covered by the cited registration); *In re Azteca Rest. Enters. Inc.*, 50 U.S.P.Q.2d at 1211 (relying on applicant’s own sale of products identical to those offered by opposer); *In re Opus One*, 60 U.S.P.Q.2d at 1815 (“The fact that applicant’s restaurant serves the type of goods . . . identified in the cited registration is certainly probative evidence which supports a finding . . . that applicant’s services and opposer’s goods are related.”); *Roush Bakery Prods. Co. v. Ridlen*, 190 U.S.P.Q. 445, 447 (T.T.A.B. 1976) (likelihood of confusion aggravated by applicant’s sales of bread in its restaurants, which is precisely opposer’s product).

In sum, the evidence overwhelmingly supports the conclusion that the beverage and food goods offered under the CRUSH mark are related to the restaurant services sought to be offered under the CRUSSH Marks. Consistent with this type of evidence, the Board often has found a likelihood of confusion in cases involving use of the same or similar marks for food and beverage products on the one hand, and restaurant services on the other – even in cases where

the senior user's mark does not have the history and recognition of Dr Pepper's CRUSH mark. *See, e.g., In re Sage Dining Servs., Inc.*, Ser. No. 75/789,623, slip op. at 8-12 (available at <http://des.uspto.gov/Foia/ReterivePdf?system=TTABIS&fINm=75789623-05-07-2003>), 2003 WL 21087722, at \*5 (T.T.A.B. May 7, 2003) (SPLASHES for beverage station services and FRUIT SPLASHES for fruit drinks and juices); *In re Heartland Design Assocs., LLC*, Ser. No. 77/245,616, slip op. at 2-16 (available at <http://des.uspto.gov/Foia/ReterivePdf?fINm=77245616-01-13-2009&system=TTABIS>), 2009 WL 129548, at \*1-\*7 (T.T.A.B. Jan. 13, 2009) (CHEF GEOFF'S for restaurant services and CHEF JEFF'S KITCHEN & Design for pickles, jellies, jams, condiments, teas, etc.); *Western Sizzlin Corp. v. Hi Mountain Jerky, Inc.*, Opp. No. 91165983, slip op. at 7-16 (available at <http://des.uspto.gov/Foia/ReterivePdf?fINm=91165983-01-03-2008&system=TTABIS>), 2008 WL 96114, at \*3-\*7 (T.T.A.B. Jan. 3, 2008) (WESTERN SIZZLIN for restaurant services and WESTERN SIZZLE & Design for spices and seasonings); *In re Constellation Wines U.S.*, Ser. No. 78/803,750, slip op. at 6-11, 2008 TTAB LEXIS 377, at \*7-\*12 (BRICKSTONE CELLARS for wine and BRICKSTONES for restaurant services); *In re Comexa Ltda.*, 60 U.S.P.Q.2d 1118, 1120 (T.T.A.B. 2001) (AMAZON and parrot design for chili sauce and pepper sauce and AMAZON for restaurant services); *In re DiLegge*, Ser. No. 75/425,118, slip op. at 5-8 (available at <http://des.uspto.gov/Foia/ReterivePdf?system=TTABIS&fINm=75425118-09-26-2000>), 2000 TTAB LEXIS 676, at \*5-10 (T.T.A.B. Sept. 26, 2000) (PASTA COSI for tomato-based pasta sauces and COSI for restaurant services); *In re Mucky Duck Mustard Co.*, 6 U.S.P.Q.2d 1467, 1469 (T.T.A.B. 1988) (MUCKY DUCK for mustard and MUCKY DUCK for restaurant services); *In re Golden Griddle Pancake House, Ltd.*, 17 U.S.P.Q.2d 1074 (T.T.A.B. 1990) (GOLDEN GRIDDLE PANCAKE HOUSE for restaurant services and GOLDEN GRIDDLE for syrup).

The Board should draw the same conclusion here, and find that the relatedness of the goods factor strongly weighs in Dr Pepper's favor.

#### **4. The Parties' Trade Channels and Customers Overlap**

Two other *du Pont* factors that weigh in Dr Pepper's favor are the overlap of the parties' trade channels and consumers. *du Pont*, 177 U.S.P.Q. at 567. Since Krush Global's services are broadly described as to their nature and type, the Board must presume that the services identified in the application will be offered in all normal channels of trade and that the services will be purchased by all potential customers, including Dr Pepper's own customers. *See In re Elbaum*, 211 U.S.P.Q. 639, 640 (T.T.A.B. 1981).

Here, there is evidence that the trade channels and the consumers will in fact overlap. First, Dr Pepper sells its CRUSH beverages to restaurants (Springate Decl., ¶ 33) – the very type of business that Krush Global intends to operate under its CRUSSH Marks. Second, not only is it common knowledge that restaurants serve beverages – including soft drinks such as those sold under the CRUSH mark – and food – including the bakery items licensed under the CRUSH mark – but also there is evidence that Krush Global's own CRUSSH restaurants offer soft drinks and bakery items. (Learmond Tr. at 34:5-13, 36:5-8; Ortiz Decl., Exh. PX166.) Further, there is evidence that Krush Global's beverage and food offerings include products distributed by third parties, such as Coca-Cola. (*Id.*) In light of this evidence, the Board must conclude that there is nothing that prevents the parties' trade channels from overlapping. This *du Pont* factor must therefore weigh in Dr Pepper's favor. *See In re Constellation Wines*, Ser. No. 78/803,750, slip op. at 11-12, 2008 TTAB LEXIS 377, at \*13; *In re Azteca Restaurant Enters. Inc.*, 50 U.S.P.Q.2d at 1211 (where evidence showed that restaurants often sell Mexican food items, holding that “[t]he average consumer . . . would be likely to view Mexican food items and

Mexican restaurant services as emanating from or sponsored by the same source if such goods and services are sold under the same or substantially similar marks”).

The Board likewise must find that the parties’ consumers overlap. Krush Global has admitted that it has *no* evidence that the intended consumers of Krush Global’s CRUSSH services would not overlap with consumers of Dr Pepper’s CRUSH goods. (Admission 13; Interrogatory Resp. 22.) This admission is not surprising, since both Dr Pepper and Krush Global seek to serve exactly the same type of consumers: consumers who are thirsty or hungry. Krush Global further admits that CRUSSH restaurants serve whoever walks in the door, regardless of their eating habits or preferences. (Learmond Tr. at 42:25-43:6, 43:20-44:30.)

Given the broad description of goods in Dr Pepper’s registrations and the broad description of services in Krush Global’s applications, the Board must conclude that consumers of the parties’ respective goods and services would overlap and that this *du Pont* factor consequently weighs in Dr Pepper’s favor.

#### **5. The Parties’ Consumers Are Not Sophisticated or Careful**

The next *du Pont* factor considers “the conditions under which and buyers to whom sales are made, *i.e.*, ‘impulse’ vs. careful, sophisticated purchasing.” *du Pont*, 177 U.S.P.Q. at 567. Impulse purchasers are more likely to be confused than sophisticated purchasers, because the lower the cost of the products at issue, the less careful consumers are likely to be. *Recot, Inc. v. Becton*, 54 U.S.P.Q.2d 1894, 1899 (Fed. Cir. 2000). Here, both parties offer low-cost, casual food and beverage items. (Springate Decl., ¶ 16; Ortiz Decl., Exh. PX166.) These products are not likely to be the subject of careful purchasing decisions, particularly by consumers who are more interested in having their thirst or hunger satisfied than in trying to discern minute differences between marks. *Cf. Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 223

U.S.P.Q. 1281, 1282 (Fed. Cir. 1984) (teas are “inexpensive, comestible goods” subject to “a lesser standard of purchasing care”); *In re Martin’s Famous Pastry Shoppe, Inc.*, 223 U.S.P.Q. 1289, 1290 (Fed. Cir. 1984) (bread and cheese are “staple, relatively inexpensive comestibles” subject to “a lesser standard of purchasing care”); *see also Lever Bros. Co v. Am. Bakeries Co.*, 216 U.S.P.Q. 177, 183 (2d Cir. 1982) (“The ordinary purchaser of bread and margarine is a casual buyer, . . . the bustling, self-service atmosphere of a typical supermarket makes careful examination of products unlikely.”); *Frisch’s Rests. v. Elby’s Big Boy*, 214 U.S.P.Q. 15, 20 (6th Cir. 1982) (“fast-food’ products . . . are not likely to be the object of intensive consumer research, but rather subject to ‘impulse buying’” and consequently a “casual ‘degree of purchaser care’”). Indeed, Krush Global has admitted that it has no evidence that the intended customers at CRUSSH cafés are sophisticated. (Admission 14.) Given that the low cost of the parties’ respective goods makes impulse purchases likely, this factor weighs in Dr Pepper’s favor.

#### **6. There Is No Evidence of Third Party Uses That Weaken the CRUSH Mark**

Because “[e]vidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection,” *Palm Bay Imports*, 73 U.S.P.Q.2d at 1693 (citations omitted), another *du Pont* factor assesses “[t]he number and nature of similar marks in use on similar goods.” *du Pont*, 177 U.S.P.Q. at 567.

Here, there is no significant evidence of third-party use of similar marks on similar goods. Krush Global has introduced into evidence exactly one third-party mark: CRUSH 29. Krush Global’s only evidence of this mark is a federal trademark registration and a printout of a webpage. (Wright Decl., Exhs. 10-11.)

The registration itself is of no import, as it is well settled that registrations are entitled to very little weight on the question of likelihood of confusion, since they prove neither that the

registered mark actually is in use nor that consumers have been exposed to the mark. *AMF Inc. v. Am. Leisure Prods., Inc.*, 177 U.S.P.Q. 268, 270 (C.C.P.A. 1973). Moreover, “[e]ven the registration of arguably confusing marks does not give applicant the right to register another confusing mark.” *Hasbro, Inc.*, Opp. No. 91169603, slip op. at 20, 2009 TTAB LEXIS 543, at \*25 (citing *AMF Inc.*, 177 U.S.P.Q. at 269; *Nat’l Aeronautics & Space Admin. v. Record Chem. Co.*, 185 U.S.P.Q. 563, 567 (T.T.A.B. 1975)).

While Krush Global had ample opportunity to obtain evidence concerning any use of CRUSH 29, it deliberately chose not to, relying instead only on an Internet printout. That printout does not *prove* that the restaurant is actually in operation. And even if it were, Krush Global has submitted no evidence that the restaurant enjoys any sort of renown that would make it known to consumers either in Roseville, California (where the restaurant purportedly is located) or nationally. Krush Global offers no evidence of any sales, advertising or marketing by CRUSH 29. It offers no evidence of the meaning of CRUSH as used in the restaurant’s name (which according to the website relied on by Krush Global, focuses on wine). (*See* Wright Decl., Exh. 10.) Nor has Krush Global submitted any evidence that the alleged existence of a single location restaurant in a small town in California named CRUSH 29 has diluted or otherwise affected consumer perception of Dr Pepper’s CRUSH mark. *See In re Opus One, Inc.*, 60 U.S.P.Q.2d at 1814 (finding media reference to third-party mark “not particularly probative” because it does not show whether the use of the third party mark “has been so extensive as to affect the scope of protection to be afforded to the registrant’s mark”). Thus, the “evidence” offered by Krush Global concerning the CRUSH 29 mark is of no probative value on any issue relevant to these proceedings. *Charrette Corp. v. Bowater Commc’n Papers, Inc.*, 13 U.S.P.Q.2d 2040, 2043 (T.T.A.B. 1989); *In re Hub Distrib., Inc.*, 218 U.S.P.Q. 284, 285 (T.T.A.B. 1983)

(“absent evidence of actual use of the marks subject of the third-party registrations, they are entitled to little weight on the question of likelihood of confusion”) (citations omitted).

Krush Global also submitted evidence that Dr Pepper entered into coexistence agreement permitting the registration and use of CRUSH 29. (ANR2, Exh. DX002 at 6 (Response to Interrogatory No. 4).) Dr Pepper’s consent to a mark that is less similar than the mark at issue here, for use in connection with a specific type of restaurant service (single-location, wine-centered, fine dining) not at issue here, simply has little relevance to whether Krush Global’s CRUSSH Marks are confusingly similar to Dr Pepper’s CRUSH mark. *See DC Comics v. Pan Am. Grain Mfg. Co.*, 77 U.S.P.Q.2d 1220, 1227 (T.T.A.B. 2005) (“We do not agree with applicant’s general statement that essentially a consent agreement with one third party is an admission that another’s use of the mark is not likely to cause confusion. No such presumption can be made from that type of agreement.”). In any event, it is perfectly rational and legally acceptable for Dr Pepper to presume that a single-location, wine-centric, upscale restaurant operating in a single, small California town would not cause a likelihood of confusion, whereas CRUSSH used nationally as the name of a chain casual restaurant would.<sup>10</sup>

Accordingly, this *du Pont* factor also weighs in Dr Pepper’s favor.

## **7. Krush Global Has Acted in Bad Faith**

Krush Global’s conduct in applying for registrations of its CRUSSH Marks demonstrates bad faith. With respect to Registration No. 3,275,548, Krush Global sought to register the word mark CRUSSH only for services in International Class 43. Yet, in Application Serial No.

---

<sup>10</sup> In fact, even Krush Global’s founder, director and chairman admitted that the existence of a single restaurant with a virtually identical name is unlikely to be of any threat to a national brand. (Learmond Dep. 71:16 – 72:5 (stating that Krush Global likely would have selected the CRUSSH name even if there had already been in existence in the U.K. a single restaurant called “CRUSH.”))

79/033,050, Krush Global applied to register the CRUSSH Logo Mark for services in International Class 43 as well as for food and beverage items in International Classes 29 and 32. Once Dr Pepper filed its opposition, Krush Global amended the application to delete International Classes 29 and 32. Krush Global's purported reason for not including Classes 29 and 32 in its application for the CRUSSH word mark was that it "was not advised by counsel to file in said classes." (Interrogatory Resp. 26.) Krush Global's purported reason for deleting Classes 29 and 32 from its CRUSSH Logo Mark application was "as a courtesy to" Dr Pepper. (Interrogatory Resp. 25.)

The clear subtext is that Krush Global and its counsel were well-aware of Dr Pepper's CRUSH mark and were well aware that Dr Pepper's mark would be a problem for the CRUSSH Marks. Accordingly, the evidence suggests that Krush Global has acted in bad faith, and this *du Pont* factor should therefore weigh in Dr Pepper's favor.

#### **8. Other Probative Evidence**

The Board must consider any other established evidence probative of likelihood of confusion. *du Pont*, 177 U.S.P.Q. at 567. In this case, the fact that both parties use an identical orange color and similar design elements with their respective marks, and that both parties use their marks for beverage-focused businesses, only reinforces the potential for confusion between the parties' respective marks.

Although color is not claimed in either Dr Pepper's registrations or Krush Global's applications, both parties regularly display their respective marks in the color orange, and use orange as the primary color in marketing and other materials related to their respective businesses conducted under the marks. All of Krush Global's U.K. materials – from cups to menus to its website – display the CRUSSH Marks primarily in orange. (ONR2 at Exhs. PX206,

207; Ortiz Second Decl., ¶ 2; Ortiz Decl., Exh. PX166.) And while Dr Pepper sells its CRUSH beverages in multiple flavors, the majority of its sales are of its orange flavored beverages – 65% including both orange and diet orange flavors –all of which display the CRUSH mark in orange. (Springate Decl., ¶ 12 and Exh. PX170.) Dr Pepper’s marketing materials for CRUSH also are generally dominated by the color orange. (*E.g.*, Springate Decl., Exh. PX169.)

Both parties’ use of the color orange in connection with their respective marks undoubtedly will tend to increase the likelihood of confusion in the marketplace, a fact relevant to the analysis of the *du Pont* factors here. *See L.A. Gear, Inc. v. Calcados Ferracini Ltda.*, Opp. No. 91168866, slip op. at 12 (*available at* <http://des.uspto.gov/Foia/ReterivePdf?flNm=91168866-09-23-2009&system=TTABIS>), 2009 TTAB LEXIS 609, at \*14 (T.T.A.B. Sept. 23, 2009) (finding fact that both parties present marks in red relevant to the likelihood of confusion analysis, despite color not being claimed in either the application or the opposer’s registration) (citation omitted); *e.g.*, *Gillette Canada Co. v. Kivy Corp.*, Opp. No. 91116804, slip op. at 10-11 (*available at* <http://des.uspto.gov/Foia/ReterivePdf?system=TTABIS&flNm=91116804-01-29-2003>), 2003 TTAB LEXIS 28, at \*11 (T.T.A.B. Jan. 29, 2003) (finding ORAL MAGIC confusingly similar to ORAL-B, where applicant displayed its mark in “the same color that opposer consistently uses to display its mark”); *Uncle Ben’s, Inc. v. Stubenberg Int’l, Inc.*, 47 U.S.P.Q.2d 1310 (T.T.A.B. 1998) (finding BEN’S BREAD confusingly similar to UNCLE BEN’S, where applicant displayed its mark in “the same color that opposer consistently uses to display its mark”).

Also tending to increase the likelihood of confusion between the parties’ marks is the fact that both parties use similar splash design in connection with their marks. The amorphous

design element in the CRUSH Logo Mark:



is similar to the splash background designs Dr Pepper uses in connection with its CRUSH beverages::



The use of this similar design element further increases the likelihood of confusion between the CRUSH and CRUSSH Marks, and also should be weighted into the *du Pont* analysis here. *Cf. Specialty Brands*, 748 F.2d at 674 (trade dress may be considered as “evidence of whether the word mark projects a confusingly similar commercial impression”).

It also is relevant to the likelihood of confusion analysis that Krush Global intends to focus its offerings on beverages product, much as it does in its existing CRUSSH outlets in the U.K. (*See, e.g., Learmond Decl.*, ¶ 13; *Learmond Tr.* at 51:17-24.) It is clear that the beverage-focused nature of Krush Global’s restaurants make its services even more closely related to the beverage products on which Dr Pepper has used its CRUSH marks for more than a century, thus increasing the likelihood that consumers will presume a connection between the parties. *See, e.g., In re Sage Dining Servs., Inc.*, Ser. No. 75/789,623, slip op. at 8-12, 2003 WL 21087722, at \*5; *see also In re Coors Brewing Co.*, 68 U.S.P.Q.2d at 1064 (although holding that beer and restaurant services are not related, noting that “[The] case would be different . . . if the registrant’s mark had been for a brewpub or for restaurant services and beer. In that case, the goods and services associated with the two marks *would clearly be related.*”) (emphasis added).

**B. Balancing the *du Pont* Factors**

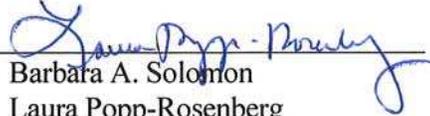
Every single factor relevant to these consolidated proceedings favors Dr Pepper. To hold that the virtually identical mark CRUSSH for restaurant services is not confusingly similar to the century-old CRUSH mark used in connection with food and beverages runs counter to law, runs counter to the way food and beverages are marketed and sold, and runs counter to Dr Pepper's long-established trademark rights. If CRUSSH can be registered for restaurant services, what is next: PEPSSI? SEVEN UPP? The facts and law require that the Board conclude that Krush Global's registration of the CRUSSH word mark and its attempted registration of the CRUSSH Logo Mark for restaurant services is likely to cause confusion, mistake and deception with respect to Dr Pepper's prior used and registered CRUSH mark in violation of Section 2(d) of the Lanham Act, and that therefore judgment must be entered in favor of Dr Pepper.

**VII. CONCLUSION**

For the foregoing reasons, Dr Pepper submits that the evidence establishes a clear likelihood of confusion, mistake and deception arising from registration of Krush Global's CRUSSH Marks. Accordingly, Dr Pepper respectfully requests: (1) that registration of Application Serial No. 79/033,050 be denied; (2) that Registration No. 3,275,548 be cancelled and (3) and that final judgment for Dr Pepper be entered in these consolidated proceedings.

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  
Phone: (212) 813-5900  
Email: bsolomon@frosszelnick.com  
lpopp-rosenberg@frosszelnick.com

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

## APPENDIX A

Opposer/Petitioner Dr Pepper/Seven Up, Inc. is relying on the following evidence in support of its position in these consolidated proceedings as set forth in the Trial Brief for Opposer:

1. Opposer's May 15, 2009 Notice of Reliance on Official Records ("ONR1") and Opposer's Exhibits PX1-PX104 referenced therein:

- Opposer's Exhibit PX1: U.S. Registration No. 1,961,757, owned by Ben & Jerry's Homemade, Inc., for the mark BEN & JERRY'S in International Class 42 for "frozen confection stores services";
- Opposer's Exhibit PX2: U.S. Registration No. 2,203,988, owned by Ben & Jerry's Homemade, Inc., for the mark BEN & JERRY'S (& Design) in International Class 30 for "ice cream, frozen yogurt, sorbet and frozen confections";
- Opposer's Exhibit PX3: U.S. Registration No. 992,146, owned by Bob Evans Restaurants of Michigan, Inc., for the mark BOB EVANS (Stylized) in International Class 42 for "restaurant services";
- Opposer's Exhibit PX4: U.S. Registration No. 3,553,608, owned by Bob Evans Restaurants of Michigan, Inc., for the mark BOB EVANS in International Class 29 for "pre-packaged refrigerated, meat entrees; . . . pre-packaged, refrigerated side dishes, namely, mashed potatoes, vegetables; and prepared and packaged side dishes consisting primarily of meat, fish, poultry, vegetables, or fruit," among many other food items, and in International Class 30 for "pre-baked, microwaveable biscuits; pre-packaged entrees consisting of gravy and biscuits; [and] pre-packaged, refrigerated side dishes, namely, macaroni, pasta, and stuffing containing bread," among other food items;

- Opposer’s Exhibit PX5: U.S. Registration No. 1,940,179, owned by Boston Market Corporation, for the mark BOSTON MARKET in International Class 42 for “restaurant services featuring poultry and a variety of side dishes”;
- Opposer’s Exhibit PX6: online record of the USPTO regarding assignments associated with U.S. Registration No. 1,940,179, which shows that notwithstanding the identification of McDonald’s Corporation as the owner of U.S. Registration No. 1,940,179 in Opposer’s Exhibit PX5, the registration is in fact owned by Boston Market Corporation;
- Opposer’s Exhibit PX7: U.S. Registration No. 3,511,498, owned by Boston Market Corporation, for the mark BOSTON MARKET in International Class 29 for “frozen entrees and meals consisting of meat, poultry, pork, vegetables, potatoes and beans; processed potatoes,” and in International Class 30 for “frozen entrees and meals consisting of pasta, rice and bread; macaroni and cheese”;
- Opposer’s Exhibit PX8: U.S. Registration No. 2,330,452, owned by Carvel Corporation, for the mark CARVEL ICE CREAM BAKERY (& design) in International Class 42 for “retail ice cream store and ice cream parlor services,” and in International Class 30 for “frozen confections, ice cream, soft ice cream, ice cream cakes and pastries containing ice cream”;
- Opposer’s Exhibit PX9: U.S. Registration No. 1,637,904, owned by CPK Management Company, for the mark CALIFORNIA PIZZA KITCHEN in International Class 42 for “restaurant services”;
- Opposer’s Exhibit PX10: U.S. Registration No. 2,241,900, owned by CPK Management Company, for the mark CALIFORNIA PIZZA KITCHEN in International Class 30 for “frozen pizza”;

- Opposer’s Exhibit PX11: U.S. Registration No. 748,901, owned by Dunkin’ Donuts USA, Inc., for the mark DUNKIN’ DONUTS in International Class 42 for “restaurant services”;
- Opposer’s Exhibit PX12: U.S. Registration No. 2,751,007, owned by Dunkin’ Donuts USA, Inc., for the mark DUNKIN’ DONUTS (& Design) in International Class 30 for doughnuts and coffee, among other items;
- Opposer’s Exhibit PX13: U.S. Registration No. 1,295,078, owned by Godiva Chocolatier, Inc., for the mark GODIVA in International Class 42 for “retail candy store and confectionery services”;
- Opposer’s Exhibit PX14: U.S. Registration No. 836,376, owned by Godiva Chocolatier, Inc., for the mark GODIVA in International Class 30 for “candy”;
- Opposer’s Exhibit PX15: U.S. Registration No. 1,116,969, owned by HDIP, Inc., for the mark HÄAGEN-DAZS (Stylized) in International Class 42 for “restaurant services—namely, the preparation and serving of ice cream and other dairy products for on and off premises consumption”;
- Opposer’s Exhibit PX16: U.S. Registration No. 737,244, owned by HDIP, Inc., for the mark HÄAGEN-DAZS (Stylized) in International Class 30 for “ice cream”;
- Opposer’s Exhibit PX17: U.S. Registration No. 1,557,380, owned by HI Limited Partnership, for the mark HOOTERS in International Class 42 for “restaurant and cocktail lounge services”;
- Opposer’s Exhibit PX18: a printout of the online records of the USPTO regarding assignments associated with U.S. Registration No. 1,557,380, which shows that notwithstanding the identification of Hooter’s Inc. as the owner of U.S. Registration No.

1,557,380 in Opposer's Exhibit PX17, the registration is in fact owned by HI Limited Partnership;

- Opposer's Exhibit PX19: U.S. Registration No. 3,568,638, owned by HI Limited Partnership, for the mark HOOTERS in International Class 30 for "sauces";
- Opposer's Exhibit PX20: U.S. Registration No. 3,501,784, owned by Margaritaville Enterprises, LLC, for the mark MARGARITAVILLE International Class 43 for "restaurant services";
- Opposer's Exhibit PX21: Allowed U.S. Application Serial No. 77/326,938, owned by Margaritaville Enterprises, LLC, for the mark MARGARITAVILLE in International Class 30 for "salsa, tortilla chips, tortillas, pita chips, salad dressings";
- Opposer's Exhibit PX22: U.S. Registration No. 3,384,300, owned by The Mrs. Fields' Brand, Inc., for the mark MRS. FIELDS (& Design) in International Class 43 for "restaurant services";
- Opposer's Exhibit PX23: U.S. Registration No. 1,983,184, owned by The Mrs. Fields' Brand, Inc., for the mark MRS. FIELDS (& Design) in International Class 30 for "bakery goods, namely cookies and brownies";
- Opposer's Exhibit PX24: U.S. Registration No. 1,926,088, owned by Nathan's Famous Systems, Inc., for the mark NATHAN'S FAMOUS in International Class 42 for "restaurant and carryout food services";
- Opposer's Exhibit PX25: U.S. Registration No. 1,058,629, owned by Nathan's Famous Systems, Inc. for the mark NATHAN'S FAMOUS SINCE 1916 (& Design) in International Class 29 for "beef frankfurters";

- Opposer’s Exhibit PX26: U.S. Registration No. 1,444,549, owned by Starbucks U.S. Brands, LLC, for the mark STARBUCKS in International Class 42 for “retail store services and distributorship services for coffee, tea and spices; coffee café services”;
- Opposer’s Exhibit PX27: U.S. Registration No. 1,452,359, owned by Starbucks U.S. Brands, LLC, for the mark STARBUCKS in International Class 30 for “coffee, tea, spices, herb tea, chocolate and cocoa”;
- Opposer’s Exhibit PX28: U.S. Registration No. 1,924,335, owned by Taco Bell Corp., for the mark TACO BELL in International Class 42 for “restaurant services and carryout food services”;
- Opposer’s Exhibit PX29: U.S. Registration No. 1,874,786, owned by Taco Bell Corp., for the mark TACO BELL in International Class 30 for “taco seasoning mix, taco shells, taco dinner kit (consisting of taco shells, taco sauce and seasoning mix), tortilla chips, picante sauce and salsa”;
- Opposer’s Exhibit PX30: U.S. Registration No. 925,656, owned by TGI Friday’s of Minnesota, Inc., for the mark T.G.I. FRIDAY’S in International Class 42 for “restaurant and liquor bar services”;
- Opposer’s Exhibit PX31: U.S. Registration No. 2,476,076, owned by TGI Friday’s of Minnesota, Inc., for the mark T.G.I. FRIDAY’S in International Class 30 for “fresh and frozen appetizers consisting primarily of pasta, dumplings or tortillas containing cheese, vegetables, meat and/or other fillings; sauces, excluding cranberry sauce and applesauce; ice cream; seasonings, seasoning mixes, spices and marinades”;

- Opposer’s Exhibit PX32: U.S. Registration No. 2,909,902, owned by White Castle Management Co., for the mark WHITE CASTLE (& Design) in International Class 43 for “restaurant services”;
- Opposer’s Exhibit PX33: U.S. Registration No. 2,942,681, owned by White Castle Management Co., for the mark WHITE CASTLE (& Design) in International Class 30 for “hamburger sandwiches,” among other food items;
- Opposer’s Exhibit PX34: U.S. Registration No. 1,901,065, owned by Wolfgang Puck, for the mark WOLFGANG PUCK in International Class 42 for “restaurant services”;
- Opposer’s Exhibit PX35: U.S. Registration No. 1,593,275, owned by Wolfgang Puck, for the mark WOLFGANG PUCK in International Class 30 for “packaged and frozen prepared food, namely, pizza”;
- Opposer’s Exhibit PX36: U.S. Registration No. 2,565,443, owned by Wolfgang Puck, for the mark WOLFGANG PUCK in International Class 29 for “packaged and prepared foods, namely, bread, pasta, pasta sauces and macaroni, pasta and rice salads, and salad dressings,” among other items;
- Opposer’s Exhibit PX37: U.S. Registration No. 3,010,443, owned by Wolfgang Puck, for the mark WOLFGANG PUCK in International Class 29 for “soups; garden salads; chicken salads; and vegetable salads”;
- Opposer’s Exhibit PX38: an official record of the USPTO obtained from TESS setting forth the results of a search of the USPTO’s database for active use-based applications and registrations covering both services in International Class 43 and goods

other than beer in International Class 32 and including in the identification of goods or services one or more of the terms restaurant, catering, snack, bar and/or café;

- Opposer's Exhibit PX39: U.S. Registration No. 3,100,296 for the mark BANANAS for, among other things, “fruit and ice beverages” and “fruit juice” in International Class 32 and “restaurant services” in International Class 43;
- Opposer's Exhibit PX40: U.S. Registration No. 3,478,171 for the mark EL FAMOUS BURRITO for “spring water” in International Class 32 and “carry-out restaurants; restaurant services; take-out restaurant services” in International Class 43;
- Opposer's Exhibit PX41: U.S. Registration No. 3,433,399 for the mark TOMAYDÓ TOMAHDÓ (& Design) for “frozen fruit beverages, fruit drinks” in International Class 32 and “restaurant and take-out food services” in International Class 43;
- Opposer's Exhibit PX42: U.S. Registration No. 3,446,819 for a design mark for “spring water” in International Class 32 and “carry-out restaurants; restaurant services; take-out restaurant services” in International Class 43;
- Opposer's Exhibit PX43: U.S. Registration No. 3,327,216 for a design mark for “soft drinks, smoothies, lemonade and fruit flavored beverages” in International Class 32 and “restaurant services” in International Class 43;
- Opposer's Exhibit PX44: U.S. Registration No. 3,327,214 for the mark AUNTIE ANNE'S (& Design) for “soft drinks, smoothies, lemonade and fruit flavored beverages” in International Class 32 and “restaurant services” in International Class 43;
- Opposer's Exhibit PX45: U.S. Registration No. 3,327,212 for the mark AUNTIE ANNE'S PRETZEL PERFECT (& Design) for “soft drinks, smoothies, lemonade

and fruit flavored beverages” in International Class 32 and “restaurant services” in International Class 43;

- Opposer’s Exhibit PX46: U.S. Registration No. 3,428,843 for the mark THE SMOOTHIE PIT for “blended drinks, namely, smoothies” in International Class 32 and “restaurant services, namely, provision of beverages for dining in and drive-in services” in International Class 43;

- Opposer’s Exhibit PX47: U.S. Registration No. 3,422,867 for the mark BOOSTER JUICE (& Design) for “Frozen fruit-based beverages; Non-alcoholic beverages containing fruit juices; Smoothies; Vegetable juice” in International Class 32 and “Fast-food restaurants and snackbars; Restaurant services” in International Class 43;

- Opposer’s Exhibit PX48: U.S. Registration No. 3,386,348 for the mark RED ROBIN AMERICA’S GOURMET BURDERS & SPIRITS (& Design) for “Non-alcoholic fruit-based beverages and fruit-based beverages with berries” in International Class 32 and “restaurant services; take-out restaurant services” among other services, in International Class 43;

- Opposer’s Exhibit PX49: U.S. Registration No. 3,243,072 for the mark BERIYO for “Smoothies, fruit drinks and fruit juices, sparkling water, spring water, flavored waters and pop” in International Class 32 and “restaurant services” in International Class 43;

- Opposer’s Exhibit PX50: U.S. Registration No. 3,257,813 for the mark ÁNIMO JUICE (& Design) for “Fruit juices, namely, fresh squeezed and organic fruit juice; organic vegetable juice; non-alcoholic beverages containing fruit juices; smoothies;

vegetable juices” in International Class 32 and “Bar services; Coffee-house and snack-bar services; Restaurant services; Snack bar and canteen services” in International Class 43;

- Opposer’s Exhibit PX51: U.S. Registration No. 3,231,465 for the mark MY DRINK MY STYLE for “Beverages, namely drinking waters, flavored waters, mineral and aerated waters; and other non-alcoholic beverages, namely, soft drinks, energy drinks and sports drinks; fruit drinks and juices” in International Class 32 and “restaurant services” in International Class 43;

- Opposer’s Exhibit PX52: U.S. Registration No. 3,357,255 for a design mark for “smoothies, fruit drinks and fruit juices, sparkling water, spring water, flavored waters and pop” in International Class 32 and “restaurant services featuring fresh and frozen yogurt products and dessert items” in International Class 43;

- Opposer’s Exhibit PX53: U.S. Registration No. 3,274,286 for the mark MAUI WOWI (& Design) for “non-alcoholic beverages, namely, blended frozen fruit drinks containing fruit, fruit juices and other natural ingredients; bottled drinking water” in International Class 32 and “restaurant services featuring frozen fruit bars, blended frozen fruit drinks, coffee and coffee-based beverages containing milk, bottled water and snacks” in International Class 43;

- Opposer’s Exhibit PX54: U.S. Registration No. 3,060,428 for the mark WILD OATS (stylized) for “mineral water; fruit juice; orange juice; grapefruit juice; aerated fruit juice; fruit flavored soft drinks; carbonated soft drinks; spring water” in International Class 32 and “Restaurant services; café services; juice bar services; coffee bar services; delicatessens; sushi bar services” in International Class 43;

- Opposer’s Exhibit PX55: U.S. Registration No. 3,191,182 for the mark “WE SQUEEZE YOU ENJOY” for “smoothies and soft drinks” among other goods in International Class 32 and “juice bar services, coffee shop services, restaurant services and carry-out restaurant services” in International Class 43;
- Opposer’s Exhibit PX56: U.S. Registration No. 3,230,950 for the mark YOVANA for “smoothies, fruit drinks and fruit juices, sparkling water, spring water, flavored waters and pop” in International Class 32 and “restaurant services” in International Class 43;
- Opposer’s Exhibit PX57: U.S. Registration No. 3,155,097 for the mark HARPOON for “soft drinks” in International Class 32 and “bar and restaurant services” in International Class 43;
- Opposer’s Exhibit PX58: U.S. Registration No. 3,269,294 for the mark HUI LAU SHAN HEALTHY DESSERT (& Design) for “fruit drinks and fruit juices” among other goods in International Class 32 and “catering services, restaurant and cafeteria services, take-out restaurant services” in International Class 43;
- Opposer’s Exhibit PX59: U.S. Registration No. 2,930,985 for the mark LIQUID PLANET (& Design) for “non-alcoholic beverages, namely smoothies” in International Class 32 and “restaurant services” in International Class 43;
- Opposer’s Exhibit PX60: U.S. Registration No. 2,929,039 for the mark LIQUID PLANET for “non-alcoholic beverages, namely smoothies” in International Class 32 and “restaurant services” in International Class 43;
- Opposer’s Exhibit PX61: U.S. Registration No. 3,410,318 for the mark JAVA JOHNNY’S MIDTOWNE CAFE for “coffee flavored non-carbonated soft drinks

and syrups and extracts for making flavored soft drinks and milk based beverages” in International Class 32 and “restaurant, cafe and coffee house services” in International Class 43;

- Opposer’s Exhibit PX62: U.S. Registration No. 3,013,320 for the mark SUBWAY for “soft drinks” among other goods in International Class 32 and “restaurant services; sandwich shop services; catering services; take-out food services” in International Class 43;

- Opposer’s Exhibit PX63: U.S. Registration No. 3,139,964 for the mark BERRY BOX for “fruit drinks and fruit juices; smoothie drinks; soft drinks” in International Class 32 and “restaurant, snack bar and juice bar services featuring food and beverage for consumption on or off the premises” in International Class 43;

- Opposer’s Exhibit PX64: U.S. Registration No. 3,150,464 for the mark MAUI WOWI (& Design) for “soft drinks and blended frozen drinks containing fruit, fruit juices and other natural ingredients” in International Class 32 and “restaurant services featuring blended frozen fruit drinks, coffee and coffee-based beverages containing milk, bottled water and snacks” in International Class 43;

- Opposer’s Exhibit PX65: U.S. Registration No. 3,150,463 for the mark MAUI WOWI for “soft drinks and blended frozen drinks containing fruit, fruit juices and other natural ingredients” in International Class 32 and “restaurant services featuring blended frozen fruit drinks, coffee and coffee-based beverages containing milk, bottled water and snacks” in International Class 43;

- Opposer’s Exhibit PX66: U.S. Registration No. 2,893,312 for a design mark for “non-alcoholic cocktail mixes, namely, margarita and daiquiri mixes; and non-alcoholic

cocktail mixes” in International Class 32 and “catering services” among other services in International Class 43;

- Opposer’s Exhibit PX67: U.S. Registration No. 2,766,831 for the mark A&W (& Design) for “soft drinks and syrups, and bases and concentrates for making same” in International Class 32 and “restaurant services” in International Class 43;

- Opposer’s Exhibit PX68: U.S. Registration No. 2,693,444 for the mark CAKE-O for “non-alcoholic beverages, namely natural spring water” in International Class 32 and “restaurant services” in International Class 43;

- Opposer’s Exhibit PX69: an official record of the USPTO obtained from TESS setting forth the results of a search of the USPTO’s database for active use-based applications and registrations covering both services in International Class 42 and goods other than beer in International Class 32 and including in the identification of goods or services one or more of the terms restaurant, catering, snack, bar and/or café;

- Opposer’s Exhibit PX70: U.S. Registration No. 2,748,693 for the mark AUNTIE ANNE’S CREÁMO CLASSIC CONES (& Design) for “smoothies and slush-type soft drinks” in International Class 32 and “restaurant services” in International Class 42;

- Opposer’s Exhibit PX71: U.S. Registration No. 2,613,558 for the mark AUNTIE ANNE’S CREÁMO for “smoothie beverages; slush-type soft drinks” in International Class 32 and “restaurant services” in International Class 42;

- Opposer’s Exhibit PX72: U.S. Registration No. 2,799,292 for the mark ORANGE JULIUS (& Design) for smoothies and soft drinks among other goods in International Class 32 and “restaurant and carry-out food services” in International Class 42;

- Opposer’s Exhibit PX73: U.S. Registration No. 2,561,895 for the mark KERBER’S (Stylized) for “beverages, namely fruit drinks and fruit juices” in International Class 32 and “restaurant and carry-out food and beverages services” in International Class 42;
- Opposer’s Exhibit PX74: U.S. Registration No. 2,597,732 for the mark HABIBI CAFE for “bottled drinking water” in International Class 32 and “restaurant” in International Class 42;
- Opposer’s Exhibit PX75: U.S. Registration No. 2,753,911 for the mark ITO EN (& Design) for “tea-flavored soft drinks, fruit juices, fruit drinks, fruit-flavored soft drinks, vegetable juices, vegetable drinks, vegetable-flavored soft drinks” in International Class 32 and “restaurant and café services” in International Class 42;
- Opposer’s Exhibit PX76: U.S. Registration No. 2,552,280 for a design mark for fruit juices and soft drinks among other goods in International Class 32 and “cafeterias, cafes, catering, hotels, restaurants, self-service restaurants, snack bars” in International Class 42;
- Opposer’s Exhibit PX77: U.S. Registration No. 2,606,543 for the mark CHA FOR TEA (& Design) for “fruit drinks and fruit juices” in International Class 32 and “operation of cafe style restaurant for on-premises and off-premises consumption of food and beverages” in International Class 42;
- Opposer’s Exhibit PX78: U.S. Registration No. 2,594,063 for the mark F & B for “lemonade, ice tea, fruit punch, coffee, tea” in International Class 32 and “restaurant, restaurant take out, carry out restaurant and restaurant delivery services” in International Class 42;

- Opposer’s Exhibit PX79: U.S. Registration No. 3,032,729 for the mark .SEN (& Design) for “fruit drinks” among other goods in International Class 32 and “restaurant services” among other services in International Class 42;
- Opposer’s Exhibit PX80: U.S. Registration No. 2,805,384 for the mark GÜDTFOOD for “lemonade, fruit punch” in International Class 32 and “restaurant, restaurant take out, carry out restaurant and restaurant featuring home delivery services” in International Class 42;
- Opposer’s Exhibit PX81: U.S. Registration No. 2,664,383 for the mark TACOTIME (& Design) for “soft drinks for consumption on or off the premises” in International Class 32 and “restaurant services” in International Class 42;
- Opposer’s Exhibit PX82: U.S. Registration No. 2,560,070 for the mark EASY LIFE for “soft drinks and fruit juices” among other goods in International Class 32 and “snack bars, restaurants and cafes” among other services in International Class 42;
- Opposer’s Exhibit PX83: U.S. Registration No. 2,886,820 for the mark LIFE SHOULD TASTE AS GOOD AS SWISS CHALET for “beverages, namely, non-alcoholic soft drinks, fruit and vegetable drinks and juices” in International Class 32 and “restaurant services, fast food services, food-take out services, restaurant services featuring prepared food delivery services” in International Class 42;
- Opposer’s Exhibit PX84: U.S. Registration No. 2,608,008 for the mark THE BLEND COFFEE & SMOOTHIE COMPANY (& Design) for “squeezed fruit and vegetables juices, orange juice, carrot juice, fresh fruit smoothies, for consumption on or off the premises” in International Class 32 and “restaurant services” in International Class 42;

- Opposer’s Exhibit PX85: U.S. Registration No. 2,847,739 for the mark SAINT’S ALP for “fruit drinks and fruit juices” among other goods in International Class 32 and “restaurant services” in International Class 42;
- Opposer’s Exhibit PX86: U.S. Registration No. 2,920,992 for the mark CAMPERO for “fruit juices” in International Class 32 and “restaurant services” in International Class 42;
- Opposer’s Exhibit PX87: U.S. Registration No. 2,967,359 for the mark CAMPERO (& Design) for “beverages, namely, fruit drinks and fruit juices” in International Class 32 and “restaurant services” in International Class 42;
- Opposer’s Exhibit PX88: U.S. Registration No. 2,298,348 for the mark B-BOP’S (& Design) for “soft drinks” in International Class 32 and “restaurant services” in International Class 42;
- Opposer’s Exhibit PX89: U.S. Registration No. 2,384,834 for the mark HONEY DEW DONUTS (& Design) for “frozen non-alcoholic fruit-flavored beverages” in International Class 32 and “restaurant and carry-out food services specializing in doughnuts, pastries, muffins and beverages” in International Class 42
- Opposer’s Exhibit PX90: U.S. Registration No. 2,389,112 for the mark BV BURGerville (& Design) for “beverages, namely, soft drinks, fruit flavored drinks, and orange juice, all for consumption on or off the premises” in International Class 32 and “restaurant services” in International Class 42;
- Opposer’s Exhibit PX91: U.S. Registration No. 2,364,537 for a design mark for “non-alcoholic frozen drinks containing natural ingredients and fruit or other

flavorings for consumption on or off the premises” in International Class 32 and “restaurant, snack bar and carry-out food services” in International Class 42;

- Opposer’s Exhibit PX92: U.S. Registration No. 2,314,516 for the mark B-BOP’S (& Design) for “soft drinks” in International Class 32 and “restaurant services” in International Class 42;

- Opposer’s Exhibit PX93: U.S. Registration No. 2,323,591 for the mark GRANDMA’S OF YORKTOWN A FAMILY TRADITION RESTAURANT & PIE SHOPS (& Design) for “soft drinks” in International Class 32 and “restaurant services” in International Class 42;

- Opposer’s Exhibit PX94: U.S. Registration No. 2,315,972 for the mark USA (& Design) for “beverages, namely, fruit juices, and carbonated and non-carbonated soft drinks for consumption on or off the premises” in International Class 32 and “restaurant services” in International Class 42;

- Opposer’s Exhibit PX95: U.S. Registration No. 2,337,490 for the mark BRAUM’S for “fruit juices, fruit drinks, bottled drinking water” in International Class 32 and “restaurant services” in International Class 42;

- Opposer’s Exhibit PX96: U.S. Registration No. 2,337,489 for the mark B (& Design) for “fruit juices, fruit drinks, bottled drinking water” in International Class 32 and “restaurant carryout services” in International Class 42;

- Opposer’s Exhibit PX97: U.S. Registration No. 2,382,230 for the mark HONEY DEW DONUTS for “frozen non-alcoholic fruit-flavored beverages” in International Class 32 and “restaurant and carry-out food services specializing in

doughnuts, pastries, muffins, coffee and frozen non-alcoholic fruit-flavored beverages” in International Class 42;

- Opposer’s Exhibit PX98: U.S. Registration No. 2,432,588 for the mark BV BURGERVILLE (& Design) for “beverages, namely, soft drinks, fruit flavored drinks, and orange juice, all for consumption on or off the premises” in International Class 32 and “restaurant services” in International Class 42;

- Opposer’s Exhibit PX99: U.S. Registration No. 2,247,805 for the mark 59<sup>th</sup> & LEX for “bottled water” in International Class 32 and “restaurant services” in International Class 42;

- Opposer’s Exhibit PX100: U.S. Registration No. 935,505 for the mark STEWART’S in International Class 42 for “drive-in restaurant services”;

- Opposer’s Exhibit PX101: U.S. Registration No. 933,646 for the mark STEWART’S in International Class 32 for “soft drinks and concentrate for preparing the same”;

- Opposer’s Exhibit PX102: U.S. Registration No. 716,618 for the mark A&W in International Class 42 for “drive-in restaurant services”;

- Opposer’s Exhibit PX103: U.S. Registration No. 1,436,058 for the mark A&W in International Class 42 for “restaurant services”; and

- Opposer’s Exhibit PX104: U.S. Registration No. 1,455,654 for the mark A&W in International Class 32 for “soft drinks for consumption on or off restaurant premises.”

2. The testimony of Mario Ortiz, as presented in the May 15, 2009 Trial Declaration of Mario Ortiz (“Ortiz First Decl.”) and Opposer’s Exhibits PX105-PX168 referenced therein:

- Opposer's Exhibit PX105: photographs showing BEN & JERRY'S-brand items for sale at a Gristedes supermarket in New York, New York in October 2008;
- Opposer's Exhibit PX106: a photograph of a BEN & JERRY'S ice cream shop from the Ben & Jerry's website <http://www.benjerry.com>;
- Opposer's Exhibit PX107: a page from the website <http://www.benjerry.com> stating that there are over 430 BEN & JERRY'S ice cream shops in the United States;
- Opposer's Exhibit PX108: a copy of a photograph of a BOB EVANS restaurant;
- Opposer's Exhibit PX109: a copy of a page from the website <http://www.bobevans.com> stating that there are 591 BOB EVANS restaurants;
- Opposer's Exhibit PX110: a copy of a page from the website <http://www.bobevans.com> showing the selection of BOB EVANS products available at third-party retailers;
- Opposer's Exhibit PX111: copies of photographs showing BOSTON MARKET-brand items for sale at a Pathmark supermarket in New York, New York in October 2008;
- Opposer's Exhibit PX112: a copy of a photograph of a BOSTON MARKET restaurant;
- Opposer's Exhibit PX113: a copy of a page from the website <http://www.bostonmarket.com> stating that there are approximately 600 BOSTON MARKET restaurants in 28 states;

- Opposer's Exhibit PX114: a copy of a page from the website <http://www.bostonmarket.com> with a map indicating BOSTON MARKET restaurant locations;
- Opposer's Exhibit PX115: a copy of a page from the website <http://www.bostonmarket.com> with a map indicating supermarket locations with BOSTON MARKET products;
- Opposer's Exhibit PX116: a copy of a page from the website <http://www.bostonmarket.com> describing the company's BOSTON MARKET supermarket offerings;
- Opposer's Exhibit PX117: copies of photographs showing CARVEL-brand items for sale at a Pathmark supermarket in New Jersey in October 2008;
- Opposer's Exhibit PX118: a copy of a photograph of a CARVEL ice cream shop;
- Opposer's Exhibit PX119: a copy of a page from the website <http://www.carvel.com> stating that there are over 500 CARVEL foodservice locations covering 25 states, and that CARVEL products are available in over 8,500 supermarkets covering 32 states;
- Opposer's Exhibit PX120: copies of photographs showing CALIFORNIA PIZZA KITCHEN-brand items for sale at a Gristedes supermarket in New York, New York in October 2008;
- Opposer's Exhibit PX121: a copy of a photograph of a CALIFORNIA PIZZA KITCHEN restaurant;

- Opposer’s Exhibit PX122: a copy of a page from the website <http://www.cpk.com>, the website for California Pizza Kitchen, stating that there are 240 California Pizza Kitchen restaurants in 33 states and nine foreign countries, and stating that the company “has a strategic alliance with Kraft Pizza Company, a subsidiary of Kraft Foods Inc., to distribute a line of premium frozen pizzas through supermarkets and other retail outlets”;
- Opposer’s Exhibit PX123: a copy of a photograph showing DUNKIN’ DONUTS-brand items for sale at a Pathmark supermarket in New York, New York in October 2008;
- Opposer’s Exhibit PX124: a copy of a photograph of a DUNKIN’ DONUTS restaurant;
- Opposer’s Exhibit PX125: a copy of a page from the website <http://www.dunkindonuts.com> stating that at the end of 2007 there were 5,769 DUNKIN’ DONUTS locations in the United States, and that the company serves more than 3 million customers daily;
- Opposer’s Exhibit PX126: copies of photographs showing GODIVA-brand items for sale at Macy’s department store in New York in October 2008;
- Opposer’s Exhibit PX127: a copy of a photograph of a GODIVA shop;
- Opposer’s Exhibit PX128: a copy of a page from the website <http://www.godiva.com> stating that there are over 275 GODIVA boutiques in the North America;

- Opposer's Exhibit PX129: copies of photographs showing HÄAGEN-DAZS-brand items for sale at a Gristedes supermarket in New York, New York in October 2008;
- Opposer's Exhibit PX130: copies of a photograph of a HÄAGEN-DAZS shop;
- Opposer's Exhibit PX131: a copy of a photograph showing HOOTERS-brand items for sale at a Gristedes supermarket in New York, New York in October 2008;
- Opposer's Exhibit PX132: copies of a photograph of a HOOTERS restaurant;
- Opposer's Exhibit PX133: a copy of a page from the website <http://www.hooters.com> stating that there are over 445 restaurants in the United States and in international locations;
- Opposer's Exhibit PX134: a copy of a page from the website <http://www.hooters.com> with a map indicating the locations of HOOTERS restaurants;
- Opposer's Exhibit PX135: a copy of a photograph showing MARGARITAVILLE-brand items for sale at a Pathmark supermarket in New Jersey in October 2008;
- Opposer's Exhibit PX136: a copy of a photograph of a MARGARITAVILLE restaurant;
- Opposer's Exhibit PX137: a copy of a page from the website indicating the locations of MARGARITAVILLE restaurants;
- Opposer's Exhibit PX138: a copy of a photograph showing MRS FIELDS-brand items for sale at a Gristedes supermarket in New York, New York in October 2008;

- Opposer's Exhibit PX139: a copy of a photograph of a MRS FIELDS shop;
- Opposer's Exhibit PX140: a copy of a page from the website

<http://www.mrsfields.com> stating that the company has nearly 390 shops in the United States;

- Opposer's Exhibit PX141: copies of photographs showing NATHAN'S FAMOUS-brand items for sale at a Pathmark supermarket in New Jersey in October 2008;

• Opposer's Exhibit PX142: a copy of a photograph of a NATHAN'S FAMOUS restaurant;

- Opposer's Exhibit PX143: a copy of a page from the website

<http://www.nathansfamous.com> stating that there are 234 NATHAN'S FAMOUS restaurants, and that NATHAN'S hot dogs are marketed and sold at over 8,000 retail locations and over 10,000 food service locations;

- Opposer's Exhibit PX144: copies of photographs showing STARBUCKS-brand items for sale at a Gristedes supermarket in New York, New York in October 2008;

• Opposer's Exhibit PX145: a copy of a photograph of a STARBUCKS coffee shop;

- Opposer's Exhibit PX146: a copy of a document entitled "Company Fact

Sheet" dated February 2008 available at the website <http://www.starbucks.com>, stating that the company has 11,167 company-operated or licensed stores throughout the 50 United States, and offers bottled Starbucks Frappuccino beverages, Starbucks DoubleShot espresso drinks, Starbucks Iced Coffee, whole bean coffee, Starbucks Coffee Liqueurs and superpremium ice cream at third-party retailers;

- Opposer's Exhibit PX147: a copy of a document entitled "Company Profile" dated February 2008 available at the website <http://www.starbucks.com>, stating that Frapuccino beverages became available in bottle form in 1996, that Starbucks DoubleShot espresso drinks became available in 2002, that Starbucks ice cream was introduced in 1995 and by 1996 had become the number one brand of coffee ice cream in the United States, and that Starbucks coffee became widely available in third party retailers beginning in 1998;
- Opposer's Exhibit PX148: a copy of a photograph showing TACO BELL-brand items for sale at a Gristedes supermarket in New York, New York in October 2008;
- Opposer's Exhibit PX149: a copy of a photograph of a TACO BELL restaurant;
- Opposer's Exhibit PX150: copies of photographs showing T.G.I. FRIDAY'S-brand items for sale at a Pathmark supermarket in New Jersey in October 2008;
- Opposer's Exhibit PX151: a copy of a photograph of a T.G.I. FRIDAY'S restaurant;
- Opposer's Exhibit PX152: a copy of a page from the website <http://www.fridays.com> stating that there are 609 T.G.I. FRIDAY'S restaurants in the United States operating in 47 states;
- Opposer's Exhibit PX153: copies of photographs showing WHITE CASTLE-brand items for sale at a Pathmark supermarket in New Jersey in October 2008;
- Opposer's Exhibit PX154: a copy of a photograph of a WHITE CASTLE restaurant;

- Opposer's Exhibit PX155: a copy of a page from the website <http://www.whitecastle.com> stating that there are over 380 WHITE CASTLE restaurants in the United States;
- Opposer's Exhibit PX156: a copy of a page from the website <http://www.whitecastle.com> with a map indicating the restaurant and retail distribution of WHITE CASTLE;
- Opposer's Exhibit PX157: a copy of a page from the website <http://www.whitecastle.com> showing, as a representative example, where WHITE CASTLE products can be purchased in Ohio;
- Opposer's Exhibit PX158: a copy of a photograph of a WOLFGANG PUCK restaurant;
- Opposer's Exhibit PX159: a copy of a page from the website <http://www.wolfgangpuck.com> stating that the company operates restaurants and distributes consumer products including pizza and soups;
- Opposer's Exhibit PX160: a copy of a page from the website <http://www.wolfgangpuck.com> showing a map indicating where WOLFGANG PUCK restaurants are located;
- Opposer's Exhibit PX161: a copy of a page from the website <http://www.wolfgangpuck.com> showing the categories of WOLFGANG PUCK products distributed at retail;
- Opposer's Exhibit PX162: printouts from Amazon.com, representing search results for a search of books containing the phrase "crush soda" on May 14, 2009;

- Opposer's Exhibit PX163: printouts from Amazon.com providing details regarding some of the books shown in Opposer's Exhibit PX162;
- Opposer's Exhibit PX164: printouts from Amazon.com, representing a sample of books resulting from a search for books containing the phrase "orange crush" on October 9 and 10, 2008;
- Opposer's Exhibit PX165: printouts from eBay.com offering CRUSH advertisements for sale, printed October 7, 2008;
- Opposer's Exhibit PX166: printouts of the website located at *www.crussh.com*, as printed on October 16, 2008;
- Opposer's Exhibit PX167: copy of the search result records from a May 15, 2009, search of online Trademark Electronic Search System ("TESS") database of the United States Patent and Trademark Office ("USPTO") for (i) live applications or registrations, (ii) with current filing bases under Section 1(a) of the Lanham Act, (iii) covering both International Class 32 and International Class 42, (iv) including within the goods or services identification one of the following words: restaurant, catering, snack, bar or café, and (v) not including within the goods or services identification the term beer; and
- Opposer's Exhibit PX168: a copy of the search results records from a May 15, 2009, search of the USPTO's TESS database for (i) live applications or registrations, (ii) with current filing bases under Section 1(a) of the Lanham Act, (iii) covering both International Class 32 and International Class 43, (iv) including within the goods and services identification one of the following words: restaurant, catering, snack, bar or café, and (v) not including within the goods or services identification the term beer.

3. The testimony of Andrew D. Springate, as presented in the May 20, 2009 Trial Declaration of Andrew Springate (“Springate Decl.”) and Opposer’s Exhibits PX169-PX198 referenced therein:

- Opposer’s Exhibit PX169: logos for the current CRUSH flavor varieties available in the United States;
- Opposer’s Exhibit PX170: examples of some current packaging for CRUSH beverages;
- Opposer’s Exhibit PX171: representative licensed CRUSH goods;
- Opposer’s Exhibit PX172: representative sample of historical CRUSH logos and word mark stylizations used by licensees;
- Opposer’s Exhibit PX173: 1919 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX174: 1923 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX175: 1924 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX176: 1926 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX177: 1929 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX178: 1929 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX179: 1930 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX180: 1930 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX181: 1939 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX182: 1939 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX183: 1947 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX184: 1947 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX185: 1947 advertisement for CRUSH beverages;

- Opposer’s Exhibit PX186: 1947 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX187: 1947 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX188: 1958 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX189: 1959 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX190: 1950s advertisement for CRUSH beverages;
- Opposer’s Exhibit PX191: 1980 advertisement for CRUSH beverages;
- Opposer’s Exhibit PX192: printout’s from Dr Pepper’s crushsoda.com website as of May 12, 2009;
- Opposer’s Exhibit PX193: sample free-standing newspaper insert advertisements for CRUSH;
- Opposer’s Exhibit PX194: examples of CRUSH advertisements appearing in supermarket weekly circulars;
- Opposer’s Exhibit PX195: photographs of innovative store displays of CRUSH beverages appearing in supermarkets;
- Opposer’s Exhibit PX196: representative printouts of third-party websites offering CRUSH products online;
- Opposer’s Exhibit PX197: printouts of Internet discussions in which consumers refer to Opposer’s brand as CRUSH; and
- Opposer’s Exhibit PX198: a list of Opposer’s challenges to third-party marks in the United States Patent and Trademark Office based on Opposer’s rights in CRUSH.

4. Opposer’s June 1, 2009 Notice of Reliance on Applicant’s/Registrant’s Discovery Responses dated June 1, 2009 (“ONR2”) and Opposer’s Exhibits PX200-PX208 referenced therein:

- Opposer's Exhibit PX199: a copy of Opposer/Registrant's First Set of Interrogatories to Applicant/Registrant, served in connection with this proceeding on February 21, 2008, which shows the definitions used across Opposer's discovery requests;
- Opposer's Exhibit PX200: Applicant's responses to Opposer's Requests for Admission Nos. 6, 13, 14, 15 and 18, dated April 18, 2008;
- Opposer's Exhibit PX201: Applicant's responses to Opposer's Requests for Admission Nos. 21, 22, 23 and 24, dated October 10, 2008;
- Opposer's Exhibit PX202: Applicant's responses to Opposer's Interrogatories Nos. 1, 3, 4, 6, 7, 8, 9, 10, 11, 12, 19, 21, 22, 23 and 24, dated April 18, 2008;
- Opposer's Exhibit PX203: Correspondence between counsel for Dr Pepper and counsel for Krush Global, in which Krush Global states that the only document it produced in response to Interrogatory No. 3 is "Doc. No. 25";
- Opposer's Exhibit PX204: Applicant's responses to Opposer's Requests for the Production of Documents and Things Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 21, 22, 23, 32 and 33, dated April 18, 2008;
- Opposer's Exhibit PX205: Letter from counsel for Dr Pepper to counsel for Krush Global confirming parties' agreement that all produced documents and things are made of record for the proceeding;
- Opposer's Exhibit PX206: Photographs of things produced by Krush Global in this proceeding;

- Opposer's Exhibit PX207: Second Trial Declaration of Mario Ortiz, certifying that the photographs attached as Exhibit PX206 are true and correct copies of photographs of things produced by Krush Global in this proceeding; and

- Opposer's Exhibit PX208: All documents produced by Applicant in this proceeding

5. The testimony of Andrew D. Springate, as presented in the August 31, 2009 Rebuttal Trial Declaration of Andrew Springate ("Springate Rebuttal Decl.") and Opposer's Exhibits PX209-210 referenced therein:

- Opposer's Exhibit PX209: representative pages from a June 9, 2009 presentation given by DPSG at the Deutsche Bank Global Consumer & Food Retail Conference showing that DPSG now names CRUSH among its "Portfolio of Powerful Brands";

- Opposer's Exhibit PX210: copy of a summary of a consumer survey for the fourth quarter of 2008, showing an awareness level for the brand SUNKIST;

- Opposer's Exhibit PX211: copy of a summary of a consumer survey for the first quarter of 2009, showing awareness levels for the brands CRUSH and SUNKIST;

- Opposer's Exhibit PX212: copy of relevant pages of Opposer's 2008 Annual Report showing CRUSH on the front cover and identifying CRUSH as a key brand, along with Dr Pepper, 7UP, Sunkist, A&W in Opposer's beverage concentrate segment;

- Opposer's Exhibit PX213: a representative press release mentioning that Opposer's brand portfolio includes CRUSH; and

- Opposer's Exhibit PX214: results from a 2008 consumer survey showing the respective percentages of consumers that believe CRUSH, FANTA and SUNKIST beverages are made with fruit juice.

6. The testimony of Mario Ortiz, as presented in the September 1, 2009 Rebuttal Trial Declaration of Mario Ortiz (“Ortiz Rebuttal Decl.”) and Opposer’s Exhibits PX215-PX222 referenced therein:

- Opposer's Exhibit PX215: printout of <http://www.cocktail.uk.com/services/aboutus/> from August 31, 2009, stating that the website is a “UK specific cocktail based web site”;
- Opposer's Exhibit PX216: printout of <http://www.cocktail.uk.com/db/member/submitCocktail.asp> from July 29, 2009, evidencing that users can upload cocktail recipes and cocktail names to the site;
- Opposer's Exhibit PX217: printout of <http://www.cocktail.uk.com/Cocktail-Recipe/Sex.htm> from August 31, 2009, evidencing that a cocktail named “Sex” had been viewed 750,940 times;
- Opposer's Exhibit PX218: printout of <http://drinkswap.com/areas/addadrink.asp> from July 29, 2009, evidencing that users can upload cocktail recipes and cocktail names to the site;
- Opposer's Exhibit PX219: a printout of <http://www.drinknation.com/submitdrink.php> from July 29, 2009, evidencing that users can upload cocktail recipes and cocktail names to the site;

- Opposer's Exhibit PX220: printout of <http://www.drinknation.com/drink/sex-on-the-beach> from August 31, 2009, evidencing that a cocktail named "Sex On The Beach" had been voted on 2,824 times;

- Opposer's Exhibit PX221: printout of <http://idrink.com/addrecipe.html> from July 29, 2009, evidencing that users can upload cocktail recipes and cocktail names to the site; and

- Opposer's Exhibit PX222: printout of <http://www.idrink.com/v.html?id=211> from August 31, 2009, evidencing that a cocktail named "Sex On The Beach" had been voted on 12,769 times.

7. Opposer's September 1, 2009 Notice of Reliance on Printed Publications ("ONR3") and Opposer's Exhibits PX223-PX224 referenced therein:

- Opposer's Exhibit PX223: Crossword Puzzle from *The New York Times* at C2, August 18, 2009, for which clue 59 Across is "Popular Fanta-like soda"; and

- Opposer's Exhibit PX224: "Answer to Previous [Crossword] Puzzle," *The New York Times* at C2, August 19, 2009, indicating that the answer to clue 59 Across from August 18, 2009's crossword puzzle is "ORANGE CRUSH."

8. The May 28, 2009 testimony deposition of Andrew D. Springate and the following Exhibit referenced therein:

- Exhibit KGL 3: Year-to-date 2009 retail sales (as of May 16, 2009) of various carbonated beverages, including CRUSH beverages.

9. The July 31, 2009 testimony deposition of James Learmond the Exhibits referenced therein:

- Exhibit DP/1: Copy of page from *www.crussh.com* website (specifically, <http://www.crussh.com/menu.php>), showing food and beverage offerings of CRUSSH restaurants, by category;
- Exhibit DP/2: Copy of page from *www.crussh.com* website (specifically, [http://www.crussh.com/menu\\_nutritional.php?menu\\_group=food&menu\\_group\\_id=28](http://www.crussh.com/menu_nutritional.php?menu_group=food&menu_group_id=28)), showing nutritional information for “Snacks and Desserts” available at CRUSSH restaurants;
- Exhibit DP/3: Copy of page from *www.crussh.com* website (specifically, [http://www.crussh.com/menu\\_nutritional.php?menu\\_group=drink&menu\\_group\\_id=29](http://www.crussh.com/menu_nutritional.php?menu_group=drink&menu_group_id=29)), showing nutritional information for “Coffee & Hot Drinks” available at CRUSSH restaurants;
- Exhibit DP/4: Copy of a printout from the USPTO’s TESS database showing Krush Global’s federal trademark Registration No. 3,275,548 for CRUSSH;
- Exhibit DP/5: Copy of a printout from the USPTO’s TESS database showing Krush Global’s trademark Application Serial No. 79/033,050 for the CRUSSH Logo Mark;
- Exhibit DP/6: Copy of an article appearing in the U.K. newspaper The Guardian on September 29, 2006 entitled “James Learmond: The juice bar founder who wouldn’t be crushed,” available at <http://www.guardian.co.uk/business/2006/sep/29/5/print>; and
- Exhibit DP/7: Copy of a page from the website *www.idrink.com* (specifically, <http://www.idrink.com/v.html?id=211>) showing that a drink recipe for the drink Sex on the Beach had been voted on 12,683 times.

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing **Trial Brief for Opposer/Petitioner** to be deposited with the United States Postal Service as First Class mail, postage prepaid, in an envelope addressed counsel for applicant, Jason Drangel, Esq., 60 East 42<sup>nd</sup> Street, Suite 820, New York, NY 10165, this 12<sup>th</sup> day of November, 2009.

  
\_\_\_\_\_  
Laura Popp-Rosenberg