

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: June 1, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*PepsiCo, Inc.*  
*v.*  
*Pet C Cola Corporation*

Opposition No. 91255530

Paul J. Reilly, Tyler M. Beas, and Omowunmi Soyinka of Baker Botts LLP,  
for PepsiCo, Inc.

Anthony Louis Marks, CEO,  
for Pet C Cola Corporation, pro se.

Before Wellington, Coggins, and Hudis,  
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Pet C Cola Corporation (“Applicant”) seeks registration on the Principal Register  
of the mark PET C COLA (in standard characters, with PET disclaimed) for

Animal feed supplements; Animal feed additives for use as  
nutritional supplements; Dietary supplements for animals;  
Non-medicated additives for animal feed for use as  
nutritional supplements; Protein supplements for animals;

Vitamins and dietary food supplements for animals, in  
International Class 5.<sup>1</sup>

In its Amended Notice of Opposition, PepsiCo, Inc. (“Opposer”) opposes registration of Applicant’s mark on the grounds of likelihood of confusion under Section 2(d) of the Trademark Act, based on Opposer’s use of and registrations for the marks PEPSI-COLA and PESPI; and dilution by blurring under Section 43(c) of the Trademark Act.<sup>2</sup> 15 U.S.C. §§ 1052(d) & 1125(c). Opposer claims ownership of several registered marks on the Principal Register, including:

- Registration No. 349886 for the stylized mark shown at right for “beverages” in International Class 32;<sup>3</sup>
- Registration No. 824151 for the typed mark PEPSI-COLA for “soft drinks and syrups and concentrates for the preparation thereof” in International Class 32;<sup>4</sup> and
- Registration No. 824150 for the typed mark PEPSI for “soft drinks and syrups and concentrates for the preparation thereof” in International Class 32;<sup>5</sup>



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<sup>1</sup> Application Serial No. 88579412 was filed on August 14, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

<sup>2</sup> 38 TTABVUE 11-20 (amended Notice of Opposition). Citations to the record and briefs reference TTABVUE, the Board’s online docket system. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, \*2 n.1 (TTAB 2020). The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry, if applicable.

<sup>3</sup> Registration No. 349886 issued September 14, 1937; renewed.

<sup>4</sup> Registration No. 824151 issued February 14, 1967; renewed. A typed mark is the legal equivalent of a standard character mark. *See In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) (until 2003 “standard character” marks were known as “typed” marks).

<sup>5</sup> Registration No. 824150 issued February 14, 1967; renewed.

and common law use of the marks PEPSI-COLA and PEPSI for more than a century for various beverages, and otherwise for many years prior to Applicant's filing date for a wide variety of goods and services including beverages, clothing, housewares, entertainment and sporting events, and the organization, promotion, and sponsorship of animal-related events and facilities.<sup>6</sup> Opposer also alleges its PEPSI-COLA mark is inherently distinctive and became famous prior to the filing date of opposed application.<sup>7</sup>

In its Answer, Applicant denies the salient allegations of the Amended Notice of Opposition.<sup>8</sup> The case is fully briefed. For the reasons explained below, we sustain the opposition solely on the ground of dilution by blurring. Because we have resolved this proceeding on Opposer's dilution claim, we need not reach Opposer's likelihood of confusion claim. *CBC Mtg. Agency v. TMRR, LLC*, 2022 USPQ2d 748, at \*29 n. 22 (TTAB 2022).

## I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's application. In addition, Opposer introduced the testimony and evidence listed below:

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<sup>6</sup> See generally 38 TTABVUE 11-20.

<sup>7</sup> 38 TTABVUE 18.

<sup>8</sup> 43 TTABVUE (Answer). Applicant alleged three purported affirmative defenses, but two are merely amplifications of its denials to the opposition and not true affirmative defenses, so we do not address them as such. See, e.g., *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at \*1 (TTAB 2020). Likewise, we do not address Applicant's "defense" of failure to state a claim upon which relief may be granted, which is not a true affirmative defense, and in any event was not pursued and is therefore waived. See *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, \*5 (TTAB 2022).

- Testimony declaration of Paul A. Lee, Opposer's Senior Director – Trademark Counsel, with Exhibits A-V (46-47 TTABVUE);
- Testimony declaration of Justin Schwarz, Opposer's Senior Director of Marketing, with Exhibits A-W (49-51 TTABVUE);<sup>9</sup>
- Supplemental testimony declaration of Mr. Schwarz, with Exhibits X-EE (62, 64 TTABVUE);<sup>10</sup>
- Testimony declaration of survey expert witness Hal Poret, with Exhibit A (44 TTABVUE);
- First Notice of Reliance, with Exhibits A-F, on Applicant's responses to various interrogatories, excerpts from the discovery deposition of Applicant's Fed. R. Civ. P. 30(b)(6) representative, printed publications, internet materials, and third-party registrations (52-55 TTABVUE);<sup>11</sup>
- Second Notice of Reliance, with Exhibits G-H, on additional excerpts from the discovery deposition of Applicant's representative, and various internet materials (63 TTABVUE).

As explained in more detail below, Applicant did not introduce any testimony or evidence during the period therefor.

## II. Evidentiary Issue and Opposer's Motion to Strike

Pursuant to Trademark Rule 2.121, 37 C.F.R. § 2.121, there are separate testimony periods for an opposer and an applicant in an opposition proceeding.

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<sup>9</sup> Confidential version at 48 TTABVUE.

<sup>10</sup> Opposer submitted as confidential the entire supplemental testimony declaration of Mr. Schwarz, with Exhibits X-CC at 64 TTABVUE, and Exhibits DD-EE thereto at 62 TTABVUE. This is improper and discouraged. *See Made in Nature*, 2022 USPQ2d 557, at \*12 (TTAB 2022) (criticizing the parties for over-designating as confidential large portions of the record). Opposer is ordered to file a non-confidential (i.e., redacted) copy of the supplemental Schwarz declaration within fifteen days of the date of this decision. *See* Trademark Rule 2.27(e), 37 C.F.R. § 2.27(e) (“[O]nly confidential portions of filings with the Board shall be filed under seal.”). Opposer need only file a public (redacted) copy of the declaration itself (i.e., without exhibits).

<sup>11</sup> Because the file of the involved application is automatically of record, submitting it as Exhibit C (*see* 52 TTABVUE 91-119) to the notice of reliance was unnecessary. Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b).

Specifically, there is a first testimony period for the opposer to present its case in chief, a second testimony period for the applicant to present its case and to meet the case of the opposer, and a third testimony period for the opposer to present evidence in rebuttal. *See* Trademark Rule 2.121(b)(1). “No testimony shall be taken or evidence presented except during the times assigned, unless by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board.” Trademark Rule 2.121(a).

On April 24, 2022, outside of Applicant’s testimony period – but during Opposer’s testimony period – Applicant filed four notices of reliance and the declaration of its CEO, Anthony Louis Marks.<sup>12</sup> In an interlocutory order, the Board struck without prejudice as premature all of Applicant’s untimely material and advised Applicant that it may refile the testimony and evidence during its testimony period, which, as the Board specifically reminded the parties, would run from June 7, 2022 to July 6, 2022.<sup>13</sup> However, Applicant did not refile the testimony and evidence during Applicant’s testimony period, nor did it file any other testimony or evidence. Accordingly, because Applicant’s untimely evidence has been stricken, and Applicant failed to introduce any evidence during its testimony period, there is no evidence of record submitted by Applicant.

In its trial brief, Applicant references its stricken evidentiary materials and makes various factual assertions based thereon. Specifically, there are about five

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<sup>12</sup> *See* 57-61 TTABVUE (untimely evidence); *see also* 42 TTABVUE 3 (schedule), 45 TTABVUE (motion to extend), and 56 TTABVUE (order granting motion to extend).

<sup>13</sup> 65 TTABVUE 1.

sentences and a list of third-party registrations referencing use and registration of the word “cola” in connection with arguments that “cola” is a weak term and indicates a type of drink.<sup>14</sup> Opposer objects to Applicant’s attempt “to backdoor evidence into its trial brief,” and moves to strike these few sentences and the list of third-party registrations therefrom.<sup>15</sup> Applicant replies that the third-party registrations listed in its brief were properly introduced by notice of reliance on April 24, 2022.<sup>16</sup>

Opposer’s motion to strike is granted. As correctly determined during the interlocutory phase of this proceeding, Applicant’s attempt to introduce evidence on April 24, 2022, was untimely, and that evidence was stricken. Applicant was expressly advised that it “may refile its testimony and notices of reliance during its testimony period.”<sup>17</sup> It did not, and Applicant may not use its trial brief as a means by which to introduce evidence. Trademark Rule 2.121 (party may introduce testimony and evidence only during its assigned testimony period). *See also, e.g., Hole In 1 Drinks, Inc. v. Lajtay*, 2020 USPQ2d 10020, at \*2 (TTAB 2020) (brief may not be used to introduce evidence); *Bass Pro Trademarks LLC v. Sportsman Warehouse, Inc.*, 89 USPQ2d 1844, 1848 (TTAB 2008) (no consideration of exhibits attached to brief on the case where they were properly made of record during the time for taking testimony); *Life Zone Inc. v. Middleman Grp., Inc.*, 87 USPQ2d 1953, 1955 (TTAB

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<sup>14</sup> 70 TTABVUE 6, 13-15.

<sup>15</sup> 71 TTABVUE 3, 4 (motion to strike); 74 TTABVUE (order deferring consideration until final decision).

<sup>16</sup> 73 TTABVUE (opposition to motion).

<sup>17</sup> 65 TTABVUE 1.

2008) (“Evidence submitted outside of the trial periods — including that attached to briefs — is untimely, and will not be considered.”).

Moreover, because Applicant submitted no evidence during trial, any factual assertions in Applicant’s brief unsupported by evidence will not be considered. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (agreeing with Board that factual statements made in a brief are not evidence introduced at trial); *Saul Zaentz Co. v. Bumb*, 95 USPQ2d 1723, 1725 n.7 (TTAB 2010) (assertions in brief carry no weight unless supported by evidence introduced at trial or except as admission against interest).<sup>18</sup>

### III. The Parties and Their Marks

In 1893, Opposer created and developed a carbonated soft drink which, in 1898, it named PEPSI-COLA. Since 1898, Opposer has continuously advertised and sold beverages under the mark PEPSI-COLA.<sup>19</sup> The mark has appeared on cans, bottles, soda fountains, product packaging, and a wide range of marketing materials in various evolving media for more than a century.<sup>20</sup> Some examples include:<sup>21</sup>

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<sup>18</sup> With regard to Applicant’s decision to defend this proceeding by itself, we note that Applicant was advised at least three times to retain legal counsel familiar with trademark law and Board procedure. *See* 2 TTABVUE 6; 10 TTABVUE 2; 37 TTABVUE 6.

<sup>19</sup> Lee Dec. ¶¶ 2-3 (46 TTABVUE 3); Schwarz Dec. ¶ 2 (49 TTABVUE 3). For simplicity, we refer to Opposer and its predecessors-in-interest simply as “Opposer.”

<sup>20</sup> Schwarz Dec. ¶ 3 and Exhibit B (49 TTABVUE 3, 103-121).

<sup>21</sup> Schwarz Dec. Exhibits A, B, G (49 TTABVUE 45-46, 103, 105, 109, 110, 112, 113, 115, 120, 409).







For decades, Opposer has frequently partnered with celebrities to market and advertise its PEPSI-COLA brand beverages, including professional athletes (e.g., Drew Brees, Kyrie Irving, Victor Cruz, and Jeff Gordon) and musicians (e.g., David Bowie, Tina Turner, Ray Charles, Janet Jackson, Mariah Carey, and One Direction).<sup>22</sup> Opposer's advertising and marketing efforts include television commercials during the Super Bowl, Academy Awards, Golden Globes, Grammy Awards.<sup>23</sup> Opposer has filmed television commercials with stars such as Britney Spears, Shakira, Michael J. Fox, Beyoncé, Enrique Iglesias, Pink, Madonna, Cindy Crawford, Kylie Minogue, Robert Palmer, and Michael Jackson.<sup>24</sup>

Opposer maintains that one of its large, iconic advertising signs (i.e., in Long Island City, New York, and one of the examples reproduced above) has been visible

<sup>22</sup> Schwarz Dec. ¶ 11, Exhibit G (49 TTABVUE 6, 399-417).

<sup>23</sup> Schwarz Dec. ¶ 12 (49 TTABVUE 7).

<sup>24</sup> Schwarz Dec. Exhibit K (49 TTABVUE 430-432).

from New York City since 1940 and was designated as a landmark in 2016.<sup>25</sup> Opposer also provided multiple examples of advertising the PEPSI-COLA mark with famous people since at least the 1940s.<sup>26</sup> In addition to advertising via traditional media throughout the decades, Opposer has a digital presence on Hulu, iHeart Media, Live Nation, Tinder, Spotify, Draft Kings, YouTube, Facebook, Instagram, and Twitter, among others.<sup>27</sup> Opposer's Facebook page has more than 37 million followers, its Twitter account over 3 million followers, and its Instagram page almost 2 million followers.<sup>28</sup> For many years and since at least prior to 2015, Opposer's social media pages have been accessed an extraordinary number of times, and the amount of money Opposer has spent on advertising since 2015 is quite large – in the hundreds of millions of dollars per year.<sup>29</sup>

These are far from the only indicia that the pleaded PEPSI-COLA mark is widely recognized and exceedingly famous in the United States. Opposer has a long history of launching iconic advertising campaigns in support of its PEPSI-COLA brand; for the past 10 years has been the name sponsor of the NFL Super Bowl Halftime show;<sup>30</sup>

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<sup>25</sup> Schwarz Dec. Exhibit B (49 TTABVUE 112).

<sup>26</sup> See, e.g., Schwarz Dec. Exhibit B (49 TTABVUE 104 and 110 (Lucille Ball)).

<sup>27</sup> Schwarz Dec. ¶¶ 12, 16 (49 TTABVUE 7, 8).

<sup>28</sup> Schwarz Dec. ¶ 20 (49 TTABVUE 9).

<sup>29</sup> Schwarz Dec. ¶¶ 12, 13, 20, Exhibits I, J (49 TTABVUE 7, 9; 48 TTABVUE 20-24, 25-29 (confidential)). Because Opposer designated its advertising expenditures and impression numbers as confidential, we refer to them only in general terms. We do the same with other material submitted under seal. See, e.g., *Spotify AB v. U.S. Software Inc.*, 2022 USPQ2d 37, \*8 (TTAB 2022). Nonetheless, we note that in its brief Opposer reveals that its nationwide sales are “supported by many hundred of millions of dollars of advertising and promotion each year.” 68 TTABVUE 17.

<sup>30</sup> Schwarz Dec. ¶ 14 (49 TTABVUE 8).

for two decades was the official sponsor for Major League Baseball; and is the official sponsor of the NBA, NFL, and NHL.<sup>31</sup> Opposer's commercials have been broadcast many times a day on a variety of national television networks such as ABC, NBC, CBS, FOX, and ESPN.<sup>32</sup> Opposer sells billions of dollars of product on billions of units sold each year under the PEPSI-COLA marks,<sup>33</sup> and receives a significant amount of unsolicited popular press coverage and routine coverage in trade publications.<sup>34</sup> In addition, and on a larger scale, between the years 2017-2021 the PEPSI-COLA brand has fluctuated between being the 22nd and 28th best global brand as ranked by Interbrand, a global brand agency.<sup>35</sup> On the whole, the record evidence demonstrates that Opposer has been an incredibly successful business, and has for decades been a part of mainstream popular culture in the United States.

Applicant was incorporated in 2019.<sup>36</sup> It has not yet offered any products for sale, but intends to offer animal supplements, vitamins, and minerals to be sold online under a few animal-themed marks, including the mark PET C COLA.<sup>37</sup> Although Applicant's goods are not yet available for sale, they are shown on Applicant's social

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<sup>31</sup> Schwarz Dec. ¶ 7 (49 TTABVUE 5).

<sup>32</sup> Schwarz Dec. ¶ 11, Exhibit G (49 TTABVUE 6-7; 48 TTABVUE 19 (confidential)).

<sup>33</sup> Schwarz Dec. ¶¶ 29-31 (49 TTABVUE 11-12). Since Opposer designated its sales numbers as confidential, we refer to them only in general terms.

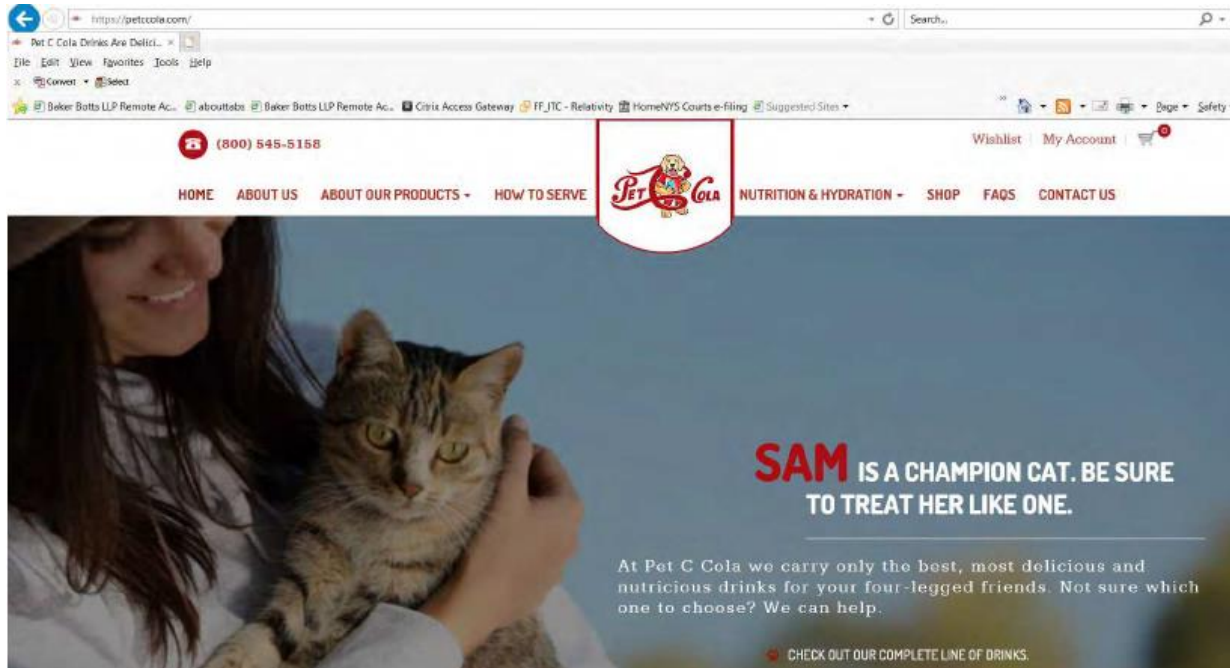
<sup>34</sup> Schwarz Dec. ¶¶ 34-35, Exhibits R, U (49 TTABVUE 12-13; 50 TTABVUE 153-226, 323-333).

<sup>35</sup> Schwarz Dec. ¶ 28, Exhibit S (49 TTABVUE 11; 50 TTABVUE 227-321).

<sup>36</sup> Applicant's Supplemental Response to Interrogatory No. 10, Opposer's First Notice of Reliance (52 TTABVUE 48-49).

<sup>37</sup> Applicant's Response to Interrogatory Nos. 1-3 (52 TTABVUE 33-34).

media pages and on a “website that is in progress.”<sup>38</sup> Excerpts from Applicant’s website include:<sup>39</sup>



<sup>38</sup> Applicant’s Response to Interrogatory No. 12 (52 TTABVUE 37).

<sup>39</sup> Schwarz Dec. ¶ 40, Exhibit W (49 TTABVUE 14; 51 TTABVUE 186, 189, 207). Although Applicant indicated that its website is still “in progress,” it appears to be live and quite extensive. *See* 51 TTABVUE 185-410. Even though evidence of Applicant’s proposed website was introduced through a declaration of Opposer’s employee and by Opposer’s notice of reliance, Applicant did not object. Additionally, Applicant’s 30(b)(6) witness testified to at least some of the content of this website during his deposition. 52 TTABVUE 86-89. Therefore, Applicant’s website is a part of the evidentiary record.



According to its proposed website, Applicant would be marketing itself as “the pet drink specialist” and “Pet C Cola is the nutritional and super tasty drink for dogs and cats.”<sup>40</sup> Applicant’s Fed. R. Civ. P. 30(b)(6) witness, Anthony Louis Marks, stated that the website was still under construction, and while it appeared that a consumer could purchase the products on the website, the website is still in “test mode” and will not allow actual purchases.<sup>41</sup>

#### IV. Entitlement to a Statutory Cause of Action


Entitlement to a statutory cause of action must be established in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \*6-7 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021). A party in the position of plaintiff may oppose registration of a mark where such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the party has a reasonable belief in damage that is proximately caused by registration of the mark. *See Peterson*

<sup>40</sup> Schwarz Dec. Exhibit W (51 TTABVUE 200).

<sup>41</sup> Marks Rule 30(b)(6) Depo., Opposer’s First Notice of Reliance (52 TTABVUE 86).

*v. Awshucks SC, LLC*, 2020 USPQ2d 11526, at \*6 (TTAB 2020) (citing *Corcamore*, 2020 USPQ2d 11277, at \*6-7). *See also Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at \*3 (Fed. Cir. 2020), *cert. denied*, 142 U.S. 82 (2021) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014).

“[A] party that demonstrates a real interest in [oppos]ing a trademark under [Trademark Act Section 13, 15 U.S.C.] § 106[3] has demonstrated an interest falling within the zone of interests protected by [the Trademark Act]. . . . Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 106[3].” *Made in Nature*, 2022 USPQ2d 557, at \*17 (quoting *Corcamore*, 2020 USPQ2d 11277 at \*7).

Opposer made of record a copy of its pleaded registrations, including Registration Nos. 349886, 824151, and 824150 for the marks , PEPSI-COLA, and PEPSI, respectively, from the TSDR electronic database.<sup>42</sup> Accordingly, Opposer’s entitlement “is established with respect to its likelihood of confusion and dilution claims by its registrations [of the PEPSI-COLA and PEPSI marks] . . . which the record shows to be valid and subsisting, and owned by Opposer.” *N.Y. Yankees P’ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015) (citing *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000)). *See also Primrose Ret. Cmtys., LLC v. Edward Rose Sr. Living, LLC*, 122

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<sup>42</sup> Lee Decl’n Exhibits A, B, and D; 46 TTABVUE 10-11, 259-60, 536-37.

USPQ2d 1030, 1032 (TTAB 2016) (entitlement established based on pleaded registration made of record).

## V. Dilution

Dilution by blurring is “an association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.” Trademark Act Section 43(c)(2)(B), 15 U.S.C. § 1125(c)(2)(B). Dilution may be likely “regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.” Trademark Act Section 43(c)(1), 15 U.S.C. § 1125(c)(1).

In order to prevail on its claim of dilution by blurring, Opposer must prove that:

- (1) Opposer owns a famous mark that is distinctive,
- (2) Applicant is using a mark in commerce that allegedly dilutes Opposer’s famous mark,
- (3) Applicant’s use of its mark began after Opposer’s mark became famous, and
- (4) Applicant’s use of its mark is likely to cause dilution by blurring.

*Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1723-24 (Fed. Cir. 2012). *See also Spotify AB v. U.S. Software Inc.*, 2022 USPQ2d 37, \*21 (TTAB 2022); *N.Y. Yankees P’ship*, 114 USPQ2d at 1502; *Chanel, Inc. v. Makarczyk*, 110 USPQ2d 2013, 2020 (TTAB 2014).

A. Opposer Owns a Distinctive, Famous Mark

There is no dispute that Opposer's mark PEPSI-COLA is distinctive. It is registered on the Principal Register without a claim of acquired distinctiveness, and is presumed distinctive. *Spotify*, 2022 USPQ2d 37 at \*21.

In analyzing the fame of the PEPSI-COLA mark for dilution purposes, we must determine whether it "is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner." *N.Y. Yankees P'ship*, 114 USPQ2d at 1502 (quoting 15 U.S.C. § 1125(c)(2)(A)). In doing so, we consider:

- (i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties;
- (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark;
- (iii) The extent of actual recognition of the mark; and
- (iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

15 U.S.C. § 1125(c)(2)(A).

1. Advertising and Publicity

For more than a century, Opposer's PEPSI-COLA mark has enjoyed wide advertising and publicity, both through Opposer's own efforts and through unsolicited references by third parties. Opposer has advertised and promoted its PEPSI-COLA goods to the general public in the United States in all varieties of media, and has spent hundreds of millions of dollars annually on such advertising. In his Rule



30(b)(6) deposition, Applicant's witness, to the best of his knowledge, agreed that Opposer has probably spent hundreds of millions of dollars on advertising, and probably earned sales in the billions of dollars.<sup>43</sup>

Opposer's Super Bowl Halftime Shows for the 10 years preceding trial have by themselves resulted in hundreds of millions of commercial impressions of the PEPSI-COLA brand.<sup>44</sup> Opposer has also promoted the PEPSI-COLA mark through advertising campaigns involving well-known athletes and entertainers,<sup>45</sup> and product placement in popular television programs like "Empire."<sup>46</sup> Opposer also has a robust presence on social media.<sup>47</sup>

The evidence from the record discussed here and above shows the extensive nature and consumer penetration of Opposer's marketing, including broad advertising campaigns in all media, celebrity endorsements, and sponsorships of large sporting events, exposing the mark to the general public. In short, "[t]he advertising and publicity-related evidence of record is overwhelming." *Spotify*, 2022 USPQ2d 37, at \*22.

## 2. Sales of Goods Offered under the PEPSI-COLA Mark

Opposer has continuously sold beverages under the PEPSI-COLA mark in the United States since 1898.<sup>48</sup> While the actual numbers were submitted under seal, the

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<sup>43</sup> Marks Rule 30(b)(6) Depo., Opposer's First Notice of Reliance (52 TTABVUE 89).

<sup>44</sup> Schwarz Dec. ¶ 7 (49 TTABVUE 5).

<sup>45</sup> Schwarz Dec. ¶¶ 11, (49 TTABVUE 6).

<sup>46</sup> Schwarz Dec. ¶ 7 (49 TTABVUE 5).

<sup>47</sup> Schwarz Dec. ¶ 20 (49 TTABVUE 9).

<sup>48</sup> Lee Dec. ¶¶ 2-3 (46 TTABVUE 3); Schwarz Dec. ¶ 2 (49 TTABVUE 3).

sales of goods under the PEPSI-COLA mark before Applicant's filing date are quite significant, in the billions of dollars annually. "To say the very least, this evidence is significant, persuasive, and corroborative of the advertising and publicity evidence." *Spotify*, 2022 USPQ2d 37, at \*24.

### 3. Actual Recognition of the Mark

"Perhaps the most significant of the four elements set forth in the Act to determine fame is the extent of actual public recognition of the mark as a source-indicator for the goods or services in connection with which it is used." *TiVo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1104 (TTAB 2018) (quoting *Nike Inc. v. Maher*, 100 USPQ2d 1018, 1024 (TTAB 2011)).

Opposer has a long history of launching iconic advertising campaign ads, and many of the campaigns have been widely acclaimed as some of the most popular advertisements of their time.<sup>49</sup> The record amply demonstrates very high actual recognition of the PEPSI-COLA mark by the general public. High actual recognition may be inferred from Opposer's broad and large advertising campaigns across all media that include the use of celebrities connected with PEPSI-COLA branded products and highly-visible events such as the Super Bowl, NBA, and NHL sponsorships.<sup>50</sup> See *N.Y. Yankees P'ship*, 114 USPQ2d at 1503 (the opposer "offered no direct evidence regarding the extent of actual recognition" of its mark, but did offer "substantial evidence relating to the first two fame factors"); *UMG Recordings, Inc.*

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<sup>49</sup> Schwarz Dec. ¶ 14 (49 TTABVUE 8).

<sup>50</sup> Schwarz Dec. ¶ 7 (49 TTABVUE 5).

*v. Mattel, Inc.*, 100 USPQ2d 1868, 1887 (TTAB 2011) (noting absence from record of “surveys or other evidence specifically measuring the general public’s ‘actual recognition’ of opposer’s MOTOWN marks,” but inferring actual recognition from evidence of extensive public exposure of the opposer’s marks). In addition, the examples of unsolicited mainstream media attention and Opposer’s 37.2 million Facebook “likes” (and its millions of followers on other social media platforms) evidences widespread recognition of the mark by a substantial fraction of the United States population.<sup>51</sup> *Spotify*, 2022 USPQ2d 37 at \*24.

The PEPSI-COLA mark also has been ranked consistently in the annual Interbrand list of Best Global Brands as among the top 100 of the world’s leading brands.<sup>52</sup> The Board has held on more than one occasion that a mark’s appearance on Interbrand’s list and in similar listings of top global brands is potent evidence of fame. *Spotify*, 2022 USPQ2d 37, at \*25 (ranking of SPOTIFY mark as No. 92 on the Interbrand list, and other evidence of recognition, supported a finding that the mark “is among the most widely recognized brands in the United States.”); *Chanel*, 110 USPQ2d at 2021 (appearance of CHANEL mark on the Interbrand list each year between 2001 and 2009 supported a finding of dilution fame).<sup>53</sup> The evidence under this factor “leaves no doubt that [PEPSI-COLA] is among the most widely recognized brands in the United States.” *Spotify*, 2022 USPQ2d 37, at \*25.


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<sup>51</sup> Schwarz Dec. ¶ 20 (49 TTABVUE 9).

<sup>52</sup> Schwarz Dec. ¶ 28 (49 TTABVUE 11).

<sup>53</sup> Coincidentally, the evidence shows Applicant consistently close to the global ranking of Chanel. Schwarz Dec. Exhibit S (50 TTABVUE 231, 248, 257, 267-68, 275-76).

4. PEPSI-COLA is Registered on the Principal Register

Opposer owns numerous United States trademark registrations for the PEPSI-COLA mark, and made several of them of record, which stand unchallenged in this proceeding. The oldest, Registration No. 349886 for the stylized mark  issued in 1937, and Registration No. 824151 for the typed mark PEPSI-COLA issued in 1967.<sup>54</sup> The PEPSI-COLA mark has been registered for more than 85 years. “[T]his factor also favors a finding of dilution fame.” *TiVo Brands*, 129 USPQ2d at 1112.

5. PEPSI-COLA is Famous

The record and all of the relevant fame factors support a finding that “[b]y any and all measures, [PEPSI-COLA] is exceedingly famous, and entitled to protection against dilution under 15 U.S.C. § 1125(c).” *Spotify*, 2022 USPQ2d 37, at \*25.

B. Applicant’s PET C COLA Mark Dilutes Opposer’s PEPSI-COLA Mark

The opposed application was filed on August 14, 2019, under Trademark Act Section 1(b) on the basis of Applicant’s alleged intention to use the mark in commerce. Applicant answered by interrogatory that it has not yet sold, distributed, or offered any products for sale,<sup>55</sup> and testified in its discovery deposition that although it appeared that some goods were for sale on its website, a prospective consumer could not actually make a purchase because the website is still in “test mode.”<sup>56</sup>

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<sup>54</sup> Lee Dec. ¶ 4, and Exhibits A and B (46 TTABVUE 3-4, 10-11, 259-60).

<sup>55</sup> Interrogatory No. 2, Opposer’s First Notice of Reliance (52 TTABVUE 34).

<sup>56</sup> Marks Rule 30(b)(6) Depo., Opposer’s First Notice of Reliance (52 TTABVUE 86).

The fact that Applicant has not used its mark in commerce is of no moment under this factor. “[A]n application based on intent to use a mark in commerce under Trademark Act Section 1(b) satisfie[s] the commerce requirement.” *N.Y. Yankees P’ship*, 114 USPQ2d at 1505-06 (citing *Toro Co. v. ToroHead, Inc.*, 61 USPQ2d 1164, 1174 (TTAB 2001) and *Chanel*, 110 USPQ2d at 2023). Opposer has therefore satisfied the second dilution element. *Id.* at 1506.

C. Opposer’s PEPSI-COLA Mark was Famous Before Applicant’s First Use of PET C COLA

Because Applicant’s application was filed under Trademark Act Section 1(b) based on its intention to use the PET C COLA mark in commerce, and because Applicant has not sought to prove any actual use of its mark, the mark’s date of constructive first use is deemed to be the August 14, 2019 filing date of the application. *Id.* at 1506. On the basis of the record evidence discussed above, there is no question that the required fame attached to Opposer’s PEPSI-COLA mark long before Applicant’s constructive use date of August 14, 2019.

D. Applicant’s Use of Its PET C COLA Mark is Likely to Cause Dilution By Blurring

Dilution by blurring “occurs when a substantial percentage of consumers, on seeing the junior party’s mark on its goods, are immediately reminded of the famous mark and associate the junior party’s mark with the owner of the famous mark, even if they do not believe that the goods emanate from the famous mark’s owner.” *N.Y. Yankees P’ship*, 114 USPQ2d at 1509; *see also Omega SA (Omega AG) (Omega Ltd.) v. Alpha Phi Omega*, 118 USPQ2d 1289, 1298 (TTAB 2016) (quoting 15 U.S.C. §

1125(c)) The concern is that “the gradual whittling away of distinctiveness will cause the trademark holder to suffer ‘death by a thousand cuts.’” *Nat’l Pork Board v. Supreme Lobster & Seafood Co.*, 96 USPQ2d 1479, 1497 (TTAB 2010) (citation omitted). *See also, Enter. Rent-A-Car Co. v. Advantage Rent-A-Car, Inc.*, 330 F.3d 1333, 66 USPQ2d 1811, 1816 (Fed. Cir. 2003) (“[D]ilution law is intended to protect a mark’s owner from dilution of the mark’s value and uniqueness.”).

Opposer must prove a likelihood of dilution by blurring by a preponderance of the evidence. *Rsch. in Motion Ltd. v. Defining Presence Mktg. Grp., Inc.*, 102 USPQ2d 1187, 1198 (TTAB 2012). To determine whether Applicant’s use of its mark is likely to cause dilution by blurring, we consider:


- (i) the degree of similarity between Applicant’s mark and Opposer’s famous mark;
- (ii) the degree of inherent or acquired distinctiveness of Opposer’s mark;
- (iii) the extent to which Opposer’s is engaging in substantially exclusive use of its mark;
- (iv) the degree of recognition of Opposer’s mark;
- (v) whether Applicant’s intended to create an association with Opposer’s PEPSI-COLA mark; and
- (vi) any actual association between Applicant’s mark and Opposer’s mark.

15 U.S.C. § 1125(c)(2)(B)(i-vi).

1. The Marks are Similar

We “consider the degree of similarity or dissimilarity of the marks in their entireties as to appearance, [sound], connotation, and commercial impression.” *N.Y. Yankees P’ship*, 114 USPQ2d at 1506 (citing *Rsch. in Motion*, 102 USPQ2d at 1198).

We must then determine whether Applicant's mark is sufficiently similar to Opposer's as to "trigger consumers to conjure up" Opposer's mark. *Nike*, 100 USPQ2d at 1030 (quoting *Nat'l Pork Bd.*, 96 USPQ2d at 1497). "In the dilution context 'the similarity between the famous mark and the allegedly blurring mark need not be substantial in order for the dilution by blurring claim to succeed.'" *TiVo Brands*, 129 USPQ2d at 1115 (quoting *Nike*, 100 USPQ2d at 1029).

Opposer has registered its PEPSI-COLA mark in standard characters and in the specialized form .<sup>57</sup> Applicant seeks registration of PET C COLA in standard characters.

We agree with Opposer that PEPSI-COLA and PET C COLA are similar in appearance because they share six of the same letters, in the same order, with each mark beginning with PE- and ending with same word COLA.<sup>58</sup> *Rsch. in Motion*, 102 USPQ2d at 1198 (TTAB 2012) ("[W]e find that there is a high degree of similarity between applicant's mark [CRACKBERRY] and opposer's famous mark [BLACKBERRY]").


In addition, Applicant's standard-character mark "may be presented in any font style, size or color," *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at \*34 (TTAB 2021) (quoting *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018)), including any such display "that minimizes the differences or emphasizes the similarities between the marks." *Id.* (quoting *Anheuser-Busch, Inc. v.*

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<sup>57</sup> Lee Decl'n Exhibits A and B; 46 TTABVUE 10-11, 259-60.

<sup>58</sup> 68 TTABVUE 32.

*Innovapak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1823 (TTAB 2015)). We thus must assume that Applicant's PET C COLA mark could be displayed in the same font, colors, and

word size and placement as Opposer's stylized  mark, with a larger initial P in script font, a large C with a curving tail atop and a long, looping tail below, and smaller block letters within the mark. In this regard, Opposer introduced evidence from Applicant's website showing Applicant's mark is routinely depicted as



. While this in no way limits the manner in which Applicant's standard character mark may be used, the Federal Circuit has held that in determining possible depictions of a standard-character mark, "illustrations of the mark as actually used may assist the [Board] in visualizing other forms in which the mark might appear." *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011)). When viewed as Applicant intends to place its mark on its website, the visual similarity between the marks is stunning. This assists us in finding that the marks are highly similar in appearance.

In its entirety, PET C COLA is also strikingly similar in sound to PEPSI-COLA. Each mark is pronounced with four similar syllables: the first syllable highly similar in sound (PET vs. PEP), the last three syllables identical (C COLA vs. SI-COLA). *See id.* at 1193 (an "undeniable phonological similarity" where the first syllables of the respective marks ("black" and "crack") are similar and the balance of each mark is the identical word "-berry."). *See also Russell Chem. Co. v. Wyandotte Chem. Corp.*, 337 F.2d 660, 143 USPQ 252 (CCPA 1964) (SENTOL similar in sound to SEN-TROL);



*Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740-41 (TTAB 2014) (IKEA similar in sound to AKEA).

We have found above that “the appearance of the marks overall is sufficiently similar that Applicant’s mark will ‘trigger consumers to conjure up’ Opposer’s famous mark. That is, consumers encountering Applicant’s mark will immediately be reminded of Opposer’s famous [PEPSI-COLA] mark and associate the two.” *N.Y. Yankees P’ship*, 114 USPQ2d at 1507. We also find that the marks are sufficiently similar in their entireties in appearance and sound “that Applicant’s mark will ‘trigger consumers to conjure up’ Opposer’s famous [PEPSI-COLA] mark. This weighs in favor of finding dilution by blurring.” *Id.*

## 2. Opposer’s Mark is Highly Distinctive

“This factor requires us to analyze how distinctive or ‘unique’ the mark is to the public. The inquiry is made even when it is undisputed that opposer’s mark is registered on the Principal Register.” *NASDAQ Stock Mkt. Inc. v. Antartica S.r.l.*, 69 USPQ2d 1718, 1735 (TTAB 2003). “The more inherently distinctive and memorable the mark, the more it is likely to be blurred by the use of other identical or similar marks. The more descriptive the mark, the less likely it is to be blurred by uses of identical or similar marks.” *Chanel*, 110 USPQ2d at 2025 (internal citation omitted).

“As explained throughout this decision, Opposer’s [PEPSI-COLA] mark is nothing if not distinctive. It is coined, fanciful, registered on the Principal Register without a disclaimer or resort to Section 2(f) of the Act, and is among the most highly recognized marks in the United States.” *Spotify*, 2022 USPQ2d 37, at \*22. Indeed, a substantial portion of the United States population is exposed to Opposer’s mark

through its broad advertising and marketing.<sup>59</sup> “This factor also weighs in favor of finding dilution by blurring.” *Id.*

3. Opposer’s Use of PEPSI-COLA is Substantially Exclusive

Opposer provided unchallenged evidence that it has exclusively used its PEPSI-COLA mark in the United States for more than a century.<sup>60</sup>

Opposer engages in a robust policing program to “vigorously and successfully” protect its marks through, for example, letters of protest and inter partes proceedings at the USPTO.<sup>61</sup> This type of evidence has been found to establish “substantially exclusive use,” *Chanel*, 110 USPQ2d at 2025-26, and there is no evidence of any third-party use of marks that would reduce the degree of Opposer’s exclusivity of use. *See also UMG Recordings*, 100 USPQ2d at 1899; *Nike*, 100 USPQ2d at 1028.

This factor therefore also weighs in favor of finding dilution by blurring.

4. Opposer’s PEPSI-COLA Mark is Widely Recognized in the United States

As explained above, Opposer’s mark is extremely famous and is widely recognized by the consuming public. Opposer’s evidence of commercial strength that includes its commercial presence, advertising and sales volumes, website and social media traffic, routine unsolicited media coverage, and long-term advertising over a variety of media using well-known individuals, and sponsorship of popular sporting events reflects widespread consumer exposure to and recognition of Opposer’s PEPSI-COLA mark.

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<sup>59</sup> See Schwarz Dec. ¶¶ 7, 12, 13, 20 (49 TTABVUE 5, 7, 9).

<sup>60</sup> Lee Dec. ¶¶ 2-3 (46 TTABVUE 3); Schwarz Dec. ¶ 2 (49 TTABVUE 3)

<sup>61</sup> Lee Dec. ¶¶ 10, Exhibit G (46 TTABVUE 6, 921-1086).

“This factor weighs heavily in favor of finding dilution by blurring.” *Spotify*, 2022 USPQ2d 37, at \*34.

5. Applicant’s Intent to Create an Association with Opposer’s PEPSI-COLA Mark


In its answers to interrogatories, Applicant stated it did not believe Opposer, or anyone, would object to its mark, and that it conducted legal research and reviewed case law involving the word “cola,” believing it that word to be a “generic term, open to all the world, which may be lawfully used as part of a trademark by competitors.”<sup>62</sup> When asked how Applicant came up with the particular stylized lettering and color for PET C COLA as used on its public-facing website, Mr. Marks stated in a lengthy and rambling answer that he wanted something that incorporated the dog into the lettering and that “[r]ed is a very good color.”<sup>63</sup>

Opposer does not point to any direct evidence of Applicant’s intent to associate its



mark with Opposer’s  mark, such as testimony, documents,

or admissions made in discovery. In the absence of such direct evidence, however, Applicant’s intent may be inferred from his slavish copying of elements of Opposer’s PEPSI-COLA script mark. Opposer introduced evidence that it has, for at least nine

decades, advertised its  mark using the color red.<sup>64</sup> While Applicant’s

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<sup>62</sup> Applicant’s Supplemental Response to Interrogatory No. 14 (52 TTABVUE 50).

<sup>63</sup> Marks Rule 30(b)(6) Depo., Opposer’s First Notice of Reliance (52 TTABVUE 87-88).

<sup>64</sup> See, e.g., Schwarz Dec. Exhibit B (49 TTABVUE 103-105, 107-110, 112, 121).

interrogatory answers and deposition testimony are credible, Applicant's adoption of a color, font, and stylization with virtually identical elements to those used by Opposer for its PEPSI-COLA script mark is "eyebrow raising," *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1063 (TTAB 2017), and is strong evidence of Applicant's intent to copy and create an association with Opposer's mark.

There are countless ways in which Applicant could display its mark on its website, including other ways to wrap the mark around a dog to incorporate the dog within the lettering,<sup>65</sup> but its choice to display the mark in a script that immediately conjures up the famous PEPSI-COLA script mark supports an inference that Applicant's desire was to have its mark stand out because of its striking similarity to Opposer's famous mark. Equally notable is the striking similarity in the sound of Applicant's mark to Opposer's PEPSI-COLA mark when pronounced.

Applicant's font, stylization, color, and aural choices regarding the elements of its mark and their display on Applicant's website culminate in its mark's striking resemblance to the PEPSI-COLA script mark, and make the conclusion that Applicant intended its mark to be associated with the famous PEPSI-COLA script mark inescapable. "We therefore find that [A]pplicant is attempting to trade on the goodwill and fame generated by the [PEPSI-COLA script mark] mark in order to promote and market [its] own [goods]. As such, this dilution factor also favors [O]pposer." *Chanel*, 110 USPQ2d at 2026.

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<sup>65</sup> See Marks Rule 30(b)(6) Depo. (52 TTABVUE 87) ("I wanted something that wrapped around the dog. . . . I wanted something that incorporated the dog into the – into the lettering. . . . [T]he stylized C was pretty good to fit around the dog . . . .").

6. Actual Association between PET C COLA and PEPSI-COLA

Applicant's application was filed on an intent-to-use basis, and Applicant stated in discovery that it has not yet offered any products bearing the mark for sale.<sup>66</sup> "Thus, there has been a limited opportunity for the public to make any actual association between the parties' . . . marks. We find this factor to be neutral." *N.Y. Yankees*, 114 USPQ2d at 1509.

E. Conclusion on Dilution

Opposer's PEPSI-COLA mark is exceedingly famous and highly distinctive. In addition, the goods sold under the mark are widely used and recognized by a large percentage of the United States population. This is all prior to Applicant's constructive use of (i.e., filing date for) its mark. Further, the marks are sufficiently similar in overall sound, appearance, and commercial impression and such association is likely to impair the distinctiveness of Opposer's PEPSI-COLA mark. Applicant's mark is likely to cause consumers to "conjure up" Opposer's famous mark, and "associate the two." *N.Y. Yankees P'ship*, 114 USPQ2d at 1507. We also find that Applicant intended such an association. "Upon encountering applicants' mark, consumers will be immediately reminded of opposer's [PEPSI-COLA] mark and associate applicant's mark with opposer's mark." *Nike*, 100 USPQ2d at 1030.

Inasmuch as the dilution doctrine was designed to provide a remedy where the goods or services involved are neither competitive nor necessarily related, *Nike*, 100 USPQ2d at 1031, any possible distinction between the parties' goods does not obviate

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<sup>66</sup> Applicant's Response to Interrogatory No. 2 (52 TTABVUE 33-34).

Opposer's dilution claim. Viewing the evidence as a whole, we conclude that Applicant's PET C COLA mark is likely to impair the distinctive quality of Opposer's famous PEPSI-COLA mark.

## VI. Decision

The opposition to registration of the mark is sustained on the ground of dilution by blurring, and registration to Applicant is refused.<sup>67</sup>

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<sup>67</sup> Because we have resolved this proceeding on Opposer's dilution claim, we need not reach Opposer's likelihood of confusion claim. *N.Y. Yankees P'ship*, 114 USPQ2d at 1512.