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

Proceeding	91178927
Party	Defendant The Coca-Cola Company
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ROYAL CROWN COMPANY, INC.	)	<u>Consolidated Proceedings:</u>
and DR. PEPPER/SEVEN UP, INC.,)	
	)	OPPOSITION NO. 91178927
Opposers,	)	OPPOSITION NO. 91180771
	)	OPPOSITION NO. 91180772
v.	)	OPPOSITION NO. 91183482
	)	OPPOSITION NO. 91185755
THE COCA-COLA COMPANY,	)	OPPOSITION NO. 91186579
	)	OPPOSITION NO. 91189847
Applicant.	)	OPPOSITION NO. 91190658

– and –

THE COCA-COLA COMPANY,)	
)	
Opposer,)	
)	
v.	)	OPPOSITION NO. 91184434
)	
ROYAL CROWN COMPANY, INC.)	
and DR. PEPPER/SEVEN UP, INC.,)	
)	
Applicants.)	

THE COCA-COLA COMPANY'S OPENING BRIEF ON THE MERITS

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INTRODUCTION

More than two years ago, in a well-reasoned opinion based on a “voluminous” record, the Board dismissed consolidated oppositions to the same seventeen applications of The Coca-Cola Company (“TCCC”) that are at issue in these proceedings. *Companhia de Bebidas das Américas – AMBEV v. The Coca-Cola Company*, 2012 WL 1881492, Oppositions Nos. 91178953, et al. (TTAB May 2, 2012) (“*Ambev*”). In the *Ambev* opinion, the Board found that TCCC had proven that ZERO, when used as an element of a mark for soft drinks, had acquired distinctiveness and need not be disclaimed.

More specifically, the Board in *Ambev* found that:

- “by itself, ZERO only describes a general absence of some ingredient normally present” and that ZERO is not “so highly descriptive as to identify a product category,” *Ambev* at 14-15;¹
- TCCC has enjoyed a “substantial degree of success with its ZERO line of beverages” and that the evidence of TCCC’s sales and advertising expenditures were “significant . . . by any measure,” *Ambev* at 17-18;
- TCCC’s advertisements for its ZERO products “convey to the consumer” that ZERO serves a trademark function and do not merely convey nutritional information, *Ambev* at 18;
- the survey conducted by Dr. Alex Simonson – which is the same survey that has been made of record in these proceedings – was “on

¹ The *Ambev* opinion is a non-precedential decision of the Board. In accordance with TBMP § 801.03, it may be cited for its persuasive value. Because the applications and many of the issues involved were the same, TCCC believes that the persuasive value of the *Ambev* opinion is significant, and RC cited the *Ambev* decision in its brief. (RC Brief at 32 n.8). References herein to the *Ambev* decision are to the pages of the Board slip opinion.

point” and “validates the significant sales and advertising numbers,” *Ambev* at 20; and

- TCCC’s use of ZERO need not be “entirely exclusive,” and that third party use of “highly descriptive zero-formative phrases” does not undercut TCCC’s claim of acquired distinctiveness. *Ambev* at 20-21.

Like the evidence of record in *Ambev*, the evidence in these proceedings also demonstrates convincingly that the ZERO element of TCCC’s ZERO marks serves as a source identifier that is associated by consumers with TCCC, and that consumers recognize that beverage products having ZERO in their names – unlike beverage products with “diet” in their names – come from only one source. The Trademark Examining Attorneys’ withdrawals of the requirement of a disclaimer of “ZERO” in connection with the applications at issue were therefore correct. The oppositions of Royal Crown Company, Inc. and Dr. Pepper/Seven Up, Inc. (together, “RC”) to the TCCC ZERO marks, seeking only that a disclaimer of “ZERO” be required, should be dismissed.

The evidence of record also establishes that RC’s marks that include ZERO for the same types of goods are likely to cause confusion with TCCC’s family of ZERO marks in view of, in part, consumers’ recognition that ZERO in a soft drink product name identifies TCCC as the source. TCCC’s opposition to RC’s DIET RITE PURE ZERO and PURE ZERO marks should therefore be sustained.

These proceedings, which were filed over a twenty-two-month period starting in August of 2007 and ending in June of 2009, relate to applications filed by TCCC and by RC to register marks that include ZERO. The TCCC marks that are the subject of the applications opposed by RC are TCCC’s marks COCA-COLA ZERO, COKE ZERO,

SPRITE ZERO, FANTA ZERO, VAULT ZERO, PIBB ZERO, CHERRY COCA-COLA ZERO (and three variants thereof), VANILLA COCA-COLA ZERO (and two variants thereof), POWERADE ZERO, FULL THROTTLE ZERO, COKE ZERO ENERGY and COKE ZERO BOLD. With the exception of COKE ZERO ENERGY and COKE ZERO BOLD, TCCC has used the marks that are the subject of the opposed TCCC applications on soft drinks, sports drinks and energy drinks.

The evidence referred to above – much of which was submitted to the Trademark Office during prosecution of the applications – takes several forms.

First, the evidence shows that TCCC and its related companies have extensively advertised and promoted TCCC's ZERO beverage products. Between 2004 and the end of 2011, TCCC itself spent over [REDACTED] [REDACTED] to advertise and promote its ZERO products in the United States, and TCCC's bottlers and the retailers who sell the products to consumers have spent significant additional amounts, likely on the same order of magnitude. TCCC's expenditures on advertising have included significant amounts spent to advertise multiple TCCC ZERO products together.

Second, sales of TCCC's ZERO beverage products have been substantial. Over [REDACTED] "unit cases" of 192 fluid ounces of TCCC's products were sold between 2004 and the end of 2011 – which represents more than [REDACTED] eight-ounce servings. Sales of TCCC's ZERO products in the United States during the same period exceeded [REDACTED] [REDACTED].

Third, TCCC's consumer survey again validates these numbers and the success TCCC has achieved in developing acquired distinctiveness for its ZERO marks. The TCCC survey was conducted in accordance with well-recognized survey techniques, using "diet" as a control stimulus, and yielded impressive results. The survey showed that consumers understand that beverage products having ZERO in their names come from only one source, in stark contrast to consumers' equally clear understanding that beverage products whose names include the word "diet" come from many sources. The TCCC survey showed that the overwhelming majority of consumers understand that "diet" is a merely descriptive or generic term that is used by many companies in the names of their products, whereas ZERO is not.

Fourth, the evidence shows the strength of TCCC's family of ZERO marks, the efforts TCCC has taken to enforce its rights in and to its family of ZERO marks, and the likelihood of confusion resulting from RC's ZERO marks for the same types of products.

The materials submitted by RC in support of its oppositions do not cast doubt on these conclusions and confirm that the results reached by the Board in the *Ambev* proceedings were correct. RC's evidence and arguments consist largely of:

- numerous references to non-trademark uses of "zero" in its ordinary dictionary sense by TCCC and other companies, in descriptive phrases such as "zero calories," "zero calorie cola" or "zero sugar";
- evidence regarding isolated and relatively limited uses of ZERO as an element of a mark or on packaging for a small number of specialty, niche non-soft drink beverages;
- arguments directed to a claim of genericness based primarily on uncorroborated descriptive third party uses of "zero" and a contention – supported by argument but not by any survey or other significant

evidence – that “zero” is considered by consumers and the beverage industry to identify a “category” of non-alcoholic beverages and as the new term for “diet” beverages.

RC’s evidence and arguments are based, in large part, on a misunderstanding of TCCC’s position and the relevant legal principles. TCCC does not seek to obtain a “monopoly” over and has not claimed any exclusive rights in or to descriptive phrases such as “zero calorie cola,” which all companies are free to use. The fact that others may use “zero” in a descriptive phrase does not detract from the protectability of ZERO as an element of a mark, when in that context it has acquired distinctiveness. Issuance of registrations to TCCC for its ZERO marks will only reflect accurately TCCC’s rights in its ZERO marks, in their entirety – including in the acquired distinctiveness of the term ZERO. RC’s hyperbole to the contrary (RC Brief at 7) is misplaced.

RC’s evidence, moreover, is wholly insufficient to support its allegation that “zero” is generic for non-alcoholic beverages or any sub-group of non-alcoholic beverages (including soft drinks). The examples of third party use of “zero” in various manners and media submitted by RC fail to show the extent of the public’s exposure to these uses or how (if at all) these uses affect consumers’ perception of “zero” when it is used as a mark in connection with soft drinks. Despite its size, sophistication and ample resources, RC has offered no survey evidence of any kind or even any expert criticism of TCCC’s survey.

When considered in light of the correct issue and governing precedents, the evidence in these proceedings considered as a whole fully supports the conclusion that ZERO, as used by TCCC in its family of ZERO marks, is not generic and has trademark significance. RC’s oppositions should be dismissed.

The Board should also sustain TCCC's opposition against Royal Crown's PURE ZERO and DIET RITE PURE ZERO applications. RC's use of these marks is likely to cause confusion with TCCC's ZERO marks due to the similar commercial impressions of the marks; the overlapping goods, relevant consumers and channels of trade; and the strength of TCCC's ZERO marks. The evidence of record shows that consumers associate ZERO as an element of a product name with one company, namely TCCC. RC's ZERO marks are therefore likely to cause consumers to believe that the marks are associated with TCCC and its family of well-known ZERO marks.

STATEMENT OF THE ISSUES

The following are the issues to be decided in these oppositions:

1. Has RC met its "high" burden of establishing that ZERO, when used in connection with beverages, is a generic term that identifies a category of beverage products?

2. Has RC met its burden of establishing that the evidence relating to TCCC's sales, advertising and marketing of its ZERO products, which TCCC submitted during prosecution and which was accepted by the Examining Attorneys under Section 2(f), was insufficient to establish that ZERO as used in TCCC's ZERO marks had acquired distinctiveness?

3. Does the preponderance of the evidence establish that ZERO, as used in TCCC's ZERO marks for soft drinks, has acquired distinctiveness?

4. Has TCCC met its burden of establishing that the DIET RITE PURE ZERO and PURE ZERO marks sought to be registered by RC so resemble TCCC's ZERO marks as to be likely, when used in connection with RC's goods, to cause confusion, or to cause mistake, or to deceive within the meaning of Section 2(d) of the Lanham Act?

DESCRIPTION OF THE RECORD

The record consists of the file histories of the seventeen TCCC and two RC applications at issue, the documentary and testimonial evidence made of record by RC during its opening testimony period, the documentary and testimonial evidence made of record by TCCC during its testimony period; the documentary evidence made of record by RC during its rebuttal testimony period, and the documentary evidence made of record by TCCC during its rebuttal testimony period.

A. The File Histories

The materials submitted in connection with the prosecution of the TCCC ZERO applications and the opposed RC applications are automatically of record in this proceeding. 37 C.F.R. § 2.122(b); TBMP § 704.03(a). The prosecution histories of the TCCC ZERO marks include:

- Thirteen third party registrations that do not include a disclaimer of ZERO or ONE for beverages and that indicate a recognition by the PTO that ZERO per se and other numbers (such as ONE) are not merely descriptive; these registrations, which were cited in TCCC's October 3, 2005 response to office action in Serial No. 78-580,598,² include registrations for the marks ZERO TEA (Reg. No. 1,862,689); LACTO ZERO (Reg. No. 2,095,972); A LESS ZER'O' SPUMEGGIANTE (Reg. No. 2,275,991); BRUT ZERO (Reg. No. 1,220,237); SUB ZERO (Reg. No. 2,454,727); ZERO MANIPULATION (Reg. No. 2,410,576); TRIPLE ZERO (Reg. No. 2,627,897); SUB ZERO (Reg. No. 2,927,378); ZERO LIMIT (Reg. No. 2,955,537); PEPSI ONE (Reg. No.

² During prosecution, TCCC made similar submissions to the Trademark Office in connection with all of the applications at issue. For ease of reference, TCCC will cite herein only to the filings made in connection with one specific application, primarily application serial number 78-580,598 to register the mark COCA-COLA ZERO.

2,226,758); PEPSI ONE (Reg. No. 2,289,636); WATERONE (Reg. No. 1,740,083); ONE (Reg. No. 2,280,130); and COLA ONE (Reg. No. 1,532,289);

- Sales and advertising expenditures for TCCC products bearing the ZERO marks;
- Examples of media coverage regarding TCCC's ZERO marks that recognizes ZERO as an element of TCCC's marks and uses TCCC's ZERO marks to identify TCCC's products;
- Examples of TCCC advertisements featuring the ZERO marks (e.g., January 25, 2007 Office Action Response in Serial No. 78-580,598; September 30, 2004 Office Action Response in Serial No. 78-316,078).

B. TCCC's Case In Chief

TCCC filed the following evidence during its case in chief

- Testimony depositions³ from:
 - Dr. Alex Simonson, TCCC's survey expert, who conducted a standard secondary meaning survey as to the significance of ZERO as an element of beverage product names; and
 - Russell Wiley Baker, TCCC's Vice President of Sales Capabilities for the Coca-Cola Refreshments Business Unit, who testified regarding, inter alia, TCCC's use of its ZERO marks; the advertising, promotion and sales of TCCC's ZERO products; and TCCC's research regarding consumer understanding of the term ZERO as used in TCCC's marks.
- TCCC's Notice of Reliance on Printed Publications, Official Records and Discovery Request Responses, filed October 15, 2013, with which TCCC made of record:

³ The testimony transcripts of Mr. Baker and Dr. Simonson will be filed in accordance with Trademark Rule 2.123(f).

- Additional examples of unsolicited media coverage regarding the TCCC ZERO Marks;
- RC's Objections and Responses to TCCC's Second Set of Requests for Production of Documents and Things;
- Office Action Response dated February 28, 2007 filed by TCCC in connection with Application Serial No. 78/664,176 for the mark COKE ZERO;
- the TTAB decision in *Companhia de Bebidas das Américas – AMBEV v. The Coca-Cola Company*, Opposition Nos. 91178953, et al. (TTAB May 2, 2012);
- TSDR records of applications for marks that include 0 or ZERO that were made of record by RC, which TCCC includes in order to show the applications are abandoned;
- TTAB pleadings and TTAB decisions in oppositions filed by TCCC against applications for marks that include ZERO, which oppositions were made of record by RC;
- Third party U.S. registrations for marks that include 0 or ZERO, some of which include a disclaimer of 0 or ZERO and others of which do not include a disclaimer of 0 or ZERO; and
- Seven third party registrations for marks identified by TCCC's expert, Dr. Simonson, in his report "A Test of Relevant Consumers to Determine the Level of Secondary Meaning of the Term "ZERO" as Part of a Name with Respect to Soft Drinks" (the "Simonson Report"), to illustrate that a term can have a descriptive meaning and also indicate source or brand; these marks include STARBUCKS DOUBLESHOT (Reg. No. 2,839,122); BUDGET RENT A CAR (Reg. No. 1,300,950); BUDGET TRUCK RENTAL (Reg. No. 3,255,851); BLOCKBUSTER (Reg. No. 2,970,581);

NETFLIX (Reg. No. 3,299,362); QUARTER POUNDER (Reg. No. 1,017,498); and QUARTER POUNDER (Reg. No. 1,017,623).

- TCCC's Notice of Reliance on the Discovery Depositions of Royal Crown Company, Inc. and Dr. Pepper/Seven Up, Inc. Witnesses, filed October 15, 2013, with which TCCC made of record:
 - Designated portions from the discovery deposition of Andrew David Springate of Dr. Pepper Snapple Group;
 - Designated portions from the discovery deposition of Russell Schleiden of Dr. Pepper Snapple Group; and
 - Designated portions from the discovery deposition of Tony Jacobs of Dr. Pepper Snapple Group.
- TCCC's Notice of Reliance on Additional Portions of Discovery Depositions of The Coca-Cola Company Witnesses, filed October 15, 2013, with which TCCC made of record:
 - Counter-designations from the deposition of William Herbert Gray, IV, TCCC's Senior Brand Manager for U.S. Sprite Brand;
 - Counter-designations from the deposition of Russell Wiley Baker, TCCC's Brand Manager for Coca-Cola Zero; and
 - Counter-designations from the deposition of Maurice Cooper, TCCC's Brand Manager for Sprite.

C. TCCC's Rebuttal

During its rebuttal period, TCCC filed TCCC's Notice of Reliance on Additional Portions of Discovery Depositions of The Coca-Cola Company Witnesses, filed February 7, 2014, with which TCCC made of record:

- Additional counter-designations from the deposition of William Herbert Gray, IV, TCCC's Senior Brand Manager for U.S. Sprite Brand;
- Additional counter-designations from the deposition of Russell Wiley Baker, TCCC's Brand Manager for Coca-Cola Zero; and
- Counter-designations from the deposition of Maurice Cooper, TCCC's Brand Manager for Sprite.

D. RC's Evidence

TCCC notes that the Board's rule 2.126, 37 C.F.R. § 2.126, sets a 55 page limit for opening briefs and that section 801.03 of the Board's Manual of Procedure, TBMP § 801.03, provides that "appendices to a brief may not be used to avoid the page limitation." In blatant disregard of these provisions, RC has attached to its 53-page brief and burdened the Board with an additional 46 pages of "appendices," in which RC purports to "describe" certain of the materials it has made of record. TCCC requests that the Board disregard those appendices. RC has also filed a separate, 16-page argumentative "statement of objections" to TCCC's evidence, to which TCCC is filing a response concurrently herewith.⁴

BACKGROUND AND FACTS

A. The Parties

TCCC is based in Atlanta, Georgia and is the world's largest beverage company. TCCC offers nearly 500 brands of sparkling beverages, juices and juice drinks and

⁴ TCCC is filing, concurrently herewith, two documents relating to evidentiary issues: (1) a separate response to RC's "Statement Of Objections" to TCCC's evidence filed on May 8, 2014, in which RC stated evidentiary objections to certain of TCCC's evidence; and (2) TCCC's Statement Of Objections, in which TCCC states its objections to certain evidence offered by RC.

ready-to-drink teas and coffee globally. One of TCCC's most successful product launches in recent years has been COCA-COLA ZERO. TCCC has used ZERO as an element of marks for approximately fifteen different beverage products sold in the United States, including soft drinks such as COCA-COLA ZERO, SPRITE ZERO, FANTA ZERO and PIBB ZERO; a hybrid soft drink / energy drink, VAULT ZERO; sports drinks such as POWERADE ZERO; and an energy drink, FULL THROTTLE ZERO. (Russell Baker Testimony ("Baker Tr.") at 30-31).

RC is the third largest refreshment beverage company in North America. RC manufactures, bottles, markets and distributes various brands of soft drinks, juices, ready to drink teas, mixers and other beverages, including DR PEPPER, 7UP, SCHWEPPEES and SNAPPLE. (RC Brief at 12-13).

B. The TCCC Applications

The seventeen TCCC applications at issue in these consolidated proceedings are the applications listed below in the order in which they were filed, which seek to register the following marks (collectively, the "ZERO Marks" or the "TCCC ZERO Marks"):

SPRITE ZERO, Ser. No. 78-316,078, filed October 20, 2003;
COCA-COLA ZERO, Ser. No. 78-580,598, filed March 4, 2005;
FANTA ZERO, Ser. No. 78-620,677 filed May 2, 2005;
COKE ZERO, Ser. No. 78-664,176 filed July 6, 2005;
VAULT ZERO, Ser. No. 78-698,990 filed August 24, 2005;
PIBB ZERO, Ser. No. 77-097,644 filed February 2, 2007;
COKE ZERO ENERGY, Ser. No. 76-674,382, filed March 22, 2007;
COKE ZERO BOLD, Ser. No. 76-674,383, filed March 22, 2007;
COKE CHERRY ZERO, Ser. No. 77-175,066 filed May 8, 2007;
CHERRY COCA-COLA ZERO, Ser. No. 77-175,127, filed May 8, 2007;
COCA-COLA CHERRY ZERO, Ser. No. 77-176,279, filed May 9, 2007;
CHERRY COKE ZERO, Ser. No. 77-176,127, filed May 9, 2007;
COCA-COLA VANILLA ZERO, Ser. No. 77-176,108, filed May 9, 2007;
VANILLA COKE ZERO, Ser. No. 77-176,099, filed May 9, 2007;

VANILLA COCA-COLA ZERO, Ser. No. 77-257,653, filed August 17, 2007; POWERADE ZERO, Ser. No. 77-309,752, filed October 27, 2007; and FULL THROTTLE ZERO, Ser. No. 77-413,618, filed March 5, 2008.

During prosecution of these applications, the Examining Attorneys initially requested disclaimers of “ZERO.” TCCC submitted proof of acquired distinctiveness including statements, accompanied by appropriate declarations in accordance with the USPTO rules, attesting to nearly \$1 billion in sales and over \$150 million in advertising of TCCC products bearing the ZERO marks, and examples of advertising and media reports. Following TCCC’s submission of this evidence, the Examining Attorneys accepted the proof of acquired distinctiveness and approved the marks for publication without a disclaimer of ZERO and with a partial 2(f) claim as to “ZERO.”

RC has opposed all of the TCCC applications on the grounds that “the term ‘zero’ cannot be source-indicating as denoting goods emanating substantially exclusively from Applicant” and that the term “zero” is allegedly “generic when applied to such goods [certain beverage products] and cannot function to indicate source.” Amended Consolidated Notice of Opposition ¶¶ 18-25.

C. TCCC’s ZERO Marks and Products

TCCC introduced DIET SPRITE ZERO in 2004, with the intent to reframe and contemporize the SPRITE brand for a younger audience. (Baker Tr. at 55-56). COCA-COLA ZERO was introduced in the summer of 2005, with a similar goal. (*Id.* at 62-63). TCCC’s ZERO family of products has since expanded to include FANTA ZERO, PIBB ZERO, VAULT ZERO, CHERRY COKE ZERO, VANILLA COKE ZERO, POWERADE ZERO, FULL THROTTLE ZERO and others.

As of the end of 2011, more than [REDACTED] servings of these various TCCC ZERO products had been sold in the United States since 2004. (*Id.* at 133). TCCC's advertising and promotion expenditures have been equally impressive, totaling more than [REDACTED] since 2004. (*Id.* at 134). These advertising dollars, which were spent by TCCC itself, do not include a similar amount spent by TCCC's bottlers and the retailers who sell the products to consumers. (*Id.* at 135). They do include, moreover, substantial amounts spent by TCCC and its bottlers and retailers for advertising and promotion that included more than one of TCCC ZERO products together. (Baker Tr. at 137-46).

D. RC's DIET RITE PURE ZERO Marks and Products

Among RC's product offerings are soft drinks sold under the DIET RITE mark. Starting in the summer of 2005, RC re-branded its DIET RITE products as DIET RITE PURE ZERO. The DIET RITE products have [REDACTED]
[REDACTED]
[REDACTED]. (Springate Tr. at 132, 134, 68). RC has not [REDACTED]
[REDACTED] (Springate Tr. at 17-18) and [REDACTED] (Springate Tr. 161-62).

ARGUMENT AND CITATION OF AUTHORITIES

In the context of the types of beverage products at issue in these proceedings, the word “zero” and the numeral “0” can be used in a number of very different ways. First, they can be used as a mark or as an element of a mark, i.e., in the name of the beverage product. Second, they can also be used together with a noun as part of a more complete descriptive phrase, such as “zero calorie cola” or “zero carbohydrates,” that directly and immediately conveys specific information about the product. And third, they can also be used in a purely informational way, such as in the required nutritional information panel on the product packaging.

When used in a mark, moreover, “zero” and “0” can be used either coupled with another word or mark – as in the TCCC ZERO Marks – or as part of a larger phrase that includes a noun modified by “zero,” such as in the mark ZERO CALORIE SARATOGA SPLASH. The issues in these proceedings relate only to the use of ZERO in a mark, unaccompanied by a noun that is coupled with ZERO in a more complete descriptive phrase or gives it a specific meaning.

I. “ZERO” AS USED IN THE TCCC ZERO MARKS IS NOT GENERIC.

RC claims that “zero” is a generic term for soft drinks with zero calories. RC has not come close to meeting its burden of proof that the primary significance to the relevant purchasing public of the term ZERO as used in the TCCC ZERO Marks is as a generic term.

The critical issue in determining genericness is whether members of the relevant public primarily use or understand a designation sought to be registered to refer to the

genus or category of goods or services in question. See *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 989-990, 228 USPQ 528 (Fed. Cir. 1986) (FIRE CHIEF for magazine not generic); see also *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999) (SOCIETY FOR REPRODUCTIVE MEDICINE for association services not generic).

There is a high standard for finding a term to be generic. *Id.* Whether a term is generic involves a two-step inquiry, determining: (1) the genus or category of goods at issue, and (2) whether the designation sought to be registered is understood by the relevant public primarily to refer to that genus or category of goods. *Id.* at 990. RC bears the burden of proving by a preponderance of the evidence its claim that ZERO is a generic term for beverages. See *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1887 (TTAB 2006); *Martahus v. Video Duplication Services Inc.*, 3 F.3d 417, 27 USPQ2d 1846, 1850 (Fed. Cir. 1993).

The public's perception is the primary consideration in determining whether a term is generic. *Loglan Inst. Inc. v. Logical Language Group Inc.*, 962 F.2d 1038, 22 USPQ2d 1531, 1533 (Fed. Cir. 1992). The Board must consider all of the evidence in the record, including an applicant's evidence of acquired distinctiveness, since this evidence touches on the public perception of the designation. See *In re Recorded Books Inc.*, 42 USPQ2d 1275 (TTAB 1997); *In re Seats, Inc.*, 757 F.2d 274, 225 USPQ 364 (Fed. Cir. 1985).

A. The Genus Of The Goods At Issue Is Non-Alcoholic Beverages.

"[A] proper genericness inquiry focuses on the description of [goods or] services set forth in the [application or] certificate of registration." *Sheetz of Delaware, Inc. v.*

Doctor's Associates Inc., 108 USPQ2d 1341, 1350 (TTAB 2013), citing *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991). The identifications of goods in TCCC's applications for its ZERO marks provides the broad genus or category of goods involved in this case, namely, non-alcoholic beverages and more specifically carbonated soft drinks, energy drinks and sports drinks (and syrups and concentrates for making such drinks).

RC argues that the genus at issue is the narrowly-defined category of "zero-calorie soft drinks" because the goods in TCCC's applications for its ZERO marks encompass zero-calorie soft drinks. (RC Brief at 36). The appropriate inquiry, however, is the description of goods actually set forth in the application. See *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 2013 WL 5407315 at *13 (TTAB 2013) (in accordance with Federal Circuit guidance, genus must be defined by respondent's recitation of services). The phrase "zero-calorie" is not included in any of the descriptions of goods in the applications for the TCCC ZERO Marks. Further, it is clear from the evidence of record that not all of TCCC's ZERO products have "zero calories" and "zero" suggests and relates to different things for TCCC's different products.⁶ RC's proposed genus is therefore too narrow and improper.⁷

⁶ For example, TCCC has used its ZERO marks on products that are not "zero calorie" products. (TCCC Ex. 14). TCCC's Russell Baker also testified regarding TCCC's consumer research that showed consumers do not know what "zero" refers to absent a clear legend identifying the ingredient that is absent. See, e.g., Baker Tr. at 66-73.

⁷ The cases cited by RC involve distinguishable ex parte appeals, in two of which the applicant cases used the mark at issue only for goods in the more limited genus. *In re Central Sprinkler Co.*, 49 USPQ2d 1194 (TTAB 1998) (applicant sought to register ATTIC for "automatic sprinklers for fire protection"; specimens of record showed that applicant's goods consisted only of "sprinklers for fire protection of attics"); *In re Dakota Natural Foods, Inc.*, S.N. 78326818, 2007 WL 2698291 (TTAB Aug. 28, 2007)

B. The Relevant Public Does Not Refer to “Zero” as a Genus of Goods.

With respect to the second part of the genericness inquiry – the understanding of the relevant public – evidence may be obtained from any competent source, such as consumer surveys, dictionary definitions, newspapers and other publications. See *In re Reed Elsevier Properties Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007). RC contends that the “evidence here . . . confirms that consumers understand ‘zero,’ when used in connection with soft drinks, to mean those with zero calories” (RC Brief at 37) and that “zero” therefore identifies a genus of soft drinks. RC has failed to provide any survey evidence on this issue, or any significant evidence showing the extent of the public’s exposure to use of “zero” in various contexts or how the relevant public perceives the term “zero” per se in connection with non-alcoholic beverages.⁸

(applicant sought to register the mark JUMBOZ for “processed sunflower seeds”; specimens of record showed that applicant used the mark only with “jumbo” sunflower seeds). The applicant in the third case, *In re Nutraceutical Corp.*, S.N. 78975072, 2006 WL 802405 (TTAB March 13, 2006), sought to register FRESH ORGANICS for retail store services and various foods identified as “fresh.” The Board found that “fresh organic foods” and “fresh organic food markets” were shown to be known sub-categories of the principal category of “organic foods.” The evidence here does not support a finding that there is a known “zero” sub-category of beverages.

⁸ RC spends a page in its brief arguing that early, informal research by TCCC showed that consumers understand that TCCC’s use of “zero” means zero calories. (RC Brief at 21). The consumer research referenced by RC, however, was conducted before COCA-COLA ZERO even launched. TCCC has claimed *acquired* distinctiveness in ZERO, which means that during the course of its use of its ZERO marks, the term ZERO has become distinctive due to advertising and promotional efforts, sales, use and unsolicited media coverage. What consumers may or may not have considered “zero” to mean prior to the launch of TCCC’s ZERO products and corresponding advertising material is irrelevant. The evidence of record in these proceedings is clear that consumers now associate “zero” with one company, which supports the conclusion that the term ZERO is not generic.

1. Third party uses of “zero”

RC has failed to prove its contention that “zero” identifies a genus of various non-alcoholic beverages and is therefore generic. RC’s claim that the evidence “is overwhelming that the term and numeral zero are used throughout the beverage industry in reference to soft drinks having zero calories” is, to say the least, overstated. The evidence of record showing references to “zero” as a term that identifies any type or category of non-alcoholic beverages is sparse at best. RC did not submit substantial evidence of commercial use of “zero” per se by third parties or by consumers either as a generic term or even in a manner that is similar to TCCC’s use of ZERO as a part of a mark.⁹ The majority of the evidence of third party use submitted by RC shows the use of “zero” for beverage products in connection with a certain characteristic (i.e., packaging legends stating “zero calories”), in a purely informational manner (i.e., on nutritional panels of product packaging) or on obscure websites (i.e., an individual’s blog).¹⁰ Such use is vastly different from the use of ZERO by TCCC, which does not tell consumers what “zero” might mean other than that it is part of the beverage brand name and that one or more unspecified ingredients present in other products is absent.

⁹ RC’s 30(b)(6) witness Tony Jacobs, The Vice President of Carbonated Soft Drink Brand Marketing for Dr. Pepper Snapple Group at the time of his deposition testimony, acknowledged [REDACTED]

[REDACTED] (TCCC Exhibit 201 at 39:9-19).

¹⁰ Rather than offer survey evidence to support its claim of genericness, RC chose instead to simply scour the Internet for isolated, anecdotal evidence to support its argument. The closest RC came to finding even arguably relevant evidence through this exercise consists of a very small number of comments by isolated individuals on blogs or websites, one article from a Dayton, Ohio newspaper that, in 2012, referred to

Further, despite the fact that RC claims that its evidence of third party use is significant (RC Brief at 22-23) and that these examples of third party use have “conditioned consumers to understand that ‘zero’ refers to the calorie content of beverages and thus a specific type of beverages” (RC Brief at 38), RC has failed to submit in support of this argument any evidence that actually tests consumers’ perception of “zero” or shows how often, if at all, the public has been exposed to these different uses.¹¹ RC could have submitted a survey to support its contention that the relevant public considers “zero” to be a generic term for a genus of various non-alcoholic beverages, but it chose not to conduct one. See *Arrow Trading Co., Inc. v. Victorinox A.G. and Wenger S.A.*, Opposition No. 103, 315, 2003 WL 21509858 at *14-15 (TTAB June 27, 2003) (noting that opposer did not retain a survey expert to critique the applicant’s survey, and did not conduct its own survey). Thus, the examples of third party use submitted by RC cannot and do not support a finding that the relevant

“Zero sodas” (RC Ex. 181), and a single Ad Age article from 2013. (RC Ex. 179). All of these Internet materials are hearsay as to what the author(s) were thinking or referring to when they used the term “zero.”

¹¹ RC contends that “the beverage industry” recognizes “zero” as a category of beverages and cites in support a digital image of a non-final version of an advertising campaign allegedly run by the American Beverage Associate (“ABA”) on NYC subway trains in 2012. (RC Brief at 28, 38, 50; RC Ex. 18). RC even goes so far as to claim that TCCC “approved” the ad. (RC Brief at 28). RC is more than taking liberties with the record regarding this image. The only witness who testified about it – Chris Barnes, the Director, Corporate Communications, of Dr. Pepper Snapple Group – admitted on cross-examination that that he did not know [REDACTED]

[REDACTED]. (Barnes Tr. at 36:25–37:3; 37:21-23; 38:19-21; 42:25–44:12). Mr. Barnes also testified [REDACTED]. (Barnes Tr. 45:6-9). There is no competent evidence to support a claim that the image was ever used, shows any “industry” recognition of anything, or was approved by TCCC.

public's understanding of the term ZERO as used by TCCC is as a common term for a category of goods. *Baroness Small Estates, Inc. v. American Wine Trade, Inc.*, 104 USPQ2d 1224, 1228 (TTAB 2012) ("The mere fact that one can do a search on the Internet and find, for example, a photograph on the flickr website, does not mean that consumers will be aware of this photograph.").

RC claims that it has provided evidence of thirty-two "zero-calorie soft drinks with ZERO-inclusive names that are *not* products of TCCC." (RC Brief at 26). A number of the uses of "zero" cited by RC include uses by third parties to which TCCC has objected, either by sending a cease and desist letter and/or by opposing an application, thereby informing the third party of TCCC's rights in and to the TCCC ZERO Marks. TCCC's fairly extensive efforts to protect and enforce ZERO weigh against a finding of genericness.¹² Further, some of the third party uses of ZERO that RC alleges are part of the product name are in fact not "part of the mark" but are instead descriptive use of "zero" on packaging call-outs.

2. Media usage of "zero"

RC claims that "[b]oth consumers and the media have adopted 'zero' as an alternative to 'diet' to indicate a category of beverages with zero calories." (RC Brief at 28). However, RC submitted virtually no articles or examples of media coverage or other sources that show the relevant public's alleged understanding of "zero" or that

¹² RC argues that TCCC has not initiated any litigation against third parties who have used marks for beverages that include ZERO. (RC Brief at 23). RC points to no evidence, however, of any awareness by TCCC during the pendency of these proceedings of any sustained use by any company (other than RC's use of DIET RITE PURE ZERO for its relatively modest legacy DIET RITE products) of ZERO in an objectionable way, that is likely to cause significant confusion, as part of name for a soft drink product with a substantial market presence. The record shows that TCCC has filed a number of oppositions to marks that contain ZERO. (TCCC Exx. 254-61).

show uncontrolled, widespread use by third parties such that “zero” has lost its significance as an indicator of origin.

More importantly, as with the other evidence upon which RC relies, there is no indication whatsoever that anyone, let alone a substantial number of consumers, has seen the materials submitted by RC, or that consumers generally perceive the term ZERO as a generic term. See *In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 & n.1 (Fed. Cir. 1987) (CASH MANAGEMENT ACCOUNT not generic for stock brokerage and related services; “[t]he issue ... is how the consuming public views the mark,” and, like the Internet, “[i]t is indeed remarkable to see the thoroughness with which NEXIS can regurgitate a [term] casually mentioned in the news”).

RC’s materials, unaccompanied by any evidence showing that they are indicative of how general consumers perceive ZERO, are unpersuasive. See *In re Country Music Association Inc.*, 100 USPQ2d 1824, 1830 (TTAB 2011) (reversing finding that COUNTRY MUSIC ASSOCIATION is generic for “association services, namely, promoting country music, and promoting the interests of country music entertainers and the country music recording industry,” based in part on finding “merit in applicant’s argument that the examining attorney’s Internet evidence of third-party usages are relatively obscure”); see also *Carl Karcher Enterprises, Inc. v. Stars Restaurant Corp.*, 35 USPQ2d 1125, 1131 (TTAB 1995) (“applicant has not furnished any evidence regarding the extent of use of the marks by these third parties. The geographic locations of these restaurants, in many instances, are relatively obscure. Moreover, the pictures of these restaurants tend to indicate that the operations are small and local in nature.”).

What is most telling about RC's assertion that "zero" has "replaced diet" for the soft drink industry, however, is the **absence** of any evidence that any significant beverage company other than TCCC has used ZERO (in place of "diet" or otherwise) for any leading soft drink brands. There is no evidence that there is or has ever been, for example, a PEPSI ZERO or a MOUNTAIN DEW ZERO, or that RC has ever even contemplated a DR PEPPER ZERO, a 7UP ZERO, a SCHWEPPES ZERO, a CANADA DRY ZERO – or use of any ZERO mark other than DIET RITE PURE ZERO. ZERO has plainly not "replaced diet" in any sense.¹⁴ This is true even for TCCC; as the record shows, TCCC continues to sell DIET COKE as well as COKE ZERO. See, e.g., Springate Tr. 155; Baker Tr. 11.

RC's genericness arguments, moreover, improperly conflate and confuse descriptiveness – which is presumed in this case due to TCCC's showings of acquired distinctiveness – and genericness. RC cites numerous uses of "zero" in descriptive phrases and in other descriptive ways but, as the Board correctly concluded in *Ambev*, those uses do not preclude a finding of acquired distinctiveness. *Ambev* at 13-15, 21. They are instead evidence of the descriptiveness of "zero" when used in its ordinary dictionary meaning, and not evidence of genericness. Generic use of "zero" would consist of widespread use of references to "zero beverages" as a recognized industry category or unambiguous references to products other than TCCC's as "zero" products

¹⁴ RC's witness Andrew Springate testified that [REDACTED] [REDACTED]. (Springate Tr. at 104, 143). TCCC's Russell Baker agreed, and confirmed there are no PEPSI ZERO, DR PEPPER ZERO, etc. products and that DIET RITE PURE ZERO is the only non-TCCC carbonated soft drink that uses ZERO in the name. (Baker Tr. 155).

of some type. RC has not offered anything more than a handful of isolated such references.

3. Third party applications and registrations

RC contends that evidence of third party applications and registrations for ZERO-inclusive marks for beverages shows a common acceptance of “zero” as an industry term. This contention is unsupported. To the extent that RC and other third parties use ZERO as part of their product name, that use may support the conclusion that ZERO is merely descriptive, but it is not particularly relevant to RC’s claim of genericness. RC’s evidence of its own applications – which initially sought registration of DIET RITE PURE ZERO and PURE ZERO without a disclaimer of “ZERO” – and third party applications and registrations for marks that include ZERO provides no information which suggests, let alone establishes, how general consumers actually perceive ZERO.

RC’s arguments, moreover, are inconsistent with the positions both RC and third parties have taken before the Trademark Office and inconsistent with the Trademark Office’s actions. Although RC argues that no applicant could include ZERO in a beverage product mark without a disclaimer, RC applied to register both DIET RITE PURE ZERO and PURE ZERO without a disclaimer of ZERO and agreed to disclaim ZERO only when requested to do so by the Examining Attorney. RC points to other marks that include numbers as evidence of the lack of distinctiveness of ZERO (RC Brief at 27 n.5, 38 n.9), yet PepsiCo’s incontestable registration for PEPSI ONE (Registration No. 2,226,758) does not disclaim ONE. And RC itself applied to register DR PEPPER TEN, 7-UP TEN and other marks that include TEN without disclaiming TEN until requested to do so by the Examining Attorneys.

4. TCCC's use of the term ZERO

Evidence of acquired distinctiveness supports a finding that a term is not generic. See *In re Recorded Books, Inc.*, 42 USPQ2d at *8. TCCC has introduced substantial evidence to support a finding of the acquired distinctiveness of ZERO. Not only have all of the TCCC ZERO Marks been published after acceptance of TCCC's claim of acquired distinctiveness under Section 2(f), but the Board held in *Ambev* that TCCC's evidence of acquired distinctiveness is sufficient to support registration of the TCCC ZERO Marks on the Principal Register without a disclaimer of ZERO.

TCCC's evidence illustrates that ZERO can and does function as a trademark to distinguish TCCC's goods from those of others and serves as an indication of origin. The Simonson survey and Dr. Simonson's testimony, while focused on the issue of secondary meaning, show that ZERO is recognized and perceived by the relevant public as associated with the products of one company, TCCC. The Simonson survey also shows conclusively that "zero" – unlike "diet" – is not viewed by consumers as a descriptive or generic term that is used by a number of companies. (Simonson Tr. at 51-54); see 2 *McCarthy on Trademarks and Unfair Competition* § 12.46 (4th ed. 2013) (secondary meaning survey may support finding that mark is not generic). Dr. Simonson's survey highlights the fact that "zero" without more, such as a noun identifying an ingredient or characteristic, is meaningless; although consumers associate it with one company, the term itself does not provide a clear meaning. See *Trump v. Caesars World, Inc.*, 645 F.Supp. 1015, 230 USPQ 594, 599 (D.N.J. 1986), *aff'd*, 819 F.2d 1135, 2 USPQ2d 1806 (3d Cir. 1987) (where survey to determine the meaning of the word "palace" found that 45.8% of respondents mentioned Caesars and

11.4% cited Trump's casino, "[t]his survey tends to negate Trump's contention that 'palace' is a generic term for accommodation and tends to support the contention that in the context of gambling activity in general palace is indicative of a source of such services.").

The numerous examples of unsolicited media coverage in the record also show use of ZERO by TCCC as a trademark. Even if RC's evidence is found to illustrate some generic use of "zero," it is of limited value because it is not supported by any testimony or other evidence bearing on how consumers perceive ZERO, and because some of it is quite obscure. RC's anecdotal Internet evidence must be balanced against TCCC's impressive showing that ZERO as part of the TCCC ZERO Marks is heavily promoted, enforced when necessary and well-recognized as identifying TCCC. This evidence, at a minimum, creates doubt on the question of genericness, and any doubt must be resolved in favor of TCCC. *See Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464, 1471 (TTAB 1993), recon. denied, 36 USPQ2d 1328, 1330 (TTAB 1994) (Opposer's burden of showing that the mark "ACTION SLACKS" for pants and shorts is merely descriptive and/or generic is not met since, despite some evidence showing sporadic descriptive uses thereof, the vast majority of uses of the term "Action Slacks" were ambiguous as to whether they were trademark uses or descriptive uses and some evidence clearly showed such term was used and recognized as trademark); *see also In re Merrill Lynch*, 828 F.2d at 1567, 4 USPQ2d at 1143; *In re America Online Inc.*, 77 USPQ2d 1618, 1623 (TTAB 2006).

5. Testimony of the parties' witnesses

Finally, knowledgeable industry witnesses from both parties testified [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (Springate Tr. at 155; Baker Tr. at 152; Jacobs Tr. [TCCC Ex. 201] at 39). This testimony corroborates and confirms that “zero” is not a generic term and is not considered to be a generic term or product “genus” by either the beverage industry or by consumers.

Based on all the evidence of record, RC has not met its burden of establishing that the relevant public perceives the term ZERO as referring to a category of non-alcoholic beverages. To the contrary, the evidence of record shows that the term ZERO functions as an identifier of goods of one particular company, namely TCCC. RC's opposition on the grounds of genericness should be dismissed.

II. TCCC HAS ACQUIRED DISTINCTIVENESS IN ZERO AS USED IN THE TCCC ZERO MARKS.

RC's position that TCCC has not established acquired distinctiveness in “zero” is based, at least in part, on an irrelevant claim and a misunderstanding of TCCC's position.

First, RC argues that TCCC has “*never* used or advertised ZERO standing alone as a mark.” (RC Brief at 44). RC is correct that TCCC has not advertised or used ZERO standing alone as a mark. However, this fact is of no consequence to whether TCCC has established acquired distinctiveness in the term ZERO when it is used as a

part of a mark. TCCC has claimed acquired distinctiveness in ZERO when used as part of a brand name as in the TCCC ZERO Marks; TCCC has not claimed acquired distinctiveness in the term ZERO standing alone for beverages. RC cites no authority that TCCC must use or advertise ZERO standing alone in order to properly establish acquired distinctiveness in the term as used in connection with its ZERO Marks. See, e.g., *Kellogg Co. v. General Mills, Inc.*, 82 USPQ2d 1766 (TTAB 2007) (opposition challenging partial § 2(f) submissions as to distinctiveness of CINNAMON TOAST in the mark CINNAMON TOAST CRUNCH dismissed; CINNAMON TOAST portion of the CINNAMON TOAST CRUNCH mark was sufficiently separable from the mark as a whole that the showing of acquired distinctiveness as to the mark as a whole was sufficient to support the applicant's claim of partial distinctiveness as to the phrase CINNAMON TOAST).

Second, RC states that "TCCC premises its claim of acquired distinctiveness in the term 'zero' on use of a purported family of marks in which 'zero' is the common, defining feature," a family which RC alleges TCCC has failed to establish that it owns. *Id.* For starters, TCCC does not "premise" its claim of acquired distinctiveness on use of its family of ZERO marks. Rather, TCCC submitted 2(f) statements separately for each of its applications based on evidence of media coverage, advertising examples, and advertising expenditures. The evidence varied in that some of it related to one of the TCCC ZERO Marks, while other evidence related to several of the TCCC ZERO Marks. TCCC premises its claim of acquired distinctiveness on the evidence submitted with TCCC's 2(f) statements (and in this proceeding), rather than solely on the assertion that TCCC has a family of marks.

Moreover, TCCC has in fact established that it owns a family of ZERO marks for beverages based on the following: (a) the TCCC ZERO Marks all include the common characteristic of the word ZERO preceded by a “parent” soft drink brand name; (b) TCCC has extensively used and promoted many of the TCCC ZERO Marks together over the years in ways that have associated multiple TCCC ZERO products with each other to consumers (Baker Tr. 138:18–143:9; 153:1-155:3; TCCC 117-121); and (c) the USPTO (through its acceptance of TCCC’s 2(f) claims), the Board (through the *Ambev* decision) and consumers (as shown in the Simonson survey) have all clearly recognized that ZERO has acquired distinctiveness based on TCCC’s use of and advertising of its multiple ZERO products.

Regardless of whether TCCC has established a family of ZERO marks, however, TCCC has established acquired distinctiveness in the term ZERO, as shown below.

A. TCCC ‘s Evidence of Acquired Distinctiveness

1. The Proof Submitted With
TCCC’s Section 2(f) Statements

TCCC submitted 2(f) statements in connection with each of its seventeen applications. TCCC’s proof of distinctiveness (such as in the response filed on January 25, 2007 in connection with the application to register COCA-COLA ZERO) was comprised of evidence of media coverage, advertising examples, more than a hundred million dollars spent on advertising and over a billion dollars of sales achieved in less than three years. This evidence demonstrated persuasively that ZERO, when used as part of a brand name as in the TCCC ZERO Marks, is perceived as a source-identifier. This evidence was accepted by the Examining Attorneys as proof that ZERO is

distinctive and properly convinced them that a disclaimer of ZERO was not appropriate. This evidence was also found by the Board to be sufficient in the *Ambev* decision.

TCCC's sales and advertising numbers are substantial, and Section 2(f) claims have been accepted on far less proof. See, e.g., *Kellogg Co.*, *supra*, 82 USPQ2d 1766 (opposition questioning Section 2(f) proof dismissed; applicant's evidence of distinctiveness consisted of sales of \$650 million and advertising of \$46 million over a five year period).

a. Unsolicited Media Coverage

The media coverage submitted with TCCC's 2(f) statements demonstrated: (1) that TCCC's ZERO marks are presented, perceived and recognized as trademarks of TCCC; (2) that TCCC's ZERO products are correctly considered to be related and to come from the same source; and (3) that ZERO, when used as part of a beverage name, is recognized as an element that identifies products of TCCC. The references in the submitted articles to TCCC's ZERO marks are evidence that ZERO, when used as part of a beverage product name, is recognized by the media and by the purchasing public as identifying TCCC as the source of the beverage products on which it appears.

b. Advertising Materials for TCCC's ZERO Products

The advertisements submitted with TCCC's 2(f) statements demonstrate that ZERO is used by TCCC in a trademark sense as part of the product brand name. The advertisements also show that TCCC or its vendors have advertised the TCCC ZERO products, such as COKE ZERO, SPRITE ZERO and FANTA ZERO, together as a "ZERO family." The advertisements further show that TCCC uses ZERO to convey different messages to consumers. For example, TCCC's has promoted its ZERO

beverages as featuring “Original Taste” with “ZERO Guilt.” “ZERO Guilt” could mean no calories or no sodium or no caffeine or no alcohol or no carbohydrates, or even other benefits wholly unrelated to the beverage itself.

c. Advertising and Sales Figures

TCCC’s 2(f) submissions included sworn statements that TCCC had spent in excess of one hundred fifty million dollars (\$150,000,000.00) for advertising and promoting its ZERO family of beverage products, which included COCA-COLA ZERO, SPRITE ZERO, FANTA ZERO, VAULT ZERO, and PIBB ZERO, through various advertising and promotional channels. By 2007, TCCC had spent over one hundred million dollars (\$110,000,000.00) advertising and promoting COCA-COLA ZERO alone.

TCCC’s 2(f) submissions also included sworn statements that sales of TCCC’s ZERO products in 2005 and 2006 exceeded one billion dollars (\$1,000,000,000.00) in total, with over one-third of that amount attributable to sales of COCA-COLA ZERO.

2. The Additional Proof In the Record

Despite RC’s contention that there is no evidence that TCCC uses “zero” in a source-identifying manner (RC Brief at 51), the additional evidence introduced by TCCC in this proceeding provides compelling support that ZERO serves as an indicator of source for TCCC and more than corroborates TCCC’s 2(f) statements submitted during prosecution of the applications. Most importantly, Dr. Simonson’s survey establishes that the term ZERO as used by TCCC is not merely descriptive and that a majority of consumers associate ZERO with a single source, namely TCCC. (Simonson Report at 9-10). The updated sales and advertising figures – which were already substantial – have continued to grow significantly since the 2(f) submissions were made. And, as can

be expected, the media has noticed the enormous success of TCCC's products and has reported extensively on what has been called the most successful new soft drink of the last decade, COCA-COLA ZERO, and on TCCC's expanding use of the ZERO mark with its other brands.

a. Additional Unsolicited Media Coverage

Additional unsolicited media coverage of TCCC's ZERO marks includes additional articles that have appeared in *The New York Times* and the *Wall Street Journal*. The *Wall Street Journal* article, dated April 17, 2007, is titled "Zero is Coke's New Hero" and notes that COKE ZERO had sold more than 100 million unit cases and is the most successful launch of any brand in twenty years for TCCC. (TCCC Ex. 271). This evidence is of the same type as that found persuasive by the Board in the *Ambev* decision. *Ambev* at 19.

b. The Testimony of TCCC's Russell Baker

TCCC also submitted extensive testimony and introduced exhibits through the deposition of the former brand manager for COCA-COLA ZERO, Russell Baker. (Baker Tr. at 18-19). Mr. Baker's testimony confirmed the sales and advertising evidence submitted with the Section 2(f) statement. Mr. Baker further testified that the dollar value of sales for products bearing the ZERO marks through 2011 was in excess of [REDACTED]. (*Id.* at 132 & Ex. 113). Mr. Baker also testified that TCCC's direct advertising expenditures for its ZERO products, featuring its ZERO Marks, had been [REDACTED] between 2004 and the end of 2011. (*Id.* at 134 & Exx. 115, 116). This figure, moreover, is TCCC's own spending and does not include advertising expenditures by bottlers or other retailers of the ZERO products, which are

likely at least equal to the advertising expenditures by TCCC. (*Id.* at 135). In other words, the products have been promoted and supported with likely more than [REDACTED] in advertising expenses.

As of the end of 2011, the equivalent of over [REDACTED] [REDACTED] – of TCCC's ZERO products had been sold. (Baker Tr. at 133 & Ex. 113). COCA-COLA ZERO and TCCC's other ZERO products are offered to consumers nationwide through numerous different channels of trade and at thousands of retail outlets that reach virtually all consumers, including supermarkets, chain stores, and convenience and gas station outlets. (Baker Tr. at 28, 102-103, 157).

RC contends that “none of TCCC's sales and marketing evidence is probative of secondary meaning in the term” unless coupled with evidence “that ZERO is used or advertised by TCCC in such a way that consumers would recognize it as an independent, source-identifying feature.” (RC Brief at 51). However, TCCC's sales and advertising figures are of such a magnitude that they without question support that the common ZERO element of TCCC's ZERO Marks has acquired distinctiveness – and the Board has agreed. *Ambev* at 17-18 (finding lower sales and advertising numbers made of record in *Ambev* were “significant . . . by any measure”). This is especially true when the evidence is viewed in tandem with Dr. Simonson's survey showing consumer recognition of ZERO as a source indicator and that ZERO is not the equivalent of “diet” as alleged by RC. (RC Brief at 27).

c. TCCC's Secondary Meaning Survey

TCCC's survey expert, Dr. Alex Simonson, conducted a standard secondary meaning survey to test whether consumers associated the term ZERO with the products of one company or more than one company. Dr. Simonson used an accepted survey format, addressed the appropriate universe and utilized an especially appropriate control, namely the word "diet." In his survey, Dr. Simonson asked consumers whether they associated the term ZERO with soft drink products of one company or with products of more than one company.

The results of the Simonson survey were that 61% of the respondents associated with one company beverage products with ZERO in the name. (Simonson Tr. 56-57). When this number is screened for noise, the net results of the survey are that 55 to 57% of the respondents associated ZERO with beverage products of one company. (*Id.* at 57). In contrast, only 6% of the respondents associated the term "diet" with products of more than one company; 79% correctly associated "diet" with products of more than one company. These results completely refute RC's unsupported attorney argument that "'zero' is the new 'diet,' conveying the same calorie information but without the negative associations." (RC Brief at 27).

Surveys of the type submitted by Dr. Simonson have long been the accepted method of demonstrating secondary meaning and results in excess of 50%, as obtained by Dr. Simonson, are readily accepted as proof of secondary meaning by both the courts and the Board. *In re Carl Walther GmbH*, 2010 TTAB LEXIS 410 (TTAB Oct. 26, 2010) (survey showing 54% of participants were able to identify maker of product based on shape, with 33% correctly identifying applicant, was sufficient to establish secondary

meaning); *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417, 424 (Fed. Cir. 1985) (survey showing 41% and 50% recognition, submitted together, found sufficient to establish acquired distinctiveness of trade dress). The Board, moreover, has already considered Dr. Simonson's survey and has found it to be reliable, probative and supportive of the conclusion that ZERO has acquired distinctiveness identifying products as those of TCCC. *Ambev* at 20.

B. RC Has Not Carried Its Burden of Proof.

RC bears the initial burden of establishing that TCCC does not have the right to register its marks without disclaimers. *Yamaha International Corp. v. Hoshina Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988). RC has not met its burden.

The evidence submitted by RC in this proceeding is insufficient to rebut the Examining Attorneys' acceptance of TCCC's 2(f) declarations. Further, RC's evidence of third party use and registrations, which is unsupported by any survey or other reliable evidence regarding consumer perception to counter TCCC's evidence and the Simonson survey, does not demonstrate significant use by others of ZERO as a brand in any sense and does not diminish the strength of the evidence submitted by TCCC.

1. RC's Third Party Evidence Does Not Establish a Lack of Distinctiveness.

In support of its position that "zero" has not acquired distinctiveness, RC cites its own uses, uses by TCCC and uses by various third parties of "zero" in a descriptive phrase. For example, RC cites use by PepsiCo of the phrases "0 cal" and "zero calorie cola," use by Ayala of the phrase "zero calories," use by Zevia of the phrase "zero calorie cola," use by RC of "0 calories," use by TCCC of "zero calorie cola," and various

applications and registrations that include phrases such as ZERO CARBS, 0 CAL or ZERO CALORIES, as proof that the TCCC ZERO Marks are merely descriptive and have not acquired secondary meaning. RC's logic is flawed. These companies and others are not making a trademark use of ZERO per se when they refer to their products as "zero calorie" any more than they make a trademark use by listing a "0" in the "calorie" column on the nutrition label on the can. TCCC is not claiming rights to all uses of "zero" or "0." TCCC is seeking only to protect the source identification that it has established in ZERO in the marks at issue that include ZERO as part of the product name.

RC's evidence regarding other non-alcoholic beverages with ZERO in the name also does not undercut TCCC's showing of acquired distinctiveness. The majority of RC's evidence consists of "naked" references to applications and registrations, which does not shed any light on consumer perception of these uses or the extent to which the public has been exposed (if at all) to these uses.¹⁵ This evidence therefore falls short because of the absence of either corroborating facts bearing on the extent of the third party use or specifics regarding the sales or promotional efforts surrounding the third party marks.

In the absence of such facts bearing on the extent of such use, this evidence has little bearing on how these alleged third party uses might affect the issues in these proceedings, if at all, and is therefore entitled to limited weight. See *Palm Bay Imports*

¹⁵ See, e.g., Marciano Tr. at 62:1-18 (testifying that [REDACTED] . This illustrates that [REDACTED]

Inc. v. Veuve Clicquot Ponsardin Maison Fondée, 396 F.3d 1369, 1374, 73 USPQ2d 1689 (Fed. Cir. 2005); see also *Valentino U.S.A., Inc. v. Florence Fashions (Jersey) Ltd.*, 2010 TTAB LEXIS 266, 50-52 (TTAB June 25, 2010).

The purpose of introducing third party use evidence is to show that customers have become so conditioned by a plethora of references to the term that they are not likely to associate the term with one source. To be entitled to any weight, however, the evidence must rise to the level of demonstrating that the third-party use was so widespread as to "condition" the consuming public. The examples of use submitted by RC do not rise to the required level and the Simonson survey establishes as much; whatever the level of third party references to "zero" may be, the survey shows that the references have not affected the consuming public's association of ZERO with one source. See, e.g., *Palm Bay Imports Inc.*, *supra*, 396 F.3d at 1374.

In addition to its laundry lists of various types of uses of "zero" in connection with beverages, RC has also submitted testimony from four third-party users of "zero," namely PepsiCo (for an enhanced water product that was for a relatively short time known as PROPEL ZERO), Reeds, Inc. (for specialty soft drinks identified as, e.g., "Virgil's Zero Root Beer"), Southern Group Enterprises (for an energy drink named IMPULSE ZERO that has had extremely limited distribution) and Beverage Marketing USA (for a tea and lemonade product referred to as "Arnold Palmer Zero Half & Half" that [REDACTED]). None of these four uses shows that ZERO has not acquired distinctiveness.

First, as the Board recognized in *Ambev*, TCCC's use of ZERO as part of a mark need not be entirely exclusive. *Ambev* at 20. The record shows that TCCC's use is in fact "substantially exclusive."

Second, the facts as to each of the four uses relied on by RC demonstrate that they do not detract from TCCC's showing of acquired distinctiveness. The PepsiCo use of PROPEL ZERO was for an enhanced water product, not a soft drink, energy drink or sports drink – and has been discontinued since the time RC took the testimony of PepsiCo's witness regarding the product.¹⁶ PepsiCo's use of the name PROPEL ZERO was therefore relatively short-lived, was for a different type of product, was not successful, and has been abandoned. See Teasdale Tr. at 22, 59-60, 83-84. The IMPULSE ZERO energy drink product is a specialty product that has had [REDACTED], especially when compared to the TCCC products. See Miller Tr. at 83-85, 87-91, 94-95, 114-15, 121-22. The VIRGIL'S soft drink products are also specialty products, sold in limited channels, and have been labeled not as "VIRGIL'S ZERO" but as "VIRGIL'S," with "zero" being used to modify the generic type of soft drink. See Reed Tr. at 11, 59, 60-61, 74-75. Finally, the Arnold Palmer iced tea and lemonade product about which Mr. Marciano testified is yet again a

¹⁶ In March of 2014, after the close of the testimony periods in these proceedings, PepsiCo announced that it was "repositioning" its PROPEL product, making it part of the GATORADE portfolio, and renaming it simply PROPEL as opposed to PROPEL ZERO. See <http://adage.com/article/cmo-strategy/gatorade-relaunches-propel/292091/>. The PROPEL website at www.propelzero.com currently confirms that the product packaging shows the name PROPEL for the product, with a small legend stating "zero calories." In the event RC refuses to consent to TCCC making this additional evidence of record, TCCC will move the Board for leave to supplement the record with these materials, which could not have been made of record during the parties' testimony periods.

specialty product and has been [REDACTED].
See Marciano Tr. at 62, 68-69.

RC cannot make a serious claim that any of these four niche products has had any meaningful impact on the association of ZERO with TCCC that has been created through TCCC's extensive advertising, promotion and sales of its ZERO products. There is no competent evidence regarding consumer awareness of any of these products, and the evidence about them that is in the record demonstrates that, when compared to TCCC's extensive use and advertising of its ZERO marks for over ten years, they are both individually and collectively insignificant and highly unlikely to affect consumer perception of ZERO as measured by the Simonson survey.

2. The Preponderance of the Evidence Establishes Distinctiveness.

Secondary meaning can be established even if a mark is "highly descriptive." In *Grand Canyon West Ranch, LLC v. Hualapai Tribe*, for example, the Board found applicant's evidence "more than sufficient to show that this highly descriptive mark, GRAND CANYON WEST, has acquired distinctiveness." 2008 TTAB LEXIS 33, 21-22 (TTAB June 30, 2008). The applicant's evidence consisted of length of use, extent of applicant's use in advertising and promotion, increasing and now substantial levels of sales, and level of awareness of applicant's services as shown by substantial levels of media coverage. *Id.* In the *Grand Canyon West* case, the applicant did not come close to establishing [REDACTED] in sales or more than [REDACTED] in advertising, and did not present survey evidence. The Board still found the evidence sufficient.

TCCC has shown secondary meaning and more. The evidence submitted by TCCC both during prosecution and in this proceeding shows that the ZERO marks have

been the subject of extensive advertising and promotion, have attracted substantial media coverage, and have generated phenomenal sales. In view of this impressive effort, it is no surprise that TCCC's survey evidence demonstrates substantial consumer recognition of the ZERO Marks as a source identifier for TCCC.

III. RC'S ZERO MARKS ARE LIKELY TO CAUSE
CONFUSION WITH THE TCCC ZERO MARKS.

A. TCCC Has Standing To Oppose RC's ZERO Marks.

TCCC has a legitimate interest in preventing the registration of RC's ZERO Marks because TCCC is the owner of all right, title and interest in and to the TCCC ZERO Marks, the parties are direct competitors in the soft drink business, and TCCC believes that it will be damaged by the registration of RC'S ZERO Marks given the similarity between RC's ZERO Marks and the TCCC ZERO Marks and the similarity of the goods, the relevant consumers and the channels of trade.

B. The Relevant Likelihood of Confusion Factors

To prevail on a Section 2(d) claim in an opposition proceeding,¹⁸ TCCC must prove that (1) it owns prior rights in the TCCC ZERO Marks and (2) RC's ZERO Marks are likely to cause confusion with the TCCC ZERO Marks. See *UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868 (TTAB 2011).

TCCC has used its ZERO Marks since at least as early as September 2004, and the first of TCCC's ZERO applications (for SPRITE ZERO) was filed on October 20, 2003. RC does not claim a date of first use in the applications for RC's ZERO Marks,

¹⁸ TCCC's opposition to the RC DIET RITE PURE ZERO and PURE ZERO marks asserted both section 2(a) and section 2(d) as grounds for the opposition. TCCC relies herein only on section 2(d).

but alleges that RC launched DIET RITE PURE ZERO in the summer of 2005. (RC Brief at 13). RC filed its application for DIET RITE PURE ZERO on February 28, 2005 and for PURE ZERO on March 7, 2005. TCCC clearly has priority.

In determining whether a mark is likely to cause confusion, the Board evaluates the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). These factors are well known to the Board and need not be recited in detail here. An opposer does not need to show that every *DuPont* factor weighs in its favor. *Cunningham v. Laser Golf Corp.*, 222 F.2d 943, 947 (Fed. Cir. 2000). While the likelihood of confusion analysis considers all of the *DuPont* factors, it may focus on dominant or key factors such as the similarity of the parties' respective marks, the relatedness of the goods, the similarity of the relevant trade channels, and an established family of marks.

1. The Strength of The TCCC ZERO Marks

TCCC's use of the TCCC ZERO Marks has been continuous since 2004. TCCC has enjoyed tremendous commercial success related to the beverage products offered under the TCCC ZERO Marks. (Baker Tr. at 72-73, 153-54). The word ZERO as used as part of the TCCC ZERO Marks has acquired distinctiveness. The unsolicited media coverage surrounding the TCCC ZERO Marks is extensive and reaches consumers nationwide. Further, as discussed above, Dr. Simonson's survey conclusively demonstrates that consumers associate ZERO with one company – TCCC – when it used as part of a soft drink product name. In fact, COKE ZERO was and remains the only sparkling beverage brand launched since 2001 to surpass a 1 percent market share and maintain it. (Baker Tr. at 159).

2. The Marks Have Similar Commercial Impressions

An oft-repeated test is “not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the [goods] offered under the respective marks is likely to result.” *UMG Recordings*, 100 USPQ2d at 1885.

The overall commercial impression of RC’s ZERO Marks and the TCCC ZERO Marks are similar because, with the exception of COKE ZERO BOLD and COKE ZERO ENERGY, the marks are all compound marks that end with the word ZERO. Given the commercial success of TCCC’s beverage products bearing the TCCC ZERO Marks, the word ZERO when used as part of a product name has become identified with TCCC. (Simonson Tr. at 51-54). Because ZERO is the common element in RC’s ZERO Marks and the TCCC ZERO Marks, consumers will likely focus on the word ZERO and believe that PURE ZERO and DIET RITE PURE ZERO are two more members of TCCC’s family of ZERO marks.

3. The Goods Are Identical.

The goods identified in the applications for the TCCC ZERO Marks and RC’s ZERO Marks are identical or nearly identical. The applications for RC’s ZERO Marks cover “soft drinks, syrups and concentrates used in the preparation thereof.” The applications for the TCCC ZERO Marks also cover these goods in addition to energy drinks and sports drinks.

4. The Channels of Trade and Classes of Purchasers are The Same.

Given that none of the subject applications contains any restrictions on the channels of trade or targeted consumers, the Board must presume that RC’s products

bearing RC's ZERO Marks will be marketed in all of the normal trade channels for such goods and will be purchased by the usual classes of purchasers. See *Octocom Systems Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). Mr. Baker testified that the DIET RITE PURE ZERO product is in fact sold in at least some of the same retail outlets as TCCC's ZERO products. (Baker Tr. at 157:9-20). Thus the channels of trade and classes of purchasers overlap and should, for purposes of section 2(d) analysis, be considered identical. (Baker Tr. at 158:1-4; 213:5-8).

5. TCCC Has a Family of ZERO Marks.

The family of marks doctrine applies where the opposer has established that it has a group of marks that all include a recognizable common characteristic and the marks are composed and used in such a way that the relevant public not only associates the marks with the trademark owner but also associates the common characteristic with the trademark owner. See *J & J Snack Foods Corp v. McDonald's Corp.*, 932 F.2d 1460, 1463 (Fed. Cir. 1991) (McDonald's has a family of marks that consist of "Mc" plus a generic food item); *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336 (Fed. Cir. 2001) (Alberto-Culver owns a family of TRES- marks for hair care products). The record shows that TCCC has established a family of ZERO marks that are used and promoted in such a manner that consumers associate the marks and the word ZERO when used as part of a product name with TCCC. See *supra*. In view of TCCC's established family of ZERO marks, consumers are likely to believe that RC's ZERO Marks, since they also contain the common ZERO characteristic, are part of TCCC's family of ZERO marks.

After balancing the relevant *DuPont* factors, it is evident by a preponderance of the evidence that there is a strong likelihood of confusion between the TCCC ZERO Marks and RC's ZERO Marks.

CONCLUSION

RC's oppositions appear to be based on the erroneous assumption that issuing registrations for the ZERO Marks without a disclaimer of ZERO somehow means TCCC will have a monopoly on the use of "zero" in connection with soft drinks. This is not true. Fair descriptive use of ordinary English language words will not be in any sense affected by granting the requested registrations without a disclaimer. Registration of the TCCC ZERO marks would be a recognition of TCCC's established rights in the entire marks and would neither create nor recognize rights in any components of the mark apart from each other. TCCC has overwhelmingly demonstrated – both before the Examining Attorneys and the Board and again by the preponderance of the evidence in this proceeding – that ZERO as used in the TCCC Marks at issue is distinctive.

Further, in view of TCCC's acquired distinctiveness in ZERO as used in the TCCC ZERO Marks and its substantially exclusive use of its family of ZERO marks, RC's PURE ZERO and DIET RITE PURE ZERO marks are likely to cause confusion with the TCCC ZERO Marks.

For all of the reasons stated above, TCCC is entitled to registration of its marks at issue without a disclaimer, and RC oppositions should be dismissed. Further, RC's ZERO marks are likely to cause confusion with the TCCC ZERO Marks. TCCC's

opposition therefore should be sustained and RC should be refused registration for the marks DIET RITE PURE ZERO and PURE ZERO.

Respectfully submitted,

KING & SPALDING LLP

A handwritten signature in black ink, appearing to read "Bruce W. Baber", written over a horizontal line.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing The Coca-Cola Company 's Opening Brief On The Merits by causing a true and correct copy thereof to be deposited in the United States mail, addressed to counsel of record for opposers and applicants Royal Crown Company, Inc. and Dr. Pepper/Seven Up, Inc. as follows:

Ms. Barbara Solomon
Ms. Laura Popp-Rosenberg
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This 16th day of June, 2014.

A handwritten signature in black ink, appearing to read 'Bruce W. Baber', written over a horizontal line.

Bruce W. Baber