

ESTTA Tracking number: **ESTTA615561**

Filing date: **07/14/2014**

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

Proceeding	91178927
Party	Plaintiff Royal Crown Company, Inc. and Dr. Pepper/Seven Up, Inc.
Correspondence Address	LAURA POPP ROSENBERG FROSS ZELNICK LEHRMAN & ZISSU PC 866 UNITED NATIONS PLAZA NEW YORK, NY 10017 UNITED STATES bsolomon@fzlz.com, bsolomon@frosszelnick.com, lpopp-rosenberg@frosszelnick.com, rosenberg@frosszelnick.com, eweiss@fzlz.com, mortiz@fzlz.com
Submission	Rebuttal Brief
Filer's Name	Laura Popp-Rosenberg
Filer's e-mail	bsolomon@fzlz.com, lpopp-rosenberg@fzlz.com, eweiss@fzlz.com, mortiz@fzlz.com, ykarzoan@fzlz.com
Signature	/Laura Popp-Rosenberg/
Date	07/14/2014
Attachments	Second Trial Brief for DPSG (F1487311x96B9E).pdf(167424 bytes )

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

-----X  
ROYAL CROWN COMPANY, INC. and :  
DR PEPPER/SEVEN UP, INC., :  
 :  
Opposers, :  
 :  
- against - :  
 :  
THE COCA-COLA COMPANY, :  
 :  
Applicant. :  
-----X

Consolidated Proceedings:  
Opposition No. 91178927  
Opposition No. 91180771  
Opposition No. 91180772  
Opposition No. 91183482  
Opposition No. 91185755  
Opposition No. 91186579  
Opposition No. 91189847  
Opposition No. 91190658

--and--

-----X  
THE COCA-COLA COMPANY, :  
 :  
Opposer, :  
 :  
- against - :  
 :  
ROYAL CROWN COMPANY, INC. and :  
DR PEPPER/SEVEN UP, INC., :  
 :  
Applicants. :  
-----X

Consolidated Proceedings:  
Opposition No. 91184434

**SECOND TRIAL BRIEF FOR  
ROYAL CROWN COMPANY, INC. AND DR PEPPER/SEVEN UP, INC.:**

**REPLY BRIEF IN SUPPORT OF ROYAL CROWN COMPANY, INC.'S OPPOSITIONS  
AND BRIEF IN OPPOSITION TO THE COCA-COLA COMPANY'S OPPOSITIONS**

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

*Attorneys for Royal Crown Company, Inc. and  
Dr Pepper/Seven Up, Inc.*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	4
I. INTRODUCTION.....	9
II. ARGUMENT .....	10
A. TCCC’s Brief Misdirects the Board on Several Key Points.....	10
1. The <i>AmBev</i> Decision is Irrelevant .....	10
2. TCCC Bears the Ultimate Burden of Proof .....	11
3. TCCC’s Survey Falls Flat.....	12
i. Royal Crown Had No Need to Hire an Expert .....	13
ii. TCCC’s Survey Cannot Defeat Royal Crown’s Genericism Claim .....	13
iii. TCCC’s Survey is Untimely .....	15
iv. TCCC’s Survey Shows Only De Facto Secondary Meaning .....	16
v. At Best, TCCC’s Survey is Equivocal on Secondary Meaning.....	17
4. TCCC Mischaracterizes Prior PTO Practice .....	20
B. TCCC Has Failed to Show by a Preponderance of the Evidence That ZERO Is Not Generic .....	21
1. Royal Crown Properly Positioned the Genus Inquiry .....	21
2. The Evidence Demonstrates That Consumers Have Been Exposed to “Zero” as a Genus of Goods.....	24
3. TCCC’s Attacks on Royal Crown’s Evidence Are Not Persuasive.....	26
i. The Evidence of ZERO-Inclusive Marks by Companies Other Than TCCC Is Not Insignificant.....	26
ii. Royal Crown’s Internet Evidence Is Not Insubstantial .....	28
iii. Consumer Impression Data is Not Required .....	29
iv. Non-Trademark Use of “Zero” is Not Irrelevant.....	30
4. TCCC’s Evidence on Secondary Meaning Does Not Establish that ZERO is Not Generic for Beverages .....	31
5. Any Doubts Should Be Resolved Against Granting TCCC a Monopoly .....	32
C. TCCC Has Not Satisfied Its High Burden of Proving Acquired Distinctiveness.....	33

1. TCCC’s Equivocation on the Basis of Its Secondary Meaning Is Merely a Distraction .....	33
2. “Zero” Is Too Weak to Form the Basis of a Family of Marks .....	35
3. TCCC’s Evidence is Woefully Insufficient To Establish a Family of Marks .....	36
4. Even if TCCC Has a Family of ZERO Marks, It Cannot Establish Acquired Distinctiveness in ZERO .....	38
<b>D. TCCC HAS NOT PROVEN ITS OPPOSITIONS TO ROYAL CROWN’S MARKS .....</b>	<b>39</b>
1. TCCC Premises Its Likelihood of Confusion Claim on Its Purported ZERO Family .....	40
2. TCCC Cannot Establish Priority in Its Family of “ZERO Marks” .....	41
i. No “Family” Existed Prior to February and March 2005 .....	41
ii. No Protectable Rights Existed Prior to February and March 2005 .....	43
3. TCCC Has Not Proven That Royal Crown’s Marks Are Likely to Cause Confusion With TCCC’s Claimed Family of “ZERO Marks” .....	44
i. TCCC’s Claimed Family of “ZERO Marks” Is Weak and Entitled to Very Limited Protection.....	45
ii. The Parties’ Marks Do Not Convey Similar Commercial Impressions.....	48
iii. No Evidence of Actual Confusion During Nine Years of Coexistence Means No Likelihood of Confusion .....	52
4. There Is No Likelihood of Confusion Between Royal Crown’s Marks and TCCC’s Individual Zero Marks .....	53
<b>III. CONCLUSION.....</b>	<b>54</b>

## TABLE OF AUTHORITIES

### CASES

<i>7-Eleven, Inc. v. Wechsler</i> , 83 U.S.P.Q.2d 1715 (T.T.A.B 2007) .....	52
<i>Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.</i> , 107 U.S.P.Q.2d 1750 (T.T.A.B. 2013) .....	23, 24
<i>American Standard Inc. v. Scott &amp; Fetzer Co.</i> , 200 U.S.P.Q. 457 (T.T.A.B. 1978) .....	35-36
<i>Anheuser-Busch, Inc. v. John Labatt Ltd.</i> , 39 U.S.P.Q.2d 1347 (8th Cir. 1996).....	17
<i>Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.</i> , 216 U.S.P.Q. 588 (9th Cir. 1982).....	16
<i>Asics Corp. v. Brazzell</i> , Canc. No. 92024536, 2001 WL 253602 (T.T.A.B. Mar. 14, 2001).....	43
<i>Baroness Small Estates, Inc. v. American Wine Trade, Inc.</i> , 104 U.S.P.Q.2d 1224 (T.T.A.B. 2012) .....	28
<i>BellSouth Corp. v. DataNational Corp.</i> , 35 U.S.P.Q.2d 1554 (Fed. Cir. 1995).....	17, 28
<i>Bluebonnet Nutrition Corp. v. New Vitality</i> , Opp. No. 91201410, 2013 WL 4397056 (T.T.A.B. Aug. 5, 2013) .....	47
<i>British Seagull Ltd. v. Brunswick Corp.</i> , 28 U.S.P.Q.2d 1197 (T.T.A.B. 1993) .....	13, 24
<i>CG Roxane LLC v. Fiji Water Co.</i> , 569 F. Supp. 2d 1019 (N.D. Cal. 2008) .....	30-31
<i>Citigroup Inc. v. Capital City Bank Group, Inc.</i> , 94 U.S.P.Q.2d 1645 (T.T.A.B. 2010) .....	53, 54
<i>Classic Foods International Corp. v. Kettle Foods, Inc.</i> , 468 F. Supp. 2d 1181 (C.D. Cal. 2007) .....	27, 30
<i>Coach/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC</i> , 110 U.S.P.Q.2d 1458 (T.T.A.B. 2014) .....	51, 54
<i>Companhia de Bebidas das Américas - AMBEV v. The Coca-Cola Company</i> , Consolidated Opp. No. 91178953, 2012 WL 1881492 (T.T.A.B. May 2, 2012).....	10
<i>Condé Nast Publications, Inc. v. Miss Quality, Inc.</i> , 184 U.S.P.Q. 422 (C.C.P.A. 1975).....	49
<i>Cortex Biochem, Inc. v. Roche Diagnostics GmbH</i> , Opp. No. 91123244, 2005 WL 1285671 (T.T.A.B. May 12, 2005).....	41
<i>Danish Dairy Board, Inc. v. Ministry of Commerce &amp; Industry of Republic of Cyprus</i> , Canc. No. 92019815, 1999 WL 612935 (T.T.A.B. Aug. 12, 1999) .....	14

<i>Delaware Quarries, Inc. v. Playcore IP Sub, Inc.</i> , Opp. No. 91190282, 2013 WL 5407286 (T.T.A.B. July 2, 2013).....	28, 30
<i>Diak v. Crafts Americana Group, Inc.</i> , Opp. No. 91195102, 2013 WL 5946236 (T.T.A.B. Oct. 22, 2013) .....	44
<i>Eastern Air Lines, Inc. v. New York Air Lines, Inc.</i> , 218 U.S.P.Q. 71 (S.D.N.Y. 1983) .....	16
<i>E. R. Squibb &amp; Sons, Inc. v. Cooper Laboratories, Inc.</i> , 214 U.S.P.Q. 441 (S.D.N.Y. 1982).....	12
<i>Ferrotec (USA) Corp. v. Ferro Laboratories, Inc.</i> , Opp. No. 91174110, 2009 WL 273256 (T.T.A.B. Jan. 29, 2009).....	36
<i>Flowers Industries Inc. v. Interstate Brands Corp.</i> , 5 U.S.P.Q.2d 1580 (T.T.A.B. 1987).....	30
<i>Fortunoff Silver Sales, Inc. v. Norman Press, Inc.</i> , 225 U.S.P.Q. 863 (T.T.A.B. 1985) .....	50
<i>Full Speed Ahead, Inc. v. SRAM Corp.</i> , Opp. No. 91171889, 2008 WL 5256412 (T.T.A.B. Dec. 10, 2008).....	52
<i>General Motors Corp. v. ICRC-Integrated Concepts &amp; Research Corp.</i> , Opp. No. 91152661, 2007 WL 683779 (T.T.A.B. Mar. 2, 2007).....	<i>passim</i>
<i>Genesee Brewing Co., v. Stroh Brewing Co.</i> , 45 U.S.P.Q.2d 1743 (2d Cir. 1997) .....	14
<i>Gillette Canada Inc. v. Ranir Corp.</i> , 23 U.S.P.Q.2d 1768 (T.T.A.B. 1992) .....	53
<i>Gilmar S.p.A. v. BBC Ice Cream, LLC</i> , Opp. No. 91158491, 2010 WL 667932 (T.T.A.B. Jan. 25, 2010).....	41
<i>Gilmar S.p.A. v. Drifa ehf</i> , Opp. No. 91180851, 2010 WL 5010894 (T.T.A.B. Nov. 24, 2010).....	43
<i>Grant Street Group, Inc. v. RealAuction.com LLC</i> , Opp. No. 91177493, 2009 WL 4086582 (T.T.A.B. Sept. 29, 2009) .....	36
<i>Gulf States Paper Corp. v. Hammermill Paper Co.</i> , 135 U.S.P.Q. 456 (T.T.A.B. 1962) .....	48
<i>H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.</i> , 228 U.S.P.Q. 528 (Fed. Cir. 1986).....	21
<i>Harjo v. Pro-Football Inc.</i> , 45 U.S.P.Q.2d 1789 (T.T.A.B. 1998).....	27
<i>Hoover Co. v. Royal Appliance Manufacturing Co.</i> , 57 U.S.P.Q.2d 1720 (Fed. Cir. 2001).....	43
<i>IOIP Holdings, LLC v. Ontel Products Corp.</i> , Opp. No. 91197243, 2012 WL 5331305 (T.T.A.B. Oct. 9, 2012) .....	43
<i>In re Ad.Com Interactive Media</i> , S.N. 77832668, 2012 WL 2588565 (T.T.A.B. June 18, 2012) .....	21
<i>In re America Online, Inc.</i> , 77 U.S.P.Q.2d 1618 (T.T.A.B. 2006).....	32

<i>In re Amini</i> , S.N. 75862136, 2002 WL 850843 (T.T.A.B. May 3, 2002).....	12
<i>In re Argo Tea, Inc.</i> , S.N. 85011197, 2013 WL 3001459 (T.T.A.B. May 9, 2013).....	21, 28-29
<i>In re Bliss Publications, LLC</i> , S.N. 77779284, 2012 WL 3224717 (T.T.A.B. July 23, 2012).....	29
<i>In re Boulevard Entertainment Inc.</i> , 67 U.S.P.Q.2d 1475 (Fed. Cir. 2003).....	21
<i>In re Broadway Chicken Inc.</i> , 38 U.S.P.Q.2d 1559 (T.T.A.B. 1996).....	49
<i>In re Central Sprinkler Co.</i> , 49 U.S.P.Q.2d 1194 (T.T.A.B. 1998).....	23, 30
<i>In re Country Music Association Inc.</i> , 100 U.S.P.Q.2d 1824 (T.T.A.B. 2011).....	29
<i>In re DGR Associates, LLC</i> , S.N. 85143447, 2013 WL 3191594 (T.T.A.B. June 7, 2013).....	38
<i>In re DNI Holdings Ltd.</i> , 77 U.S.P.Q.2d 1435 (T.T.A.B. 2005).....	22
<i>In re Dakota Natural Foods, Inc.</i> , S.N. 78326818, 2007 WL 2698291 (T.T.A.B. Aug. 28, 2007).....	22, 30
<i>In re E.I. du Pont de Nemours &amp; Co.</i> , 177 U.S.P.Q. 563 (C.C.P.A. 1973).....	45, 46, 53
<i>In re Hartz Hotel Services, Inc.</i> , 102 U.S.P.Q.2d 1150 (T.T.A.B. 2012).....	46, 49
<i>In re Louisiana Fish Fry Products</i> , S.N. 77816809, 2013 WL 3191197 (T.T.A.B. May 24, 2013).....	30, 35
<i>In re Lucky Co.</i> , 209 U.S.P.Q. 422 (T.T.A.B. 1980).....	47
<i>In re Merrill Lynch, Pierce, Fenner &amp; Smith, Inc.</i> , 4 U.S.P.Q.2d 1141 (Fed. Cir. 1987).....	32
<i>In re Murphy Door Bed Co.</i> , 223 U.S.P.Q. 1030 (T.T.A.B. 1984).....	16
<i>In re Nett Designs</i> , 57 U.S.P.Q.2d 1564 (Fed. Cir. 2001).....	21
<i>In re Nortech Investments Ltd.</i> , S.N. 85081203 & 85081475, 2013 WL 6056586 (T.T.A.B. July 12, 2013).....	21
<i>In re Nutraceutical Corp.</i> , S.N. 78975072, 2006 WL 802405 (T.T.A.B. Mar. 13, 2006).....	22, 30
<i>In re PRGCO, LLC</i> , S.N. 77252690 <i>et al.</i> , 2012 WL 1881480 (T.T.A.B. May 4, 2012).....	22
<i>In re Perfetti Van Melle Benelux BV</i> , S.N. 77306624, 2011 WL 810193 (T.T.A.B. Feb. 8, 2011).....	34
<i>In re Recorded Books Inc.</i> , 42 U.S.P.Q.2d 1275 (T.T.A.B. 1997).....	31, 32

<i>In re Reed Elsevier Properties Inc.</i> , 82 U.S.P.Q.2d 1378 (Fed. Cir. 2007).....	29
<i>In re Seats, Inc.</i> , 225 U.S.P.Q. 364 (Fed. Cir. 1985) .....	31
<i>Inwood Laboratories, Inc. v. Ives Laboratories, Inc.</i> , 456 U.S. 844, 214 U.S.P.Q. 1 (1982).....	19, 20
<i>Kellogg Co. v. General Mills Inc.</i> , 82 U.S.P.Q.2d 1766 (T.T.A.B. 2007).....	34, 35
<i>Knight Textile Corp. v. Jones Investment Co.</i> , 75 U.S.P.Q.2d 1313 (T.T.A.B. 2005) .....	52
<i>L.C. Licensing, Inc. v. Berman</i> , 86 U.S.P.Q.2d 1883 (T.T.A.B. 2008) .....	27
<i>Levi Strauss &amp; Co. v. Genesco, Inc.</i> , 222 U.S.P.Q. 939 (Fed. Cir. 1984) .....	28, 38
<i>Levi Strauss &amp; Co. v. R. Josephs Sportswear, Inc.</i> , 28 U.S.P.Q.2d 1464 (T.T.A.B. 1993) .....	32
<i>Lockheed Martin Corp. v. Raytheon Co.</i> , Consolidated Opp. No. 91167189, 2011 WL 5014027 (T.T.A.B. Sept. 27, 2011) .....	15-16, 25-26, 28
<i>Martahus v. Video Duplication Services Inc.</i> , 27 U.S.P.Q.2d 1846 (Fed. Cir. 1993) .....	11, 12
<i>Master Builders, Inc. v. Polymerica, Inc.</i> , Consolidated Canc. No. 92030319, 2004 WL 407353 (T.T.A.B. Feb. 24, 2004) .....	35, 36
<i>McNeil-PPC, Inc. v. Walgreen Co.</i> , Opp. No. 91184978, 2013 WL 223400 (T.T.A.B. Jan. 22, 2013) .....	13
<i>Manufacturers Technical Institutes, Inc. v. Pinnacle College, LLC</i> , Opp. No. 91195896, 2013 WL 5402083 (T.T.A.B. Sept. 4, 2013) .....	47
<i>Miller Brewing Co. v. Falstaff Brewing Corp.</i> , 211 U.S.P.Q. 665 (1st Cir. 1981).....	16
<i>Nextel Communications, Inc. v. Motorola, Inc.</i> , Opp. No. 91164353, 2009 WL 1741923 (T.T.A.B. June 12, 2009).....	18
<i>OMS Investments, Inc. v. Central Garden &amp; Pet Co.</i> , Opp. No. 91156249, 2006 WL 2066583 (T.T.A.B. July 10, 2006).....	37
<i>Orange 21 North America Inc. v. Beryll Brand Division Est.</i> , Opp. No. 91181440, 2012 WL 684463 (T.T.A.B. Feb. 21, 2012) .....	50
<i>Otto Roth &amp; Co., Inc. v. Universal Foods Corp.</i> , 209 U.S.P.Q. 40 (C.C.P.A. 1981).....	44
<i>Palm Bay Imports, Inc. v. Veuve Cliquot Ponsardin Maison Fondée En 1772</i> , 73 U.P.S.Q.2d 1689 (Fed. Cir. 2005).....	45-46
<i>Presto Products Inc. v. Nice-Pak Products Inc.</i> , 9 U.S.P.Q.2d 1895 (T.T.A.B. 1988).....	50
<i>Rocket Trademarks Pty. Ltd. v. Phard S.p.A.</i> , 98 U.S.P.Q.2d 1066 (T.T.A.B. 2011) .....	47-48, 51
<i>Rolex Watch U.S.A. Inc. v. AFP Imaging Corp.</i> , 101 U.S.P.Q.2d 1188 (T.T.A.B. 2011).....	40



<i>Roselux Chemical Co. v. Parsons Ammonia Co.</i> , 132 U.S.P.Q. 627 (C.C.P.A. 1962).....	15
<i>Sheetz of Delaware, Inc. v. Doctors Associates Inc.</i> , 108 U.S.P.Q.2d 1341 (T.T.A.B. 2013) .....	<i>passim</i>
<i>Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.</i> , 220 U.S.P.Q. 1072 (T.T.A.B. 1983) .....	36
<i>Sports Authority Michigan, Inc. v. PC Authority, Inc.</i> , Opp. No. 113785, 2002 WL 745589 (T.T.A.B. Apr. 16, 2002).....	51
<i>Swatch AG v. M. Z. Berger &amp; Co.</i> , 108 U.S.P.Q.2d 1463 (T.T.A.B. 2013).....	40
<i>Tea Board of India v. Republic of Tea Inc.</i> , 80 U.S.P.Q.2d 1881 (T.T.A.B. 2006) .....	11
<i>Tektronix, Inc. v. Daktronics, Inc.</i> , 187 U.S.P.Q. 588 (T.T.A.B. 1975).....	27
<i>Tektronix, Inc. v. Daktronics, Inc.</i> , 189 U.S.P.Q. 693 (C.C.P.A. 1976).....	49
<i>Towers v. Advent Software Inc.</i> , 16 U.S.P.Q.2d 1039 (Fed. Cir. 1990) .....	43-44
<i>Trump v. Caesars World, Inc.</i> , 230 U.S.P.Q. 594 (D.N.J. 1986).....	14
<i>Wal-Mart Stores, Inc. v. Loufrani</i> , S.N. 75977376, 2009 WL 873129 (T.T.A.B. Mar. 20, 2009).....	40
<i>World Triathlon Corp. v. Traditional Medicinals, Inc.</i> , Opp. No. 91110391, 2008 WL 4876562 (T.T.A.B. Nov. 3, 2008) .....	38
<i>Yamaha International Corp. v. Hoshino Gakki Co.</i> , 6 U.S.P.Q.2d 1001 (Fed. Cir. 1988).....	11, 12, 32
<i>Zirco Corp. v. American Telephone and Telegraph Co.</i> , 21 U.S.P.Q.2d 1542 (T.T.A.B. 1992) .....	41

**STATUTES**

15 U.S.C. § 1052(d) .....	40
15 U.S.C. § 1057(b) .....	12
21 C.F.R. 101.9(c)(1).....	23

**TREATISE**

J. Thomas McCarthy, <i>McCarthy on Trademarks and Unfair Competition</i> (4th ed. 2013) .....	33
---	----

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

TBMP § 509.01(b)(2) .....	28
---------------------------	----

Royal Crown Company, Inc. and Dr. Pepper/Seven Up, Inc. (together, “Royal Crown”) submit this brief in further support of their challenge to the right of The Coca-Cola Company (“TCCC”) to register various ZERO-inclusive marks in connection with beverages without a disclaimer of the term “zero,” and in opposition to TCCC’s challenge to Royal Crown’s right to register its DIET RITE PURE ZERO and PURE ZERO marks (together, the “DIET RITE PURE ZERO Marks”).

## I. INTRODUCTION

This case is about more than TCCC’s desire to obtain registrations for marks without a disclaimer. If TCCC is permitted to register its ZERO-inclusive marks without disclaiming the term, the Board will effectively have granted TCCC a monopoly to use a common English word in its common English meaning, a word already in general use in the beverage industry to identify beverages characterized by zero calories. Granting TCCC registrations without disclaimers will prevent others in the beverage industry from using a term that is as instructive and non-source identifying as DIET or LITE. While TCCC pretends that the specter of a monopoly is wholly imagined hyperbole by Royal Crown, TCCC’s own actions prove out its monopolistic intents. These consolidated oppositions also involve TCCC’s oppositions against Royal Crown’s DIET RITE PURE ZERO Marks, which TCCC alleges are likely to cause confusion with TCCC’s own ZERO-inclusive marks, despite the fact that Royal Crown’s DIET RITE soft drink and TCCC’s soft drinks have been coexisting without confusion for years and even decades. TCCC also has opposed numerous other third party marks that combine the term “zero” with known brands, and, contrary to its exhortations that it does not claim exclusive rights in descriptive phrases including the term “zero” (TCCC Tr. Br. at 10), it has opposed an application with no other use of ZERO other than the phrasing (as translated) ZERO SUGAR.

(See Opp. No. 91186175.) Royal Crown has merely put a name to the monopolistic intent that TCCC has already demonstrated.

In contrast, requiring TCCC to include a disclaimer of the term “zero” – and denying TCCC’s oppositions to Royal Crown’s DIET RITE PURE ZERO Marks – does not negatively affect the beverage industry, allows third parties to continue to use “zero” to identify zero-calorie drinks, and still provides TCCC with protection for its marks “in their entirety,” which is all TCCC claims to seek (TCCC Tr. Br. at 10). The Board should rule in Royal Crown’s favor on all aspects of these consolidated oppositions.

## II. ARGUMENT

### A. TCCC’s Brief Misdirects the Board on Several Key Points

#### 1. The *AmBev* Decision is Irrelevant

Predictably, TCCC opens its brief with a reference to the Board’s decision in *Companhia de Bebidas das Américas – AMBEV v. The Coca-Cola Company*, Consolidated Opposition No. 91178953, 2012 WL 1881492 (T.T.A.B. May 2, 2012) (“*AmBev*”). Not only is the *AmBev* decision not *res judicata*, but also there are significant differences between this case and *AmBev* that make the Board’s decision in the earlier case irrelevant to the Board’s decision here. First and foremost, the claims are different. Here, Royal Crown challenges TCCC’s claim to exclusive rights to the term ZERO based both on genericness of that term and lack of secondary meaning; the *AmBev* case involved only the question of secondary meaning. Second, the evidentiary records are different. Among other things, Royal Crown has introduced evidence of 32 companies that use ZERO-inclusive marks for beverages in exactly that same manner as TCCC, including PepsiCo and Royal Crown, indisputably both leaders in the beverage industry, along with substantial evidence of industry-wide use and acceptance of the term and numeral

zero to signify beverages with zero calories; *AmBev* involved comparatively little in the way of third-party use. Third, the use of “zero” to refer to a type of beverage has become far more commonplace in the four years since the testimony period in *AmBev* closed. While TCCC might like the Board to render a decision based on the facts as they may have existed (or were presented) four years ago, the Board is required to analyze the facts and law on the basis of *this* record. There is no question that the record here mandates a different result than the Board reached in *AmBev*.

## **2. TCCC Bears the Ultimate Burden of Proof**

The parties agree that TCCC bears the burden of proving its Lanham Act Section 2(d) priority and likelihood of confusion claim against Royal Crown’s applications. However, TCCC mistakenly contends that it is Royal Crown that bears the ultimate burden of proving by a preponderance of the evidence that ZERO either is generic or lacks acquired distinctiveness. (TCCC Tr. Br. at 11; *see also id.* at 20.)

TCCC’s contention is wrong as a matter of law. As the Federal Circuit made clear in *Yamaha International Corp. v. Hoshino Gakki Co.*, 6 U.S.P.Q.2d 1001, 1008 (Fed. Cir. 1988), an applicant seeking registration under Section 2(f) of the Lanham Act bears the ultimate burden of establishing acquired distinctiveness. As for its theory that Royal Crown bears the ultimate burden of proof on the issue of genericness, TCCC relies on *Tea Board of India v. Republic of Tea Inc.*, 80 U.S.P.Q.2d 1881, 1887 (T.T.A.B. 2006), and *Martahus v. Video Duplication Services Inc.*, 27 U.S.P.Q.2d 1846, 1850 (Fed. Cir. 1993). (*See* TCCC Tr. Br. at 21.) TCCC’s reliance is misplaced, as neither of those cases are applicable. *Tea Board of India* involved a claim that a *registered* mark was generic. 80 U.S.P.Q.2d at 1887. While a registered mark like the one at issue in *Tea Board of India* is entitled to a presumption of validity, TCCC’s

*unregistered* marks enjoy no such presumption. 15 U.S.C. § 1057(b); *see also Yamaha*, 6 U.S.P.Q.2d at 1008. The *Martahus* case, on the other hand, simply holds that the proponent of a likelihood of confusion claim bears the burden of proof, 27 U.S.P.Q.2d at 1850, and does not opine on which party bears the burden of proving that an unregistered mark is either not generic or possesses acquired distinctiveness.

In contrast, the case law cited by Royal Crown and ignored by TCCC makes clear that it is TCCC – not Royal Crown – that bears the ultimate burden to establish that the ZERO portion of TCCC’s marks either is not generic or has acquired secondary meaning. (*See RC Init. Br. at 33-24*, citing *Yamaha*, 6 U.S.P.Q.2d at 1008; *E. R. Squibb & Sons, Inc. v. Cooper Labs., Inc.*, 214 U.S.P.Q. 441, 446 (S.D.N.Y. 1982) (proponent of unregistered mark bears burden of proving that it is not generic).) As the Federal Circuit Court has held, placing the ultimate burden of disproving registrability on an opposer “would give the applicant for a trademark the rebuttable presumption of validity that properly follows on the registration of the mark, not the publication of the proposed mark prior to its registration.” *Yamaha*, 6 U.S.P.Q.2d at 1008.<sup>1</sup> Thus, it is TCCC, not Royal Crown, which must prove by a preponderance of the evidence that “zero” is entitled to protection.

### **3. TCCC’s Survey Falls Flat**

Throughout its brief, TCCC repeatedly invokes the survey conducted by Dr. Alex Simonson (the “Simonson Survey”), as if it trumps all other evidence in this case. TCCC also repeatedly chastises Royal Crown for not conducting its own survey and for not hiring an expert

---

<sup>1</sup> While *Yamaha*’s holding related specifically to the burden of proving acquired distinctiveness of a descriptive term, as the Board has noted, genericness is the ultimate form of descriptiveness. *See In re Amini*, S.N. 75862136, 2002 WL 850843, at \*2 (T.T.A.B. May 3, 2002) (citation omitted).

to criticize the Simonson Survey. However, both TCCC's heavy reliance on the Simonson Survey and its criticism of Royal Crown are misplaced.

i. Royal Crown Had No Need to Hire an Expert

TCCC seems to believe that the Simonson Survey is unassailable because Royal Crown neither conducted its own survey nor hired an expert to criticize TCCC's survey. However, the Board has made clear that not only are Board litigants generally not required to introduce surveys, the fact that one party has introduced a survey does not obligate the party's opponent to introduce its own survey. *British Seagull Ltd. v. Brunswick Corp.*, 28 U.S.P.Q.2d 1197, 1202 (T.T.A.B. 1993). This is especially true where, as here, the party offering the survey is the one that bears the ultimate burden on the issue addressed by the survey. *Id.*

Nor does it follow that simply because TCCC hired an expert to conduct a survey that Royal Crown must hire its own expert to critique that survey. In fact, the Board has discounted survey results from Dr. Simonson in at least one case in which the opposing party relied solely on its own criticism rather than hiring an expert. *McNeil-PPC, Inc. v. Walgreen Co.*, Opp. No. 91184978, 2013 WL 223400, at \*9 (T.T.A.B. Jan. 22, 2013). As Royal Crown makes clear in its accompanying evidentiary motion, the flaws in the Simonson Survey are so glaring that it does not take a survey expert to point them out or for the Board to recognize them.

ii. TCCC's Survey Cannot Defeat Royal Crown's Genericism Claim

TCCC's attempt to rely on the Simonson Survey to disprove genericism is misplaced. (*See* TCCC Tr. Br. at 30.) The Simonson Survey did not ask consumers whether they believed the term "zero" was generic – that is, whether it referred to a type or category of soft drinks – but instead asked whether they associated the term with one or more companies. The Board has previously held that such "association" surveys are patently incapable of determining whether a

particular term is or is not generic. *Danish Dairy Bd., Inc. v. Ministry of Commerce & Indus. of Republic of Cyprus*, Canc. No. 92019815, 1999 WL 612935, at \*5 (T.T.A.B. Aug. 12, 1999); *see also Genesee Brewing Co., v. Stroh Brewing Co.*, 45 U.S.P.Q.2d 1743, 1738 n.4 (2d Cir. 1997) (confirming that a secondary meaning survey that does not consider the possibility that consumers believe a term “to emanate from one source, but nonetheless to be a category” of products is a critical omission on the question of genericness).

TCCC further contends that the Simonson Survey “highlights the fact that ‘zero’ without more, such as a noun identifying an ingredient or characteristic, is meaningless; . . . the term itself does not provide a clear meaning.” (TCCC Tr. Br. at 30.) However, there is nothing about the Simonson Survey that sheds any light on whether consumers believe “zero” has a literal meaning when used in connection with soft drinks. The Simonson Survey only asked respondents whether they associated the term “zero” for soft drinks with one or more companies; it did not ask respondents to define “zero,” either abstractly or specifically in connection with soft drinks. (TCCC 131 at App. B.) As such, the Simonson Survey tells us *nothing* about the meaning consumers ascribe to “zero” when used for beverages.<sup>2</sup> The only survey in the record that does so is TCCC’s survey conducted before the launch of COCA-COLA ZERO, which showed that 92% of respondents ascribed a meaning of “zero calories” to the term “zero” when used in a soft drink name. (RC95 at TCCC00244.)

---

<sup>2</sup> For the same reasons, TCCC’s citation to *Trump v. Caesars World, Inc.*, 230 U.S.P.Q. 594, 599 (D.N.J. 1986), is inappropriate. Unlike the Simonson Survey, which asked only whether respondents associated the term “zero” with one or more companies, the survey conducted in *Trump* first asked respondents “for the meaning of the word ‘palace,’” and then asked whether the respondents had “ever heard of the word ‘palace’ as part of the name of a casino hotel, and, if so, what was the name of the casino using ‘palace’ as part of its name.” 230 U.S.P.Q. at 598.

iii. TCCC's Survey is Untimely

TCCC extensively relies on the Simonson Survey to support its position that the alleged family of ZERO marks used by TCCC has acquired secondary meaning. However, the Simonson Survey achieves the somewhat remarkable feat of being both too early and too late to have any bearing on the question of secondary meaning for purposes of these consolidated proceedings. As explained in more detail in Section D.2.ii, *infra*, the Simonson Survey is too early to establish any acquired distinctiveness relevant to TCCC's opposition to Royal Crown's marks because it took place more than three years after Royal Crown's priority dates. And as explained below, the Simonson Survey is too early to establish the acquired distinctiveness needed to defeat Royal Crown's oppositions to TCCC's marks.

In order to defeat Royal Crown's claim that the ZERO portion of TCCC's marks is merely descriptive, TCCC must prove that its marks possess acquired distinctiveness at the time that their registrability is being determined – that is, now. *Roselux Chem. Co. v. Parsons Ammonia Co.*, 132 U.S.P.Q. 627, 634 (C.C.P.A. 1962). However, the Simonson Survey was conducted in September 2008, nearly six years ago. Since that time, the number of ZERO-named beverages on the market has increased, with TCCC's knowledge and with its failure to take action to prevent use. The proliferation of ZERO-named beverages since the Simonson Survey was conducted in 2008 renders the survey results irrelevant in determining whether consumers *currently* perceive the term to be associated with a single source. Thus, TCCC cannot rely on the Simonson Survey undertaken in 2008 to show that in 2014, when TCCC's ZERO-named products share shelf space with dozens of other ZERO-named products, ZERO in a beverage product name primarily exclusively designates TCCC as the source. *Cf. Lockheed Martin Corp. v. Raytheon Co.*, Consolidated Opps. No. 91167189, 2011 WL 5014027, at \*6



(T.T.A.B. Sept. 27, 2011) (“A term may start out as nongeneric as applied to a product but may in time lose whatever source significance it might originally have had.”) (citing *In re Murphy Door Bed Co.*, 223 U.S.P.Q. 1030, 1033 (T.T.A.B. 1984)).

iv. TCCC’s Survey Shows Only De Facto Secondary Meaning

Even if the results of the Simonson Survey were relevant to any time period meaningful to this proceeding, the Simonson Survey shows, at most, only *de facto* secondary meaning resulting from TCCC’s marketplace dominance in 2008 and the advertising push behind the COCA-COLA ZERO product prior to that time. COCA-COLA ZERO was among the first and certainly the most heavily marketed beverage to adopt the “zero” moniker, strongly suggesting that any secondary meaning demonstrated by Dr. Simonson’s survey was merely the result of TCCC’s aggressive marketing. Such *de facto* secondary meaning cannot be used to determine that “zero” is not generic. See *Anti-Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 216 U.S.P.Q. 588, 593 (9th Cir. 1982) (despite 63% of consumers recognizing “Monopoly” as a brand name and 55% associating name with Parker Brothers, “Monopoly” determined to be generic); *Miller Brewing Co. v. Falstaff Brewing Corp.*, 211 U.S.P.Q. 665, 668 (1st Cir. 1981) (because “lite” is generic, that “public perception of Miller as the source of ‘LITE’ has increased and become dominant in the public mind . . . is irrelevant”); *E. Air Lines, Inc. v. N.Y. Air Lines, Inc.*, 218 U.S.P.Q. 71, 75 (S.D.N.Y. 1983) (“[F]act that a [survey] respondent mentioned ‘Eastern’ when he heard the word ‘shuttle’ . . . [only] demonstrates . . . that a likely response to any generic word is the name of the best known producer or manufacturer of that product.”); *Sheetz of Del., Inc. v. Doctors Assocs. Inc.*, 108 U.S.P.Q.2d 1341, 1361 (T.T.A.B. 2013) (discounting survey results because “applicant’s extensive advertising campaign may have created *de facto* secondary meaning (*i.e.*, buyer association with a generic term)”).

Surprisingly, TCCC readily admits that any secondary meaning demonstrated in the Simonson Survey is in fact nothing more than *de facto* secondary meaning. As TCCC acknowledges, early research conducted by TCCC before COCA-COLA ZERO launched showed that 92% of relevant consumers understood ZERO in a beverage mark to mean zero calories. (TCCC Tr. Br. at 23, n.8.)<sup>3</sup> And as TCCC admits, it was only *after* TCCC's aggressive marketing push behind COCA-COLA ZERO that consumers linked "zero" to TCCC. (*Id.*) While TCCC contends that "[w]hat consumers may . . . have considered 'zero' to mean prior to the launch of TCCC's ZERO products and corresponding advertising material is irrelevant" (*id.*), this contention is contrary to the law. *BellSouth Corp. v. DataNational Corp.*, 35 U.S.P.Q.2d 1557 (Fed. Cir. 1995) ("A descriptive term may be generic for a designation ab initio . . . or it may become generic over time through common usage.") (citation omitted); *see also Anheuser-Busch, Inc. v. John Labatt Ltd.*, 39 U.S.P.Q.2d 1347, 1352 (8th Cir. 1996) (upholding jury verdict that "ice was and always had been the name of a beer category") (emphasis added).

v. At Best, TCCC's Survey is Equivocal on Secondary Meaning

According to TCCC, the Simonson Survey showed that 55% to 57% of respondents associated ZERO with beverage products of one company. (TCCC Tr. Br. at 39.) Dr. Simonson arrived at the 55% figure by taking the 61% percent of respondents who associated "zero" with one company and subtracting out the 6% of respondents who associated "diet" with more than one company. (Simonson Dep. at 27:10-16.) Dr. Simonson arrived at the 57% figure by taking

---

<sup>3</sup> This admission, and the research that it references, negates TCCC's assertion that "consumers do not know what 'zero' refers to absent a clear legend identifying the ingredient that is absent." (TCCC Tr. Br. at 22, n. 6.) TCCC's related contention that its own use of "zero" in its ZERO-inclusive marks "does not tell 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" (TCCC Tr. Br. at 24) is belied by its own marketing. All of the promotion around TCCC's ZERO-named products specifies and emphasizes that the ZERO in the product name refers to zero calories and only to zero calories, from the press releases

the 61% figure and subtracting out 4% of respondents who both said that “zero” is associated with one company and “diet” is associated with more than one company. (*Id.* at 27:17-28:4.)

There are several problems, however, with Dr. Simonson’s conclusions.

First, Dr. Simonson included within the 61% several respondents that should have been excluded. Specifically, Dr. Simonson includes within the 61% respondents who indicated that they associate “zero” with one company but, when asked which company, named something other than TCCC (or a TCCC brand): seventeen respondents named Pepsi,<sup>4</sup> and seven respondents name something else, including one respondent who specified “Volt,” which is not a TCCC product.<sup>5</sup> (TCCC 131 at App. E.) Dr. Simonson explained that he believes it is appropriate to count such respondents because of the “anonymous source” rule (Simonson Dep. at 133:17-134:4), which states, generally, “that a consumer need now know the identity of the manufacturer of goods or the provider of services, and that all that is necessary to establish secondary meaning is that the consumer associates the proposed mark with a single source.” *Nextel Commcn’s, Inc. v. Motorola, Inc.*, Opp. No. 91164353, 2009 WL 1741923, at \*11 (T.T.A.B. June 12, 2009) (citation omitted). However, these respondents did not say that the term was associated with some un-named source; they identified a source distinct from TCCC. Under such circumstances, they must be excluded from the secondary meaning total.

Indeed, the Board has previously held that the anonymous source rule does not apply in the context of association survey such as the one undertaken by Dr. Simonson. *Id.* (where

---

announcing the products to the “Real Coca-Cola Taste and Zero Calories” tagline that appears on virtually every COCA-COLA ZERO product and advertisement. (*See* RC Init. Br. at 19-20.)

<sup>4</sup> Respondent Nos. 85179, 75000, 36061, 98322, 61704, 54575, 36035, 76872, 33331, 79708, 64497, 40530, 91776, 65210, 82415, 89097, and 39903.

<sup>5</sup> Respondent No. 82609 specified “zero cola”; Respondent No. 34408 specified “COLA”; Respondent No. 19514 specified “some energy drink that says zero on it zero calories”; Respondent No. 96066 specified “no idea”; Respondent No. 45615 specified “zero”; and Respondent No. 22582 specified “cola.”

respondents associated tested mark with multiple sources, “applicant’s reliance on the anonymous source rule, with regard to the survey results, [is] misplaced”). As the Board reasoned, if respondents associated the mark with a particular company, the Board could not “conclude that the source being associated with the [mark] is ‘anonymous.’” *Id.*

Since the anonymous source rule does not permit Dr. Simonson to include respondents who associated “zero” with a specific company other than TCCC, the 61% figure becomes 53% (152 respondents who associated “zero” with one company, minus 18 respondents who named a company other than TCCC (Pepsi or Volt), divided by 251 as the total number of respondents). Subtracting from this either 4% or 6% to account for the results of the “diet” control leaves a secondary meaning percentage of only 47% to 49%. This is below the threshold needed to establish that source identification is the “primary” meaning of the term in consumer’s eyes. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 214 U.S.P.Q. 1, 4 n.11 (1982).

Moreover, the 47-49% figure does not take into account the margin of error inherent in every survey, including the Simonson Survey, as Dr. Simonson admitted. (Simonson Dep. at 177:7-9; *see also* Simonson Tr. at 171:6-11 (mall intercept surveys only give you “an order of magnitude” not precise results).) Although Dr. Simonson did not bother to calculate the margin of error at the time he wrote his survey report (Simonson Tr. at 169:3-6, 177:3-6), he estimated at trial that it would be in the range of “plus or minus four, five or six percentage points.” (*Id.* at 172:3-5.) This means that it is possible that the Simonson Survey showed that, even in 2008 when there were far fewer ZERO-named beverages on the market, only 41% of respondents associated the term “zero” with TCCC.

Establishing acquired distinctiveness requires showing that the *primary* significance of the term is to identify the source. *Inwood Labs.*, 214 U.S.P.Q. at 4 n.11. With the Simonson

Survey results in 2008 being in the range of 41% to 55% at best, the most that can be said about the Simonson Survey is that it is equivocal on the question of secondary meaning. Since the survey does not conclusively show that the primary meaning of “zero” as used for beverages is to identify TCCC as the source, and given all of the other issues with the survey identified by Royal Crown, the survey simply cannot outweigh the overwhelming evidence pointing to “zero” as highly descriptive without sufficient secondary meaning (if it is not generic).

#### **4. TCCC Mischaracterizes Prior PTO Practice**

TCCC seeks to rely on the PTO’s registration of certain ZERO-inclusive marks without disclaimer of the term “zero” (TCCC Tr. Br. at 12), ignoring the fact that the general practice of the PTO is, in fact, to require a disclaimer of the term. Having taken the position that the PTO’s practice regarding disclaimers is relevant and instructive, TCCC then ignores the multitude of relevant, soft drink applications and registrations in the record – 30 in total<sup>6</sup> – in which the PTO required disclaimer of the term or numeral zero, including Royal Crown’s own DIET RITE PURE ZERO and PURE ZERO applications. In the face of this evidence, TCCC can identify only *two* registrations that include the term ZERO and cover soft drinks: Registration No. 1862689 for ZERO TEA for “sports drinks” and Registration No. 2275991 for A LESS ZER‘0’ SPUMEGGIANTE for “non-alcoholic beverages, namely, fruit juices, carbonated soft drinks, flavored cocktail based on grape juice, spring water,”<sup>7</sup> both of which were issued before the term ZERO became commonplace in the beverage industry (1994 and 1999, respectively). Thus, the

---

<sup>6</sup> Royal Crown’s applications, plus Application Serial Nos. 77586710, 77587579, 77612529, 77275916, 77181474, 77489223, 77546090, 77946061, 77336826, 85513847, 8548159, 76608876, 77119736, 77943690, 79118667, 85498866, 77662597, 85053733, 85727407, and 8542741; and Registration Nos. 3179696, 3657037, 3156317, 3992546, 4206840, 4206841, 3110915, and 3048276.

<sup>7</sup> The other registrations to which TCCC cites are irrelevant to this dispute. Many cover alcoholic beverages (Registration Nos. 1220237, 2454727, 2410576, 2627897, and 2927378), one covers milk (Registration No. 2095972), and rest do not contain ZERO (Registration Nos. 226758, 2289636, 1740083, 2280130, and 1532289).

weight of the evidence shows that the PTO does in fact regularly require the term “zero” to be disclaimed from trademark applications covering soft drinks,<sup>8</sup> and such disclaimers point to “zero” being generic. See *In re Ad.Com Interactive Media*, S.N. 77832668, 2012 WL 2588565, at \*8 (T.T.A.B. June 18, 2012) (evidence of 28 registrations disclaiming relevant terms showed that “the public is likely to understand such terms to be generic” for the services at issue).

Of course, in any event, as the Board and its reviewing court have repeatedly held, “each application must be judged on its own merits based upon the evidence of record, and we are not bound by the past decisions of individual examining attorneys in considering different applications.” *In re Nortech Invs. Ltd.*, S.N. 85081203 & 85081475, 2013 WL 6056586, at \*7-8 (T.T.A.B. July 12, 2013) (rejecting evidence of allegedly analogous third-party registration that had been registered without a disclaimer, holding that “it is illogical to suggest . . . that every one of four-hundred examining attorneys must be factually accurate and legally consistent with each other 100% of the time in order for this Board to find [the marks at issue in the appeal] generic”) (citations omitted); see also, e.g., *In re Boulevard Entm’t Inc.*, 67 U.S.P.Q.2d 1475, 1480 (Fed. Cir. 2003); *In re Nett Designs*, 57 U.S.P.Q.2d 1564, 1566 (Fed. Cir. 2001); *In re Argo Tea, Inc.*, S.N. 85011197, 2013 WL 3001459, at \*2 (T.T.A.B. May 9, 2013).

## **B. TCCC Has Failed to Show by a Preponderance of the Evidence That ZERO Is Not Generic**

### **1. Royal Crown Properly Positioned the Genus Inquiry**

The first step of the genericness inquiry is defining the goods or services at issue. *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 228 U.S.P.Q. 528, 530 (Fed. Cir. 1986).

---

<sup>8</sup> No conclusion can be drawn regarding PTO requirements with regard to disclaimer of “zero” from most of the applications in the record in which the term was not disclaimed, as many had not made it far enough along the examination process to determine if the PTO would or would not have required a

TCCC complains that Royal Crown inappropriately identified the genus as “zero-calorie soft drinks.” (TCCC Tr. Br. at 22.) But Royal Crown positioned the genus inquiry as required by case law: because the goods covered by TCCC’s applications encompass zero-calorie soft drinks, the Board must consider whether “zero” is generic for such goods. (See RC Init. Br. at 36, citing *In re Cent. Sprinkler Co.*, 49 U.S.P.Q.2d 1194, 1197 (T.T.A.B. 1998); *In re Dakota Natural Foods, Inc.*, S.N. 78326818, 2007 WL 2698291, at \*3 (T.T.A.B. Aug. 28, 2007); *In re Nutraceutical Corp.*, S.N. 78975072, 2006 WL 802405, at \*2 (T.T.A.B. Mar. 13, 2006).) See also *In re PRGCO, LLC, S.N. 77252690 et al.*, 2012 WL 1881480, at \*6 (T.T.A.B. May 4, 2012) (in considering genericness of RECYCLED PAPER GREETINGS, noting that “the question in these appeals concerns whether the goods identified in the applications, which are not limited to particular types of greeting cards, would include within their scope cards of recycled paper”; affirming disclaimer requirement for “recycled paper”); *In re DNI Holdings Ltd.*, 77 U.S.P.Q.2d 1435, 1439 (T.T.A.B. 2005) (relevant genus “includes wagering on sporting events,” despite the fact that applicant had specifically carved out “sports wagering” from its recitation of services).

TCCC’s attempts to distinguish Royal Crown’s cases are strained and unpersuasive.<sup>9</sup> TCCC attempts to distinguish *In re Central Sprinkler Co.* and *In re Dakota Natural Foods, Inc.* on the basis that the applicant in each of those cases only used its mark for the more narrowly defined goods rather than the broader category set forth in the application. (TCCC Tr. Br. at 22-23, n.7.) As much as TCCC would like the Board to believe otherwise, TCCC also only uses its

---

disclaimer. Further, many were abandoned for failure to respond to Office Actions, which Office Actions may well have included a requirement that “zero” be disclaimed.

<sup>9</sup> Of note, these are the only cases from Royal Crown’s entire initial trial brief that TCCC attempts to distinguish.

ZERO-inclusive marks for zero-calorie soft drinks.<sup>10</sup> TCCC attempts to distinguish *In re Nutraceutical Corp.* on the theory that the more narrowly defined genus of “fresh organic foods” and “fresh organic food markets” were “known subcategories of the principal category of ‘organic foods.’” (TCCC Br. at 23, n.7.) The case, however, contains no such statement, and, perhaps tellingly, TCCC does not provide a pin cite to support its contention. In any event, the evidence here also establishes that “zero” is a known sub-category of beverages recognized by competitors, the industry, and consumers.

Moreover, the case cited by TCCC in support of its argument that the Board cannot specifically consider whether “zero” is generic for zero-calorie beverages actually supports Royal Crown’s position. In *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 U.S.P.Q.2d 1750 (T.T.A.B. 2013), the mark at issue was ANNAPOLIS TOURS and the question was whether the genus was adequately defined by the services identified in the registration – “conducting guided tours of historic districts and other areas of cities” – or whether the genus inquiry should more narrowly focus on “‘guided tours of Annapolis, or simply tours of Annapolis’” as petitioner recommended. *Id.* at 1761. Respondent argued that “guided tours of Annapolis” was inappropriately narrow because the company offered tours other than of Annapolis. *Id.* Noting that “often” – but not always – “the genus is defined by the identified goods or services of the involved registration,” *id.* (emphasis added), the Board stated that “[r]espondent cannot circumvent a genericness finding on the basis that the mark ANNAPOLIS TOURS may be used to identify guided tour services of other cities.” *Id.* Extrapolating the

---

<sup>10</sup> TCCC’s argument that it has applied ZERO-inclusive marks to non-zero-calorie soft drinks is specious. While TCCC’s ZERO-named products may have trace amounts of calories, each is properly labeled as zero-calorie under FDA regulations and TCCC markets them as such. (See Springate Trial Decl. ¶ 31 n.2; see also 21 C.F.R. 101.9(c)(1) (“amounts less than 5 calories may be expressed as zero calories”).)



holding of *Alcatraz Media* to this case, TCCC cannot avoid a genericness finding merely because its recitation of goods is broad enough to encompass goods other than zero-calorie soft drinks, or even if not all of TCCC's ZERO-named products contain zero calories.

## **2. The Evidence Demonstrates That Consumers Have Been Exposed to “Zero” as a Genus of Goods**

TCCC asserts that Royal Crown failed to provide “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.” (TCCC Tr. Br. at 23.) But like many of the assertions made by TCCC, this, too, ignores the evidence of record:

- Royal Crown’s evidence of 32 ZERO-named soft drinks by companies other than TCCC that have appeared in the U.S. market. This evidence includes two third-party ZERO-named products that TCCC itself distributes: MONSTER ENERGY ABSOLUTELY ZERO and MONSTER ENERGY ZERO ULTRA.<sup>11</sup> This evidence also includes first-hand sales and marketing details for five of the marks, including beverages offered by the second and third largest North American beverage companies, PROPEL ZERO by PepsiCo and DIET RITE PURE ZERO by DPSG. (RC Init. Br. at 23-27), and includes database information as to sales under fourteen other marks. (Springate Trial Decl. ¶ 35 & RC17.)
- Royal Crown’s evidence of dozens of examples showing use of the term or numeral zero on beverages to refer to zero calories, including on required nutritional panels and in packaging call-outs. (RC Init. Br. at 22-23.)

---

<sup>11</sup> The fact that TCCC distributes a competitive product bearing a ZERO-inclusive trademark is particularly damning evidence. *See British Seagull*, 28 U.S.P.Q.2d at 1203-04 (T.T.A.B. 1993) (“[A]pplicant not only is not the exclusive user of [the claimed designation], it has actually itself

- Royal Crown’s evidence of 68 third-party applications and registrations for non-alcoholic beverages containing the term or numeral zero. (RC Init. Br. at 27, appxs. B & C.)
- Royal Crown’s evidence that the American Beverage Association, a beverage industry trade organization of which TCCC is a member, has used “zero” to refer to a category of beverages in advertisements displayed throughout the New York City transit system. (Barnes Trial Decl. ¶¶ 6, 8-11 & RC18.)<sup>12</sup>
- Royal Crown’s evidence of multiple examples of use by the media of the term “zero” to refer to zero-calorie beverages as a category. (RC Init. Br. at 29-30.)<sup>13</sup>
- Royal Crown’s evidence confirming that TCCC itself wants consumers to understand “zero” as shorthand for zero-calorie beverages. (RC Init. Br. at 19-20.)
- Consumer research conducted by TCCC showing that, even before TCCC launched COCA-COLA ZERO, 92% of relevant consumers understood ZERO, when used as part of a beverage trademark, to refer to “zero calories.” (RC Init. Br. at 21.)

---

contributed to the widespread use of the [claimed designation] by others. . . . Such action is plainly contrary to applicant’s claim of substantially exclusive use.”).

<sup>12</sup> TCCC’s criticism of Royal Crown’s evidence on the American Beverage Association (“ABA”) advertisement fails. Although TCCC claims the ABA advertisement introduced into the record is “non-final” (TCCC Tr. Br. at 25, n.11) the only testimony on the question contradicts TCCC’s assertion. (Barnes Trial Decl. ¶ 9; Barnes Trial Dep. at 23:13-15.) TCCC is also absolutely incorrect that Mr. Barnes testified that “he had no evidence that TCCC ever approved” the ABA advertisement. (TCCC Tr. Br. at 25, n.11.) Mr. Barnes testified, without equivocation, that he knows TCCC did in fact approve the advertisement. (Barnes Trial Decl. ¶ 11; Barnes Trial Dep. at 44:18-24.) In any event, TCCC had significant notice that the ABA advertisement would be introduced at trial accompanied by Mr. Barnes testimony. If TCCC believed Mr. Barnes’ testimony to be inaccurate, TCCC could have introduced its own witness to contradict it, under oath. Its failure to do so is telling.

<sup>13</sup> TCCC attempts to discredit the media evidence by arguing that it is hearsay “as to what the author(s) were thinking or referring to when they used the term ‘zero.’” (TCCC Tr. Br. at 24-25, n. 10.) The articles may be hearsay as to the truth of any statements made in them, but they are not hearsay as to how the authors used the term “zero,” namely, to refer to a category of beverages. *Lockheed Martin*, 2011 WL 5014027, at \*9 (“printed publications are evidence of the manner in which [a term] has been used in the printed publication”).

- Royal Crown’s evidence that consumers themselves use “zero” to refer to zero-calorie beverages as a category. (RC Init. Br. at 28-29.)

### 3. TCCC’s Attacks on Royal Crown’s Evidence Are Not Persuasive

#### i. The Evidence of ZERO-Inclusive Marks by Companies Other Than TCCC Is Not Insignificant

TCCC’s primary argument for disregarding the fact that 32 soft drink products other than TCCC’s products have used ZERO-inclusive trademarks is that, in TCCC’s words, no “significant beverage company other than TCCC uses ZERO . . . for any leading soft drink brands.” (TCCC Tr. Br. at 28.)<sup>14</sup> Apparently in TCCC’s view of the world, the only beverage companies that matter are TCCC, PepsiCo and DPSG, and the only soft drinks that matter other than TCCC’s own are Pepsi, Mountain Dew, Dr Pepper, 7Up, Schweppes and Canada Dry, none of which, admittedly, have yet introduced a ZERO-named version. TCCC, however, cannot point to a single case holding that the only third-party uses that matter are those for leading brands – because there is no such case. As the Board has recognized, “[t]he Trademark Act protects all competitors, big or small, against harm resulting from registration of generic terms.” *See Sheetz of Del.*, 108 U.S.P.Q.2d at 1367 (“The fact that applicant’s business is much larger than some other establishments using ‘Footlong’ in connection with 12-inch sandwiches does not establish applicant’s right to exclusive use of the term.”). Moreover, while PepsiCo and DPSG might not yet have applied ZERO to the brands TCCC mentions, both PepsiCo and DPSG have used ZERO-inclusive marks,<sup>15</sup> and both PepsiCo and DPSG have objected to TCCC’s attempt to

---

<sup>14</sup> TCCC also contends “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 uses of ‘zero’ on packaging call outs.” (TCCC Tr. Br. at 26.) TCCC does not back up this contention with examples, but, in any event, TCCC simply is wrong.

<sup>15</sup> TCCC’s attempt to introduce new evidence in its trial brief regarding PepsiCo’s PROPEL ZERO mark (*see* TCCC Tr. Br. at 43 n.16) is improper. The procedural mechanism for a party seeking to introduce

monopolize the term “zero” – TCCC through this opposition, and PepsiCo through a successful opposition in the United Kingdom and a pending opposition in Canada. (RC282-RC283; PepsiCo Dep. at 51:4-8.) *Classic Foods Int’l Corp. v. Kettle Foods, Inc.*, 468 F. Supp. 2d 1181, 1192 (C.D. Cal. 2007) (opinions of industry leaders are “particularly helpful . . . in determining the genericness of a term) (citation omitted).

TCCC also tries to minimize the impact of the 32 other ZERO brands by claiming that it has objected to a number of third-party uses of ZERO-inclusive marks “either by sending a cease and desist letter and/or by opposing an application” (TCCC Tr. Br. at 26.) The record, however, is devoid of evidence that TCCC has taken any substantial steps to clear the marketplace of ZERO-inclusive marks. There is no evidence that TCCC has sought a single injunction, despite widespread evidence of third-party use, including by TCCC’s biggest competitors for products directly competitive to TCCC’s own ZERO-named products. There is no evidence of a single demand letter sent to any user of a ZERO-inclusive mark other than to Royal Crown and Loud Beverage Corp., the owner of the POMBERRY ZERO mark – and both recipients rejected

---

new evidence after its testimony period is to file a motion to reopen its testimony period. *See* TBMP § 509.01(b)(2). TCCC’s failure to undertake such a motion compels the Board to reject the evidence. *See Tektronix, Inc. v. Daktronics, Inc.*, 187 U.S.P.Q. 588, 589 n.1 (T.T.A.B. 1975) (rejecting new evidence attached to opposer’s reply trial brief because “the information contained therein could have been made of record through other means such as a motion to reopen”). Further, any such motion would have been unsuccessful. Although TCCC asserts that the evidence could not have been discovered earlier, this is not the sole factor for consideration. *Harjo v. Pro-Football Inc.*, 45 U.S.P.Q.2d 1789, 1791-92 (T.T.A.B. 1998). Other factors to be considered include the nature and purpose of the evidence sought to be added, the stage of the proceeding and prejudice to the nonmoving party. *Id.* Here, TCCC seeks to add an article from Advertising Age’s website and a page from the PROPEL ZERO website to show that PepsiCo announced it is discontinuing its PROPEL ZERO mark. Such article and website, however, are hearsay that cannot be used to prove the truth of the matters asserted therein, and thus have no probative value for the purpose that TCCC seeks to use them. *See L.C. Licensing, Inc. v. Berman*, 86 U.S.P.Q.2d 1883, 1887 (T.T.A.B. 2008) (denying motion to reopen testimony period to introduce newspaper article because the article was not evidence of what was stated therein). Additionally, the evidence that TCCC seeks to add is irrelevant. Testimony from PepsiCo has demonstrated that the public was exposed to significant marketing and advertising of PROPEL ZERO, and that PepsiCo achieved significant sales of the beverage sold under the mark. (RC Init. Br. at 24-25.) What PepsiCo intends to do with its PROPEL ZERO mark in the future is of no import.

TCCC's claim of exclusive rights. (See RC99 (Loud Beverage Corp.'s response to TCCC's demand letter, rejecting TCCC's claimed exclusive rights in ZERO).) There is no evidence of a single agreement in which any company has acknowledged TCCC's claimed exclusive rights in ZERO. (Cf. RC100-RC101 (agreements with third parties in which third parties do not acknowledge TCCC's claimed exclusive rights in ZERO).) Compare *Lockheed Martin*, 2011 WL 5014027, at \*18 (rejecting as "vague and evasive" opposer's assertions that it had enforced its mark when opposer was "unable to produce any details about such efforts or any written letters or memoranda memorializing them"). TCCC's failure to police and enforce its claimed exclusive rights in ZERO in the marketplace is devastating to its position in these consolidated oppositions, since unfettered third-party use has rendered "zero" generic even if it was not before TCCC adopted it, *BellSouth Corp.*, 35 U.S.P.Q.2d at 1557, and is antithetical to the exclusive rights TCCC's claims. *Levi Strauss & Co. v. Genesco, Inc.*, 222 U.S.P.Q. 939, 942 (Fed. Cir. 1984).

ii. Royal Crown's Internet Evidence Is Not Insubstantial

TCCC criticizes Royal Crown's evidence as being Internet-based, citing cases stating things like "a photograph on the flickr website[] does not mean that consumers will be aware of that evidence." (TCCC Tr. Br. at 26, citing *Baroness Small Estates, Inc. v. Am. Wine Trade, Inc.*, 104 U.S.P.Q.2d 1224, 1228 (T.T.A.B. 2012); see also TCCC Tr. Br. at 24 n.10, 27) As an initial matter, the Board repeatedly finds marks to be generic on the basis largely of Internet-based evidence. See e.g., *Del. Quarries, Inc. v. Playcore IP Sub, Inc.*, Opp. No. 91190282, 2013 WL 5407286, at \*6-8 (T.T.A.B. July 2, 2013) (finding ROCKSCAPE generic on the basis of challenger's Internet evidence of third-party use in both trademark and descriptive form); *In re Argo Tea, Inc.*, 2013 WL 3001459, at \*3-5 (finding POMEGRANATEA generic where evidence

of third-party use consisted solely of Internet printouts); *In re Bliss Publ'ns, LLC*, S.N. 77779284, 2012 WL 3224717, at \*4-5, \*7 (T.T.A.B. July 23, 2012) (finding BABY GUIDE generic where evidence of third-party use consisted solely of Internet printouts).

Moreover, Royal Crown's evidence does not consist exclusively or even mostly of Internet-based evidence. Among other things, Royal Crown introduced documents and testimony concerning its extensive use of DIET RITE PURE ZERO and other uses of "zero" on soft drinks, documents and testimony from third parties using ZERO-named beverage marks, and actual products purchased in the marketplace. Further, the Internet evidence that was introduced by Royal Crown is far different than the random flickr photo referenced in *Baroness Small Estates* or the other "relatively obscure" Internet examples critiqued in *In re Country Music Association Inc.*, 100 U.S.P.Q.2d 1824, 1830 (T.T.A.B. 2011) (cited at TCCC Tr. Br. 27). Royal Crown's Internet evidence includes third-party beverage company websites, trade websites, Internet beverage retailers, and the Internet powerhouse retailer Amazon, among others. *In re Reed Elsevier Props. Inc.*, 82 U.S.P.Q.2d 1378, 1381 (Fed. Cir. 2007) (third-party websites are "competent sources" to show what the relevant public would understand a term to mean and "provide substantial evidence to support" a finding of genericness). As much as TCCC would like to pretend that the extensive evidence introduced by Royal Crown adds up to nothing, the math will never come out in TCCC's favor.

### iii. Consumer Impression Data is Not Required

TCCC also critiques Royal Crown's evidence for lacking information regarding how many consumers have been exposed to the numerous uses of "zero" found in the record. Such an argument is hypocritical. While Royal Crown did not present empirical evidence of consumer impressions, neither did TCCC for its own advertisements. Yet this hasn't stopped TCCC from

arguing that its own marketing and advertising to an unspecified number of consumers has created acquired distinctiveness. Just as TCCC would not suggest that its evidence should not be disregarded, it cannot logically argue that Royal Crown's evidence should be disregarded. Moreover, TCCC has not cited to a single case holding that such information is required, and in fact virtually every case finding a term generic lacks such evidence. *See, e.g., Del. Quarries*, 2013 WL 5407286; *In re La. Fish Fry Prods., Ltd.*, S.N. 77816809, 2013 WL 3191197 (T.T.A.B. May 24, 2013); *In re Dakota Natural Foods, Inc.*, 2007 WL 2698291; *In re Nutraceutical Corp.*, 2006 WL 802405; *In re Cent. Sprinkler Co.*, 49 U.S.P.Q.2d 1194. In any event, given the sheer volume of evidence presented by Royal Crown of the many different ways consumers have been exposed to "zero" used generically, consumer impression data becomes superfluous.

iv. Non-Trademark Use of "Zero" is Not Irrelevant

TCCC attempts to criticize Royal Crown for counting among its genericness evidence the voluminous evidence showing that TCCC, Royal Crown and numerous third-parties have used "zero" descriptively to identify their beverages as having zero calories, asserting that Royal Crown's reliance on such evidence "conflate[s] and confuse[s]" descriptiveness and genericness. (TCCC Br. at 28.) But it is TCCC that is confused as to the law, not Royal Crown. The evidence submitted by Royal Crown confirms with established Board and Court precedent; TCCC's criticism does not. (*See RC Init. Br. at 37-41, citing, inter alia, In re Dakota Natural Foods*, 2007 WL 2698291, at \*2-3; *In re Cent. Sprinkler*, 49 U.S.P.Q.2d at 1199; *Flowers Indus. Inc. v. Interstate Brands Corp.*, 5 U.S.P.Q.2d 1580, 1589 (T.T.A.B. 1987); *Classic Foods Int'l*, 468 F. Supp. 2d at 1195; *CG Roxane LLC v. Fiji Water Co.*, 569 F. Supp. 2d 1019, 1027-28

(N.D. Cal. 2008).) *See also Sheetz of Del.*, 108 U.S.P.Q.2d at 1357-59 (relying on extensive use of “footlong” to describe 12-inch sandwiches in holding FOOTLONG generic).

#### **4. TCCC’s Evidence on Secondary Meaning Does Not Establish that ZERO is Not Generic for Beverages**

TCCC argues that in assessing whether ZERO is generic for beverages, the Board “must” consider TCCC’s evidence of acquired distinctiveness. (TCCC Tr. Br. at 21). However, neither of the cases that TCCC cites – *In re Recorded Books Inc.*, 42 U.S.P.Q.2d 1275 (T.T.A.B. 1997), and *In re Seats, Inc.*, 225 U.S.P.Q. 364 (Fed. Cir. 1985) – stand for such a proposition. In fact, the Federal Circuit in *In re Seats* specifically refused to decide the question “of whether the Board may ever in future cases refuse to consider evidence of acquired distinctiveness” when considering the issue of genericness. 225 U.S.P.Q. at 367. And while the Board in *In re Recorded Books Inc.* stated that it had considered the applicant’s acquired distinctiveness evidence on the question of genericness, it ultimately disregarded that evidence as showing nothing more than “de facto secondary meaning that, in legal effect, can neither confer nor maintain trademark rights in the designation sought to be registered.” 42 U.S.P.Q.2d at 1282 (citations omitted).

The evidence that TCCC would have the Board consider, while irrelevant, also does not establish secondary meaning. TCCC’s circumstantial evidence of secondary meaning – such as sales data, marketing data, and media references – not only are insufficient to prove acquired distinctiveness in ZERO as discussed below (Section C.4, *infra*), it is manifestly insufficient to overcome the substantial evidence on genericness presented by Royal Crown. And TCCC’s direct evidence of secondary meaning – the Simonson Survey – is not only flawed (*see* Royal Crown and DPSG’s Statement of Objections to TCCC’s Evidence, Dkt. No. 146, at 2-10) and at best equivocal on the fundamental issue of the primary meaning of the term “zero” (*see* Section



A.3.v, *supra*), but also neither addresses the question of genericness generally (*see* Section A.3.ii, *supra*) nor considers the issue of what “zero” means today (*see* Section A.3.iii, *supra*).

### **5. Any Doubts Should Be Resolved Against Granting TCCC a Monopoly**

Recognizing that its claim of rights in the generic term ZERO is unsupportable as a matter of fact and law, TCCC makes a last ditch effort to save its rights by arguing that any doubts must be resolved in its favor as the applicant. (TCCC Tr. Br. at 31.) But there is no such rule favoring the applicant in a case such as this, and the precedent that TCCC relies on are not applicable. Both *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 4 U.S.P.Q.2d 1141 (Fed. Cir. 1987), and *In re America Online, Inc.*, 77 U.S.P.Q.2d 1618 (T.T.A.B. 2006) (cited at TCCC Tr. Br. at 31), are appeals from denials of registration, not *inter partes* proceedings as here.<sup>16</sup> In registration appeals, the Examining Attorney bears the burden of proving that the contested designation is generic, so it makes sense that any doubts in such cases should be resolved in favor of the applicant. Since in this *inter partes* proceeding it is TCCC that bears the burden of proving by a preponderance of the evidence that “zero” is not generic, if any doubts remain, it mean that TCC has not discharged its burden. Any doubts, then, should and must be resolved in favor of denying registration without a disclaimer, denying a monopoly, and maintaining the industry’s right to use ZERO freely.

---

<sup>16</sup> Although TCCC also cites *Levi Strauss & Co. v. R. Josephs Sportswear, Inc.*, 28 U.S.P.Q.2d 1464, 1471 (T.T.A.B. 1993), there is no reference in that case to the proposition that doubts must be resolved in favor of the applicant. *Levi Strauss*, in any event, is no longer good law, as it places the burden of disproving acquired distinctiveness on the opposer, which is contrary to the Federal Circuit’s later decision in *Yamaha International Corp. v. Hoshino Gakki Co.*, 6 U.S.P.Q.2d 1001 (Fed. Cir. 1998).

## C. TCCC Has Not Satisfied Its High Burden of Proving Acquired Distinctiveness

### 1. TCCC's Equivocation on the Basis of Its Secondary Meaning Is Merely a Distraction

TCCC begins the section of its brief concerning its alleged acquired distinctiveness by making contradictory assertions. First, TCCC asserts that it has “not claimed acquired distinctiveness in the term ZERO standing alone for beverages.” (TCCC Tr. Br. at 33.) But this is, in effect, exactly what TCCC is doing by claiming a family of marks predicted on use of ZERO as the common surname. 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23:61 at 23-318 (4th ed. 2013) (“[I]n effect, the family ‘surname’ or distinguishing element is recognized by customers as an identifying trademark *in and of itself* when it appears in a composite.”) (emphasis added). TCCC’s practice of opposing every third-party trademark application for a beverage mark containing the term ZERO (*see, e.g.,* RC267-RC280) demonstrates that this is the net effect of its family of marks claim.

Continuing this disingenuous claim, TCCC proceeds to assert that it does not base its claim of acquired distinctiveness on use of a family of ZERO marks, claiming that it submitted Section “2(f) statements separately for each of its applications based on evidence of media coverage, advertising examples, and advertising expenditures.” (TCCC Tr. Br. at 33.) But each and every one of those separate Section 2(f) submissions asserted that TCCC possessed a family of ZERO marks. TCCC’s contention that it did not base its acquired distinctiveness claim on a family of marks is also belied by the fact that TCCC had not even used certain of its ZERO-inclusive marks before TCCC filed 2(f) statements for them, and still has not used certain of those ZERO-inclusive marks to this day.<sup>17</sup>

---

<sup>17</sup> Presumably, TCCC makes these untenable assertions to avoid the question raised in Royal Crown’s trial brief: whether an applicant can rely on the family of marks doctrine for registration purposes

The bottom line of TCCC's convoluted argument seems to be that TCCC claims acquired distinctiveness in "zero" based both on an alleged family of marks (TCCC Tr. Br. at 34) *and* on the use of individual ZERO-inclusive marks (TCCC Tr. Br. at 33). Its reliance on the former basis is discredited elsewhere. (*See* Sections C.1-4, *infra*.) As for TCCC's reliance on the latter basis, the evidence showing the genericness and widespread third-party use of the term "zero" also mean that TCCC cannot establish acquired distinctiveness through the use of any of the individual ZERO-inclusive marks.

TCCC's reliance on *Kellogg Co. v. General Mills Inc.*, 82 U.S.P.Q.2d 1766 (T.T.A.B. 2007), does not help it. The mark in that case was CINNAMON TOAST CRUNCH, applied to breakfast cereal, for which the applicant had submitted a partial 2(f) statement with respect only to the CINNAMON TOAST portion. 82 U.S.P.Q.2d at 1772. The Board concluded that, because CINNAMON TOAST and CRUNCH were separable elements of the mark, Kellogg's evidence as to acquired distinctiveness of the mark as a whole likewise supported its claim of partial acquired distinctiveness for the CINNAMON TOAST portion. *Id.* However, *Kellogg* is distinguishable because in that case, both separable elements of the mark were descriptive. *Id.* Here, in contrast, each of TCCC's ZERO-inclusive marks combines a brand name (Coca-Cola, Sprite, Fanta, etc.) with the highly descriptive if not generic term "zero." A view of the packaging for these products confirms that it is the brand name that dominates the commercial impression. In similar cases, the Board has rejected even "extensive" sales and advertising data to show acquired distinctiveness of the subservient terms. *See In re La. Fish Fry Prods.*, 2013

---

generally to avoid a disclaimer requirement, and particularly when a mark has not even been used. (*See* RC Init. Br. at 44-45 n.13.) *Cf. In re Perfetti Van Melle Benelux BV*, S.N. 77306624, 2011 WL 810193, at \*3 (T.T.A.B. Feb. 8, 2011) (rejecting registration based on a purported family of marks, and holding that a mark must be registrable in and of itself, "not on the basis of the use of other marks. Also, the concept of a family of marks is more relevant in the context of a likelihood of confusion analysis.").

WL 3191197, at \*14 (“Likewise, applicant’s sales and advertising while extensive do not shed any light on whether consumers perceive the term FISH FRY PRODUCTS as a source indicators since the term is used only in association with the name “Louisiana’ that . . . engenders the commercial impression of LOUISIANA brand “Fish Fry Products.’”). Thus, TCCC also has not and cannot establish acquired distinctiveness in the term “zero” through use of any of its individual ZERO-inclusive marks.

## **2. “Zero” Is Too Weak to Form the Basis of a Family of Marks**

In its initial trial brief, Royal Crown explained that “zero” is simply too weak to carry the weight of a protectable family of marks. (RC Init. Br. at 46-47.) Although TCCC did not address this issue in its own trial brief, the point bears repeating. As the Board has held, “the ‘family’ feature must be distinctive, not descriptive or highly suggestive or so commonly used in the trade that it cannot function as the ‘surname’ of the ‘family.’” *Master Builders, Inc. v. Polymerica, Inc.*, Consolidated Canc. No. 92030319, 2004 WL 407353, at \*13 (T.T.A.B. Feb. 24, 2004) (citations omitted). This rule developed because generic, descriptive and even highly suggestive terms are likely to be recognized for their dictionary meaning rather than as a source-identifying designation when used in composite marks. *See Am. Standard Inc. v. Scott & Fetzer Co.*, 200 U.S.P.Q. 457, 462 (T.T.A.B. 1978). Accordingly, in case after case, the Board has refused to find a family of marks where the common feature is generic, descriptive or even where it is suggestive. *See, e.g., Grant St. Grp., Inc. v. RealAuction.com LLC*, Opp. No. 91177493, 2009 WL 4086582, at \*4 (T.T.A.B. Sept. 29, 2009) (“auction” too descriptive to function as protectable family element); *Ferrotec (USA) Corp. v. Ferro Labs, Inc.*, Opp. No. 91174110, 2009 WL 273256, at \*4 (T.T.A.B. Jan. 29, 2009) (“ferro” too descriptive); *Master Builders*, 2004 WL 407353 at \*14 (“master” “highly suggestive” for goods at issue, cannot form

basis of family); *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 220 U.S.P.Q. 1072, 1075 (T.T.A.B. 1983) (“spice” generic and cannot form basis of family).

“Zero” is as weak as the generic or descriptive terms in the cited cases and, like those terms, is too weak to carry the weight of a family of marks. It is common sense, and the record demonstrates, that consumers, when they encounter ZERO as part of TCCC’s marks – or any of the other 32 beverages marks in the record – will understand that it identifies the beverage as having zero calories, not as identifying a beverage from only a single source. It is against such common sense for the Board to award TCCC a monopoly in that term by finding a family of marks in this case.

### **3. TCCC’s Evidence is Woefully Insufficient To Establish a Family of Marks**

TCCC’s evidence simply does not add up to meet the high standard needed to establish a family of marks. “[I]n order to establish a family of marks, it must be demonstrated that the marks asserted to comprise the ‘family,’ or a number of them, have been used and advertised in promotional material or used in everyday sales activities in such a manner as to create common exposure and thereafter recognition of common ownership based up on a feature common to each mark.” *Master Builders*, 2004 WL 407353, at \*13 (citations omitted). While TCCC has submitted marketing figures and examples of advertising for individual products sold under some of its ZERO-inclusive marks, its evidence related to promotion of its claimed family of ZERO marks is virtually non-existent. For instance, there is *no evidence* that the “approximately fifteen different beverage products sold in the United States”<sup>18</sup> allegedly offered by TCCC under

---

<sup>18</sup> The use of “approximately” is interesting in this sentence: How does TCCC not know exactly how many ZERO-inclusive marks it has used? Relatedly, TCCC’s brief never identifies the alleged fifteen members of its ZERO family. According to the evidence of record, there have actually been only 13 TCCC products sold under a ZERO-inclusive mark. (*See* RC Init. Br. at 17.)

ZERO-inclusive marks (TCCC Tr. Br. at 17) have *ever* been advertised together. TCCC also has offered *no evidence* on the amount of money spent to advertise ZERO-named products together. Although TCCC repeatedly asserts that “substantial amounts” have been spent for such purposes. (*see, e.g.*, TCCC Tr. Br. at 8, 19), the record support TCCC offers in the form of the deposition testimony of Russell Baker (*see* TCCC Tr. Br. at 19) is unavailing. Nowhere does Mr. Baker state that “substantial amounts” have been spent on family advertising or even make any reference as to how much may have been spent for such purposes. TCCC’s attempt to mislead the Board on what is in the record on such a critical issue indicates both a failure of evidence and TCCC’s recognition that such failure is fatal both to its defense of Royal Crown’s opposition and to establishing its claim against Royal Crown’s marks.

When the Board considers the evidence that is properly of record – namely, a scant five documents that purport to be marketing materials, each showing only a few of TCCC’s ZERO-named products, and none of which any TCCC witness could definitely state was ever deployed in the marketplace (*see* RC Init. Br. at 47-48) – it cannot conclude that TCCC has borne its high burden of establishing a family of marks with a common ZERO surname. *See OMS Invs., Inc. v. Cent. Garden & Pet Co.*, Opp. No. 91156249, 2006 WL 2066583, at \*8 (T.T.A.B. July 10, 2006) (although evidence suggested that marks may have been promoted together in displays, there was “no testimony as to how frequently such displays have been used, where in stores such displays are set up or how many people viewed such displays”; no family found); *World Triathlon Corp. v. Traditional Medicinals, Inc.*, Opp. No. 91110391, 2008 WL 4876562, at \*5 (T.T.A.B. Nov. 3, 2008) (opposer attempted to establish family through introducing a small number of advertisements and offering testimony and assertions in its brief claiming that there were other “similar presentations along with millions of dollars in advertising”; evidence found

insufficient to establish a family); *see also In re DGR Assocs., LLC*, S.N. 85143447, 2013 WL 3191594, at \*4 (T.T.A.B. June 7, 2013) (Board presumes that proponent has offered the best evidence it has).

#### **4. Even if TCCC Has a Family of ZERO Marks, It Cannot Establish Acquired Distinctiveness in ZERO**

As the Federal Circuit has explained, distinctiveness is acquired by “substantially exclusive and continuous use” of a mark in commerce. *Levi Strauss & Co. v. Genesco*, 222 U.S.P.Q. at 942. “When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term . . . , an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.” *Id.* at 940-41.

Here, there can be no real question that purchasers are confronted with numerous independent uses of the term ZERO as part of beverage marks, used in the same manner and for the same purpose as TCCC: to indicate to consumers a beverage with zero calories. TCCC tries to attack Royal Crown’s evidence by claiming that such uses are “isolated and relatively limited” and for “a small number of specialty, niche non-soft drink beverages.” (TCCC Tr. Br. at 9; *see also id.* at 42-44.) The implausibility of TCCC’s attack shows the depth of its desperation. Royal Crown submitted evidence of 32 beverages with ZERO-inclusive marks, which is far from a “small number.” And TCCC’s assertion that such uses were for “non-soft drink beverages” is ludicrous: the non-TCCC ZERO-inclusive marks are used for carbonated soft drinks (including DIET RITE PURE ZERO, VIRGIL’S ZERO,<sup>19</sup> BIG RED ZERO, and DIET CRISP ZERO,

---

<sup>19</sup> TCCC’s argument that the mark is not VIRGIL’S ZERO but rather “‘VIRGIL’S’ with ‘zero’ being used to modify the generic type of soft drink” (TCCC Tr. Br. at 43) is not only belied by the evidence but also does not help its argument. “Zero” is no less generic or descriptive when used to modify a soft drink type.

among others), for enhanced waters<sup>20</sup> (PROPEL ZERO among others), for juice-based drinks (ARNOLD PALMER ZERO and POMBERRY ZERO among others), for energy drinks<sup>21</sup> (RED BULL TOTAL ZERO, MONSTER ENERGY ABSOLUTELY ZERO, and IMPULSE ZERO, among others), and for other non-alcoholic (i.e., “soft”) drinks. Nor are the uses introduced by Royal Crown for “specialty, niche” beverages – unless you are of TCCC’s mindset that only Coca-Cola, Pepsi and Dr Pepper really matter. (*See* TCCC Tr. Br. at 9, 44.)

There can be no real question that TCCC has failed to establish that its use of ZERO-inclusive marks has been substantially exclusive in the beverage industry. This, alone, is sufficient to dispose of TCCC’s claim of acquired distinctiveness. *Sheetz of Del.*, 108 U.S.P.Q.2d at 1370.

#### **D. TCCC HAS NOT PROVEN ITS OPPOSITIONS TO ROYAL CROWN’S MARKS**

In what seems to be an afterthought and despite having the burden of proof, TCCC make a half-hearted attempt to argue that registration should be refused to Royal Crown’s DIET RITE PURE ZERO Marks under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).<sup>22</sup> To prevail on its Section 2(d) claim, TCCC has the burden of proving by a preponderance of the evidence both that it has priority of rights and that there is a likelihood of confusion between its marks and Royal Crown’s marks. *See Wal-Mart Stores, Inc. v. Loufrani*, S.N. 75977376, 2009 WL 873129,

---

<sup>20</sup> While TCCC conspicuously avoids any mention of it in its brief, TCCC itself offers a ZERO-named enhanced water product that competes directly with PROPEL ZERO, namely, VITAMINWATER ZERO. (Baker Dep. at 30:20-31, 43:113-18; PepsiCo Dep. at 25:21-25.)

<sup>21</sup> Some of TCCC’s applications at issue specifically reference energy drinks.

<sup>22</sup> TCCC also opposed Royal Crown’s marks under Section 2(a) of the Lanham Act, false suggestion of a connection. In its brief, TCCC explicitly abandons its claim under Section 2(a). (TCCC Tr. Br. at 45 n.18). Because TCCC has not pursued its claim under Section 2(a), the claim is deemed waived, *Swatch AG v. M. Z. Berger & Co.*, 108 U.S.P.Q.2d 1463, 1465 n.3 (T.T.A.B. 2013), and judgment in favor of Royal Crown should be entered on this count. *See, e.g., Rolex Watch U.S.A. Inc. v. AFP Imaging Corp.*,



at \*3 (T.T.A.B. Mar. 20, 2009). Even if the Board concludes that TCCC has satisfied its burden of proving that “zero” is not generic or, if only descriptive, has acquired distinctiveness, and therefore that TCCC has rights in ZERO to assert against Royal Crown, TCCC still has not presented evidence sufficient to establish either element of its Section 2(d) claim.

### **1. TCCC Premises Its Likelihood of Confusion Claim on Its Purported ZERO Family**

TCCC’s opposition to Royal Crown’s DIET RITE PURE ZERO Marks is based solely on a claim of priority in and likelihood of confusion with TCCC’s purported family of ZERO marks, not any of the individual ZERO-inclusive marks that make up the supposed family. In the opening section of its brief, TCCC unequivocally frames its opposition by stating that Royal Crown’s DIET RITE PURE ZERO and PURE ZERO marks “are likely to cause confusion with TCCC’s family of ZERO marks.” (TCCC Tr. Br. at 7.) Once TCCC gets to the likelihood of confusion section of its brief, TCCC repeatedly refers to its rights in the “ZERO Marks,” a phrase that TCCC defines to mean, collectively, the seventeen ZERO-inclusive marks that TCCC has applied to register.<sup>23</sup> (*Id.* at 17-18.) Then, TCCC proceeds to assess the likelihood of confusion factors solely in relation to its “ZERO Marks,” never in relation to any of the individual ZERO-inclusive marks. (*See, e.g.*, TCCC Tr. Br. at 47 (assessing similarity of the marks factor by referring solely to TCCC’s “ZERO Marks,” not by arguing that Royal Crown’s marks are similar to any of the individual ZERO-inclusive marks).) And TCCC concludes its confusion analysis by reiterating that the basis for its likelihood of confusion claim is its allegation that consumers will perceive Royal Crown’s DIET RITE PURE ZERO Marks to be

---

101 U.S.P.Q.2d 1188, 1189 (T.T.A.B. 2011), *decision vacated on other grounds by* 107 U.S.P.Q.2d 1626 (T.T.A.B. 2013).

<sup>23</sup> When referring to TCCC’s “ZERO Marks,” Royal Crown will maintain the quotation marks around the phrase to signify that it is being used as defined by TCCC.

part of TCCC's family of "ZERO Marks" (TCCC Br. at 48), notwithstanding the lack of any confusion and the decades of coexistence between TCCC's various brands and the DIET RITE brand.<sup>24</sup>

## **2. TCCC Cannot Establish Priority in Its Family of "ZERO Marks"**

In order to meet its burden of proof on the element of priority, TCCC must establish that its claimed family of "ZERO Marks" existed before Royal Crown's priority dates. Royal Crown's priority dates for purposes of this proceeding are its application dates: February 28, 2005 for the DIET RITE PURE ZERO mark, and March 7, 2005 for the PURE ZERO mark. *See Zirco Corp. v. Am. Tel. and Tel. Co.*, 21 U.S.P.Q.2d 1542, 1544 (T.T.A.B. 1992) (priority date for intent-to-use application is the filing date of application). Knowing this, TCCC attempts to establish priority by pointing to the purported September 2004 first use date of some unidentified "ZERO Marks" and the October 2003 filing date of its SPRITE ZERO application (TCCC Tr. Br. at 45-46.) TCCC, however, cannot rely on either of these dates to establish priority in the alleged family of "ZERO Marks" it asserts against Royal Crown

### **i. No "Family" Existed Prior to February and March 2005**

TCCC claims priority by asserting that it "has used its ZERO Marks since at least as early as September 2004." (TCCC Tr. Br. at 45.) But the uncontroverted evidence is that before Royal Crown's priority dates of February and March 2005, the only ZERO-inclusive mark used

---

<sup>24</sup> To the extent that TCCC's Consolidated Notice of Opposition can be read as also including a Section 2(d) claim on the basis of a conflict with any individual ZERO-inclusive mark, such claims were waived when TCCC did not advance them in its initial trial brief and thus can no longer be considered by the Board. *See Cortex Biochem, Inc. v. Roche Diagnostics GmbH*, Opp. No. 91123244, 2005 WL 1285671, at \*14 n.17 (T.T.A.B. May 12, 2005) (dismissing opposition where opposer's 2(d) claim was based on its family of marks and Board found that no family existed, and refusing to consider likelihood of confusion with any of opposer's individual marks because opposer had not made that argument); *cf. Gilmar S.p.A. v. BBC Ice Cream, LLC*, Opp. No. 91158491, 2010 WL 667932, at \*3 (T.T.A.B. Jan. 25, 2010) (finding opposer waived claim of likelihood of confusion with family of marks where opposer did not discuss the allegation in its brief).

by TCCC was the now-abandoned DIET SPRITE ZERO,<sup>25</sup> a mark that is not included in the list of “ZERO Marks” that allegedly form the family of marks upon which TCCC relies for its Section 2(d) claim. (See TCCC Tr. Br. at 17-18.) In fact, TCCC did not begin using any of the marks that make up its claimed family of “ZERO Marks” until it introduced COCA-COLA ZERO in the summer of 2005 – *months* after Royal Crown’s priority dates. (See Baker Dep. Tr. at 62:13-20, 168:17-21; *see also* RC300 (Responses to RFAs) Nos. 144-145, 147-162, 164-179, and 181-194 (admitting that none of TCCC’s ZERO-inclusive marks, other than DIET SPRITE ZERO, were in use as of February 28, 2005).)

It is simply impossible for TCCC to establish a “family” before even a single member of the purported family had ever been used. *See Gen. Motors Corp. v. ICRC-Integrated Concepts & Research Corp.*, Opp. No. 91152661, 2007 WL 683779, at \*15 (T.T.A.B. Mar. 2, 2007) (reliance on the family of marks doctrine requires opposer to “demonstrate [ ] that prior to applicant’s [priority date], the various marks said to constitute the family, or at least a good number of them, were used and promoted together ...”); *see also Gilmar S.p.A. v. Drifa ehf.*, Opp. No. 91180851, 2010 WL 5010894, at \*3 (T.T.A.B. Nov. 24, 2010) (granting partial summary judgment on claim that applicant’s mark conflicted with opposer’s family of marks, where evidence showed that only one mark in the purported family had been used prior to applicant’s priority dates).

As TCCC is incapable of establishing the existence of a family of “ZERO Marks” earlier than either of Royal Crown’s priority dates, TCCC’s Section 2(d) claim fails. *See IOIP Holdings, LLC v. Ontel Prods. Corp.*, Opp. No. 91197243, 2012 WL 5331305, at \* 2 (T.T.A.B.

---

<sup>25</sup> TCCC no longer uses the DIET SPRITE ZERO mark (Baker Dep. Tr. at 62: 1-4), and it was not until 2006, a year after Royal Crown’s priority dates, that DIET SPRITE ZERO became SPRITE ZERO. (*Id.* at 61:17-62:4.)

Oct. 9, 2012) (where opposer had not established that its family of marks “was created prior to the earliest priority date that applicant may rely upon, in this case, the filing date of the application, . . . opposer’s likelihood of confusion ground cannot be based on the purported family of [] marks”); *Asics Corp. v. Brazzell*, Cancellation No. 92024536, 2001 WL 253602, at \*1 (T.T.A.B. Mar. 14, 2001) (denying summary judgment because petitioner had not established that its family mark had acquired distinctiveness prior to filing date of respondent’s application); *see also Hoover Co. v. Royal Appliance Mfg. Co.*, 57 U.S.P.Q.2d 1720, 1722 (Fed. Cir. 2001) (affirming dismissal of Section 2(d) opposition where opposer could not establish acquired distinctiveness in its mark before applicant’s priority date).

ii. No Protectable Rights Existed Prior to February and March 2005

Not only has TCCC failed to establish the existence of a “family” of marks before Royal Crown’s priority dates, it also has failed to established the existence of any protectable rights in the term “zero” prior to that time.

“Priority of rights” does not mean priority of use or application date; it means priority of rights in a valid trademark. For a descriptive term, valid trademark rights do not develop until the term has developed acquired distinctiveness. *Towers v. Advent Software Inc.*, 16 U.S.P.Q.2d 1039, 1041 (Fed. Cir. 1990) (confirming that an opposer must show secondary meaning in a descriptive term before an applicant’s priority date) (citing *Otto Roth & Co., Inc. v. Universal Foods Corp.*, 209 U.S.P.Q. 40, 43 (C.C.P.A. 1981)). Since it is indisputable that the ZERO portion of TCCC’s mark is at least descriptive, TCCC must prove that its use of ZERO acquired distinctiveness prior to Royal Crown’s priority dates. TCCC cannot do so, since, as discussed above, none of its claimed “ZERO Marks” were in use prior to Royal Crown’s priority dates. *See Diak v. Crafts Americana Grp., Inc.*, Opp. No. 91195102, 2013 WL 5946236, at \*5

(T.T.A.B. Oct. 22, 2013) (opposer could not establish acquired distinctiveness when there was no evidence of use prior to applicant's priority date). Nor can TCCC rely on the Simonson Survey to establish acquired distinctiveness, since that survey was conducted in September 2008, more than three-and-half years *after* Royal Crown's priority dates. Any secondary meaning that may be shown by a survey undertaken in September 2008 cannot be extrapolated back to February and March 2005, which is before the COCA-COLA ZERO product – or the advertising machine behind it – were launched. TCCC's survey expert admitted as much. (Simonson Dep. at 89:3-14.) Therefore, even assuming "zero" is not generic and that as some point TCCC could establish acquired distinctiveness in the term, TCCC cannot establish that any such acquired distinctiveness existed as of February or March 2005, and TCCC's priority claim thus also fails for lack of proof of acquired distinctiveness before the relevant time period.

### **3. TCCC Has Not Proven That Royal Crown's Marks Are Likely to Cause Confusion With TCCC's Claimed Family of "ZERO Marks"**

While TCCC's inability to establish priority of rights is fatal to its Section 2(d) claim, TCCC also has not carried its burden of proving that Royal Crown's use of either of the DIET RITE PURE ZERO Marks is likely to cause confusion with TCCC's claimed family of "ZERO Marks." Its claim therefore fails on this basis as well.

While recognizing the need for the Board to assess all of the relevant the factors set out in *In re E.I. du Pont de Nemours & Co.*, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973) (the "*du Pont* factors"), TCCC's brief addresses only four: the strength of the claimed "ZERO Marks," the similarity of the parties' marks, the similarity of the parties' goods, and the similarity of the parties' trade channels. (TCCC Tr. Br. at 46-49.) Significantly, TCCC fails to address the *du Pont* factor considering the nature and number of similar marks, which demonstrates that ZERO is a weak term, used by the industry and recognized by consumers to mean zero calories, and not

as a source-identifier; fails to address the *du Pont* factors considering the extent of actual confusion and the length of coexistence without confusion, ignoring the fact that the parties' marks have been coexisting in the marketplace for nearly *nine years* with absolutely *no* evidence of confusion; and fails to address that consumers can readily distinguish among the parties' products by virtue of the parties' use of recognized brand names that reveal source and have been coexisting without confusion for decades.

The *du Pont* factors are intended to be a guide to assist the Board in determining whether there is any likelihood of confusion. They are not to be applied in any formulaic manner, and certainly their application cannot trump common sense. For over half a century, DIET RITE soft drinks have been sold in the United States. Never has TCCC suggested that consumers believe that DIET RITE soda comes from or is associated with TCCC. It is absurd to suggest that confusion will suddenly occur merely because Royal Crown and TCCC both append the word "zero" to their branded products to signal that the products have zero calories. And the market has borne out that such confusion is not likely, as no confusion has occurred despite nine years of coexistence. Just as consumers are not likely to believe that all products using the word DIET or LITE come from the same source, so too are consumers unlikely to believe that the addition of the word ZERO to established brand names will create confusion where none has ever existed.

i. TCCC's Claimed Family of "ZERO Marks"  
Is Weak and Entitled to Very Limited Protection

In its analysis of the strength of its claimed ZERO family, TCCC conveniently ignores another of the *du Pont* factors critical to analyzing that strength: the number and nature of similar marks in use on similar goods. *du Pont*, 177 U.S.P.Q. at 567. "Evidence of a third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection." *Palm Bay Imps., Inc. v. Veuve Cliquot Ponsardin*

*Maison Fondée En 1772*, 73 U.P.S.Q.2d 1689, 1693 (Fed. Cir. 2005). The same evidence that demonstrates that TCCC does not, in fact, own a family of marks (*see* Section C.2-3, *supra*) also demonstrates that, to the extent any such family exists, it is incredibly weak.

First, as demonstrated in Royal Crown’s opening brief and as discussed in more detail above (RC Init. Br. at 22-27 and evidence cited therein; Section B.3.i, C.4, *supra*), TCCC’s use of ZERO-inclusive marks is far from exclusive. Royal Crown made of record 32 zero-calorie soft drinks with ZERO-inclusive names, including products of TCCC’s biggest competitors: PROPEL ZERO by PepsiCo and DIET RITE PURE ZERO by Royal Crown. This evidence conclusively establishes that TCCC’s claimed “ZERO Marks” lack commercial strength, regardless of the sales and marketing evidence to which TCCC points. *See Gen. Motors*, 2007 WL 683779, at \*14 (concluding SMART to be a weak formative in light of numerous third-party marks, including a mark by one of opposer’s primary competitors); *In re Hartz Hotel Servs., Inc.*, 102 U.S.P.Q.2d 1150, 1155 (T.T.A.B. 2012) (“Because of the highly suggestive nature of the mark ‘Grand Hotel,’ the proliferation of registered ‘Grand Hotel’ marks and the unregistered uses of ‘Grand Hotel’ marks, the mark ‘Grand Hotel,’ itself, is entitled to only a very narrow scope of protection or exclusivity of use.); *In re Lucky Co.*, 209 U.S.P.Q. 422, 423 (T.T.A.B. 1980) (third-party dilution leaves the users “with marks that are extremely weak and certainly entitled to only a very narrow and limited scope of protection”).

TCCC’s varied attacks on this evidence cannot overcome the sheer number of third-party ZERO marks introduced into the record. (*See* RC Init. Br. at 22-27 and evidence cited therein; Section B.3.i, C.4, *supra*.) The Board has determined marks to be weak and deserving of very limited protection on the basis of far less third-party evidence than introduced here. *See, e.g., Mfrs. Technical Insts., Inc. v. Pinnacle Coll., LLC*, Opp. No. 91195896, 2013 WL 5402083, at \*9

(T.T.A.B. Sept. 4, 2013) (finding PINNACLE mark weak based on Internet evidence of five third-party marks).

While evidence of 32 ZERO-inclusive beverage marks in the marketplace not owned by TCCC undercuts TCCC's arguments regarding the commercial strength of its claimed ZERO family, TCCC's claimed ZERO family lacks inherent strength as well. "Zero" is a common English word used throughout the beverage industry not to convey source, but to convey information about the zero-calorie nature of the products. Royal Crown submitted evidence of 68 third-party applications and registrations for non-alcoholic beverages containing the term or numeral zero. (RC192-RC258.) The sheer magnitude of this evidence conclusively establishes that TCCC's claimed family of "ZERO Marks" lacks inherent strength. "A mark may be shown to be weak . . . based on a number of third-party registrations serving to show that it has a suggestive or descriptive meaning in th[e] field." *Bluebonnet Nutrition Corp. v. New Vitality*, Opp. No. 91201410, 2013 WL 4397056 at \*7 (T.T.A.B. Aug. 5, 2013); *see also Rocket Trademarks Pty. Ltd. v. Phard S.p.A.*, 98 U.S.P.Q.2d 1066, 1078 (T.T.A.B. 2011) (finding that where both opposer's and applicant's mark included the term ELEMENT(S), evidence of third-party use of the term ELEMENT(S), either alone or in conjunction with other terms, tended to show that "consumers are able to distinguish among ELEMENT(S) marks based on other terms in the marks"); *Gulf States Paper Corp. v. Hammermill Paper Co.*, 135 U.S.P.Q. 456, 458 (T.T.A.B. 1962) (holding that third-party registrations for marks that included the term E-Z showed that "the term 'E-Z', per se, is inherently weak" and thus opposer's claimed family of E-Z marks not entitled to protection).



In sum, TCCC cannot escape the unavoidable conclusion that, even if it owns a family of “ZERO Marks” (which it does not), its family is incredibly weak and is entitled to a very narrow scope of protection.

ii. The Parties’ Marks Do Not Convey Similar Commercial Impressions

The same considerations that make TCCC’s claimed family of “ZERO Marks” weak – the inherent weakness of ZERO as a mark for beverages and the commercial impact of extensive third-party use – render TCCC’s speculation as to the similarity of the marks’ commercial impression baseless.

As TCCC admits, the marks at issue are compound marks, with the first part of the marks being wholly distinct and not likely to cause confusion, and with the only similarity found in the term “zero.” (TCCC Tr. Br. at 47.) That the parties’ marks share a term also used by dozens of other products in the market for the same purpose – to educate consumers about the zero-calorie nature of the products – cannot support a finding of likelihood of confusion. Among other things, a crowded field of ZERO-inclusive marks has conditioned consumers to understand that ZERO does not indicate origin, and that they must look instead to other elements of the marks to determine source. *See In re Broadway Chicken Inc.*, 38 U.S.P.Q.2d 1559, 1565-66 (T.T.A.B. 1996); *see also, e.g., Tektronix, Inc. v. Daktronics, Inc.*, 189 U.S.P.Q. 693, 694 (C.C.P.A. 1976) (no likelihood of confusion where parties adopted TRONICS and TRONIX portions of mark “to convey the dictionary meaning thereof, namely, that their products are electronic in character”); *Condé Nast Publ’ns, Inc. v. Miss Quality, Inc.*, 184 U.S.P.Q. 422, 425 (C.C.P.A. 1975) (COUNTRY VOGUES not likely to be confused with VOGUE, where VOGUES used in “its normal and well-known meaning”) (citation omitted).

There can be no argument that there are significant differences between the parties' marks. Each of TCCC's ZERO-inclusive marks begins with the brand name of the beverage, such as Coca-Cola, Sprite, Fanta, *etc.* Likewise, Royal Crown's DIET RITE PURE ZERO mark begins with the brand name DIET RITE, and the PURE ZERO mark begins with a non-ZERO term as well. These differences are particularly significant here, because the brand name portions of the parties' marks have been extensively used and marketed – for decades in most cases – without any allegation of confusion. (*See, e.g.*, Springate Trial Decl. ¶ 10 (DIET RITE mark used since 1958); RC300 (Responses to RFAs) No. 197 (SPRITE mark used since 1961).) And these differences become magnified in the crowded field of ZERO-inclusive marks and eviscerate any likelihood of confusion. *See In re Hartz Hotel*, 102 U.S.P.Q.2d at 1155 (given widespread use and registration of GRAND HOTEL marks, “consumers are able to distinguish between different GRAND HOTEL marks based on small differences in the marks . . .”).

While TCCC makes the unsupported assertion that “consumers likely will focus on the word ZERO” in the parties' marks (TCCC Tr. Br. at 47), it made the completely opposite argument to the PTO in its response to an office action concerning its abandoned ZERO (stylized) mark (Application Serial No. 78459300). (*See* RC281.) Specifically, TCCC asserted in its office action response that, in light of the numerous third-party registrations for ZERO-inclusive marks, the term ZERO “as applied to soft drinks[] is a relatively ‘weak’ designation” (*id.* at 3), and that, therefore, “the evidence suggests that consumers would be accustomed to distinguishing between marks containing such highly suggestive matter based on other elements of the marks.” (*Id.* at 5.)<sup>26</sup> Applying TCCC's own argument to the facts at hand, consumers will

---

<sup>26</sup> While this admission is not dispositive, it is still relevant to the issue of likelihood of confusion in this proceeding. *See Orange 21 N. Am. Inc. v. Beryll Brand Div. Est.*, Opp. No. 91181440, 2012 WL 684463,

be able to readily distinguish among TCCC's and Royal Crown's respective marks due to their inclusion of highly differentiated brands that have been coexisting in some cases for decades without confusion. *See Fortunoff Silver Sales, Inc. v. Norman Press, Inc.*, 225 U.S.P.Q. 863, 868 (T.T.A.B. 1985) (holding that consumers unlikely to confuse applicant's NORMAN PRESS THE JEWELERS SOURCE mark with opposer's FORTUNOFF, THE SOURCE mark because "purchasers are so conditioned by third party uses of the term 'source' by others in the same field of commerce as the parties are engaged that they would be unlikely to treat the term 'source' as a term which distinguishes source"). That the brand names come first in the multi-component marks further supports the conclusion that "zero" will not be the focus of source recognition for consumers. *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 U.S.P.Q.2d 1895, 1897 (T.T.A.B. 1988) ("[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.").

The inherently weak nature of the ZERO portion of the parties' marks additionally supports the conclusion that consumers will focus on the non-ZERO portion of the marks. Consumers who encounter the word ZERO in the parties' marks are likely to attribute it to its generic or highly descriptive meaning, *i.e.* beverages that have zero calories, and thus their focus will instead be on other distinctive terms in the marks, namely, the well-known brand names. *Coach/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 U.S.P.Q.2d 1458, 1478 (T.T.A.B. 2014) ("The addition of matter has been found sufficient to distinguish the marks under circumstances where the common element is descriptive or highly suggestive."), *see also Sports Auth. Mich., Inc. v. PC Auth., Inc.*, Opp. No. 113785, 2002 WL 745589, at \*23 (T.T.A.B. Apr.

---

at \*8 (T.T.A.B. Feb. 21, 2012) (finding opposer's admission against interest in response to office action relevant to "illumin[ate] the shade and tone in the total picture confronting the decision maker").

16, 2002) (applicant's THE PERSONAL COMPUTER AUTHORITY mark was not likely to cause confusion with opposer's family of "\_\_\_\_\_ AUTHORITY" marks in part because of limited strength of opposer's AUTHORITY family).

The case of *General Motors Corp. v. ICRC – Integrated Concepts & Research Corp.*, Opp. No. 91152661, 2007 WL 683779 (T.T.A.B. Mar. 2, 2007), is almost directly parallel. Applicant applied to register the mark SMARTRUCK for armored vehicles and related services, which General Motors Corporation ("GM") opposed on the ground that it was likely to cause confusion with GM's several SMART-formative marks, including SMARTTRAK. *Id.* at \*1. The Board held that the parties' respective marks were not similar. Focusing on applicant's SMARTTRUCK mark and GM's SMARTTRAK mark, the Board stated that the term "smart" was highly suggestive for the parties' respective goods, as confirmed by the number of similar marks registered in connection with related goods and services, and thus consumers would "look to other portions of the composite marks to find distinguishing matter," namely "truck" versus "trak." *Id.* at \*12. The existence of distinguishing matter allowed the Board to conclude that the marks were not sufficiently similar for confusion to occur. *Id.* at \*13, \*17; *see also Rocket Trademarks*, 98 U.S.P.Q.2d at 1074-75 (finding that applicant's ZU ELEMENTS mark was not similar to opposer's ELEMENT and ELEMENTALITY marks because consumers were likely to attribute a meaning to the term ELEMENTS in applicant's mark that was suggestive of apparel items and focus instead on the ZU portion of the mark); *Full Speed Ahead, Inc. v. SRAM Corp.*, Opp. No. 91171889, 2008 WL 5256412, at \*9-10 (T.T.A.B. Dec. 10, 2008) (applicant's SRAM FORCE mark was not similar to opposer's K FORCE mark because the shared word was weak in the relevant field); *Knight Textile Corp. v. Jones Inv. Co.*, 75 U.S.P.Q.2d 1313, 1315 (T.T.A.B. 2005); (NORTON MCNAUGHTON ESSENTIALS is not likely to be confused with

prior ESSENTIALS mark because “the word ESSENTIALS is highly suggestive as applied to the parties’ clothing items”); *cf. 7-Eleven, Inc. v. Wechsler*, 83 U.S.P.Q.2d 1715, 1720 (T.T.A.B 2007) (although finding family in opposer’s GULP marks, holding that applicant’s GULPY mark was not sufficiently similar to GULP family).

Given the overall differences between Royal Crown’s DIET RITE PURE ZERO Marks and TCCC’s claimed family of “ZERO Marks,” consumers simply “are not likely to mistakenly assume that [Royal Crown’s] goods bear any source or other relationship to [TCCC] or [TCCC’s] . . . goods,” making confusion between the parties’ marks and products unlikely. *Knight Textile*, 75 U.S.P.Q. 2d at 1317 (“[T]he dissimilarity of the marks, under the first *du Pont* factor, simply outweighs the evidence as to the other factors which favor opposer’s case.”).

iii. No Evidence of Actual Confusion During Nine Years of Coexistence  
Means No Likelihood of Confusion

Although the parties’ products are similar, the consumers overlap and the marketing channels are the same, that has been true for the parties’ products throughout their existence, and yet there has never been any suggestion of confusion between DIET RITE branded goods and any of TCCC’s branded goods. The addition of the word “zero” to the parties’ established brands that consumers have been buying for decades without confusion will not change this – and *has* not changed this, as the marketplace has borne out. TCCC conveniently ignores this fact or any discussion of the *du Pont* factors considering whether there has been any actual confusion and how long the parties’ marks have coexisted without such confusion. *du Pont*, 177 U.S.P.Q. at 567. Both of these factors weigh decidedly in Royal Crown’s favor.

Royal Crown launched its DIET RITE PURE ZERO beverage in the summer of 2005 (Springate Trial Decl. ¶ 14), within weeks of TCCC’s launch of COCA-COLA ZERO. (Baker Dep. at 62:13-20, 168:17-21.) Ever since that time, Royal Crown’s DIET RITE PURE ZERO

product has coexisted alongside TCCC's ZERO-named products – a period of nearly nine years at this point. Yet in all this time, *neither* party has learned of a *single* consumer who has been confused. (RC121 (TCCC's Responses to RFAs) Nos. 71-98); RC125 (TCCC's Responses to Interrogatories) No. 9.) The lack of actual confusion is particularly meaningful in this case because there has been substantial opportunity for actual confusion to occur, as both parties' products are sold nationwide at many of the same stores. *See Gillette Can. Inc. v. Ranir Corp.*, 23 U.S.P.Q.2d 1768, 1774 (T.T.A.B. 1992) (observing that absence of actual confusion is meaningful where “the record indicated appreciable and continuous use by applicant of its mark for a significant period of time in the same markets as those served by opposer under its marks”).

Coexistence for approximately nine years without a single instance of actual confusion under conditions in which confusion would have occurred is powerful evidence that there is in fact no *likelihood* of confusion either. *See Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 U.S.P.Q.2d 1645, 1660-62 (T.T.A.B. 2010).

#### **4. There Is No Likelihood of Confusion Between Royal Crown's Marks and TCCC's Individual ZERO Marks**

Although TCCC has waived any argument that Royal Crown's DIET RITE PURE ZERO Marks are likely to be confused with any of TCCC's individual ZERO-inclusive mark (n.28, *supra*), the issue is addressed here briefly for the sake of completeness.

To start, TCCC has priority over Royal Crown's February 28 and March 7, 2005 application priority dates with respect to only two of its individual ZERO-inclusive marks: SPRITE ZERO, based on its October 20, 2003 application date; and COCA-COLA ZERO, based on its March 4, 2005 application date. The SPRITE ZERO mark has priority over both of Royal Crown's marks, and the COCA-COLA ZERO mark has priority only over the PURE ZERO mark.

The *du Pont* factors do not point to a likelihood of confusion with respect to either of these marks. First, the parties' respective marks are not similar in the least. The only shared feature of the marks is the term "zero," and, as described above, in light of the term's weak nature and the fact that third parties extensively use the term in connection with beverage products, consumers will focus on the other terms in the marks. *See Gen. Motors*, 2007 WL 683779, at \*12-13. Here, the other terms include each parties' brand names, which the parties have been using for decades without any claim of confusion. Thus, consumers will direct their focus to the non-ZERO terms, making likelihood of confusion impossible. *See Coach/Braunsdorf*, 110 U.S.P.Q.2d at 1478. Moreover, as described above, there has been no actual confusion between TCCC's SPRITE ZERO or COCA-COLA ZERO marks and Royal Crown's marks despite nine years of coexistence. (*See* Section D.3.iii, *supra*) This strongly suggests that there is no likelihood of any confusion either. *See Citigroup*, 94 U.S.P.Q.2d at 1660-62.

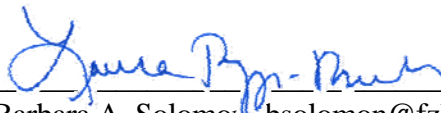
The bottom line is that TCCC cannot prevail on its Section 2(d) claim from any angle.

### III. CONCLUSION

Despite TCCC's best efforts to overstate its own evidence, ignore Royal Crown's evidence, and misstate the law, the record of this case makes clear that "zero" is a generic term when used in connection with TCCC's beverage products, has been used as such throughout the beverage industry, and is recognized as such by consumers. Because TCCC has failed to sustain its burden of establishing valid, protectable rights in the term "zero," either alone or as part of a purported family of marks, the Board should (i) hold that ZERO, as used in connection with TCCC's marks, to be either generic or descriptive without secondary meaning, and refuse registration to the opposed marks without disclaimer of the term; and (ii) dismiss as meritless TCCC's opposition to Royal Crown's DIET RITE PURE ZERO and PURE ZERO marks.

Dated: New York, New York  
July 14, 2014

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By:   
Barbara A. Solomon (bsolomon@fzlj.com)  
Laura Popp-Rosenberg (lpopp-rosenberg@fzlj.com)  
Emily Weiss (eweiss@fzlj.com)


866 United Nations Plaza  
New York, New York 10017  
Phone: (212) 813-5900

*Attorneys for Royal Crown Company, Inc. and  
Dr Pepper/Seven Up, Inc.*



**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing **Second Trial Brief for Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc.** to be deposited with the United States Postal Service as priority mail, postage prepaid, in an envelope addressed counsel for The Coca-Cola Company, Bruce W. Baber, Esq., King & Spalding LLP, 1185 Avenue of the Americas, New York, New York 10036-4003, on this 14<sup>th</sup> day of July 2014.



---

Emily Weiss