

**THIS OPINION  
IS NOT A PRECEDENT OF  
THE TTAB**

Mailed: May 2, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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Companhia de Bebidas das Américas - AMBEV

v.

The Coca Cola Company  
\_\_\_\_\_

Opposition Nos. 91178953; 91180439; 91180442; 91183447; 91183448;  
91183452; 91183464; 91183465; 91183467; 91185734; 91185739;  
91185750; 91186620; 91186661; 91188229; 91188396; and 91189018<sup>1</sup>

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W. Mack Webner and Jody H. Drake of Sughrue Mion, PLLC for  
Companhia de Bebidas das Américas - AMBEV.

Bruce W. Baber of King & Spalding LLP for The Coca-Cola Company.

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Before Bucher, Zervas, and Shaw,  
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

The Coca-Cola Company ("TCCC" or "applicant") has filed seventeen applications for the following marks, all containing, *inter alia*, the term ZERO for use on "beverages, namely soft drinks; syrups and concentrates for the making of the same," in International Class 32.

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<sup>1</sup> Consolidated on May 5, 2008, December 24, 2008 and March 6, 2009.

SPRITE ZERO<sup>2</sup>  
COCA-COLA ZERO<sup>3</sup>  
FANTA ZERO<sup>4</sup>  
COKE ZERO<sup>5</sup>  
VAULT ZERO<sup>6</sup>  
PIBB ZERO<sup>7</sup>  
COKE ZERO ENERGY<sup>8</sup>  
COKE ZERO BOLD<sup>9</sup>  
COKE CHERRY ZERO<sup>10</sup>  
CHERRY COCA-COLA ZERO<sup>11</sup>  
COCA-COLA CHERRY ZERO<sup>12</sup>  
CHERRY COKE ZERO<sup>13</sup>  
COCA-COLA VANILLA ZERO<sup>14</sup>  
VANILLA COKE ZERO<sup>15</sup>  
VANILLA COCA-COLA ZERO<sup>16</sup>  
POWERADE ZERO<sup>17</sup>  
FULL THROTTLE ZERO<sup>18</sup>

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<sup>2</sup> Application Ser. No. 78316078, filed October 20, 2003, alleging first use anywhere and in commerce on September 13, 2004.

<sup>3</sup> Application Ser. No. 78580598, filed March 4, 2005, alleging first use anywhere and in commerce on June 13, 2005.

<sup>4</sup> Application Ser. No. 78620677, filed May 2, 2005, alleging a bona fide intent to use the mark.

<sup>5</sup> Application Ser. No. 78664176, filed July 6, 2005, alleging first use anywhere and in commerce on June 13, 2005.

<sup>6</sup> Application Ser. No. 78698990, filed August 24, 2005, alleging first use anywhere and in commerce on December 2, 2005.

<sup>7</sup> Application Ser. No. 77097644, filed February 27, 2007, alleging first use anywhere and in commerce as July 2005.

<sup>8</sup> Application Ser. No. 76674382, filed March 22, 2007, alleging a bona fide intent to use the mark.

<sup>9</sup> Application Ser. No. 76674383, filed March 22, 2007, alleging a bona fide intent to use the mark.

<sup>10</sup> Application Ser. No. 77175066, filed May 8, 2007, alleging first use anywhere and in commerce on January 29, 2007.

<sup>11</sup> Application Ser. No. 77175127, filed May 8, 2007, alleging a bona fide intent to use the mark.

<sup>12</sup> Application Ser. No. 77176279, filed May 9, 2007, alleging first use anywhere and in commerce on January 29, 2007.

<sup>13</sup> Application Ser. No. 77176127, filed May 9, 2007, alleging a bona fide intent to use the mark.

<sup>14</sup> Application Ser. No. 77176108, filed May 9, 2007, alleging a bona fide intent to use the mark.

<sup>15</sup> Application Ser. No. 77176099, filed May 9, 2007, alleging a bona fide intent to use the mark.

<sup>16</sup> Application Ser. No. 77257653, filed August 17, 2007, alleging a bona fide intent to use the mark.

<sup>17</sup> Application Ser. No. 77309752, filed October 22, 2007, alleging first use anywhere and in commerce as May 2008.

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In each of these applications TCCC has claimed that ZERO has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

Companhia de Bebidas das Américas - AMBEV ("Ambev" or "opposer") has opposed registration of each application on the same grounds, namely, that the term ZERO is merely descriptive and that the evidence of acquired distinctiveness is insufficient to permit registration on the Principal Register under Section 2(f).

Applicant, in its answer, denied the salient allegations of the notice of opposition. The case is fully briefed and an oral hearing was held on October 5, 2011.

#### **The Record**

The evidence of record, as fully referenced in the parties' briefs, is voluminous, consisting of the pleadings, the files of the involved applications, third party registrations of marks including the term ZERO, surveys and testimony depositions on behalf of opposer and applicant, respectively, all with accompanying exhibits, and numerous additional exhibits made of record by the parties' notices of reliance (NOR).

#### **Opposer's Evidentiary Objections**

Ambev has made two objections to TCCC's evidence.

First, Ambev objects to the survey and testimony of TCCC's expert witness, Dr. Simonson, as improper rebuttal because he was

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<sup>18</sup> Application Ser. No. 77413618, filed March 5, 2008, alleging

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identified only as a rebuttal witness, not as a witness for TCCC's case in chief.<sup>19</sup>

As background, we note that during its main testimony period, opposer introduced the testimony deposition of Dr. Thomas D. Dupont, former President of D2 Research, a company that specialized in designing and conducting surveys to measure consumer perception. Dr. Dupont, through D2 Research, conducted a survey to determine "the main function of the word "zero" . . . in the brand name Coca-Cola Zero." Dupont testimony at 6.

Applicant introduced the testimony deposition of Dr. Alex Simonson, applicant's expert witness regarding surveys. Dr. Simonson was identified by applicant in its expert disclosures as a rebuttal witness. Applicant's Br. at 29. Dr. Simonson critiqued the survey conducted by Dr. Dupont and opined as to how the survey should have been conducted. Dr. Simonson also conducted a "standard secondary meaning survey as to ZERO." *Id* at 12.

Ambev argues that the Simonson survey and testimony should be excluded because it constitutes improper rebuttal in that it did not "test the same question that was posed in the Ambev survey it purports to rebut." Opposer's Br. at 7, n.2. Ambev is correct that TCCC identified Simonson as a rebuttal witness and therefore his survey and testimony should be limited to rebuttal.

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a bona fide intent to use the mark.

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However, the rebuttal survey and testimony need not be limited to the same question that was posed in Ambev's survey. The purpose of rebuttal is to "introduce facts and witnesses appropriate to deny, explain or discredit the facts and witnesses adduced by the opponent. . . ." *Royal Crown Cola Co. v. Bakers Franchise Corp.*, 150 USPQ 698, 700 (TTAB 1966), *affirmed*, 160 USPQ 192, (CCPA 1969).

Because Dr. Simonson's survey and testimony regarding that survey are proper rebuttal to the extent that they bear on the validity and probative value of the Dupont survey, Ambev's objection is not well taken. Moreover, the fact that evidence might have been offered in chief does not preclude its admission as rebuttal. *Data Packaging Corp. v. Morning Star, Inc.*, 212 USPQ 109, 113 (TTAB 1981). Accordingly, we have considered the Simonson survey and testimony to the extent that they seek to "deny, explain or discredit" Ambev's survey and testimony. *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1625 n.33 (TTAB 1989). To that extent, Ambev's objection is overruled.

Second, Ambev objects to the portion of TCCC's notice of reliance that was filed on Ambev's responses to Applicant's Requests for Documents and Things. Opposer's Br. at 7, n.3. Ambev argues that responses to document requests are not

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<sup>19</sup> Neither party challenged the qualifications of the other's expert; we therefore accept that both experts are qualified to offer expert testimony.

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admissible under a notice of reliance. TCCC responds that it is not relying on any documents produced but only upon Ambev's written responses, which are properly submitted through a notice of reliance. Applicant's Br. at 11, n.2.

Documents produced in response to document requests may not be submitted via a notice of reliance except to the extent they are admissible by notice of reliance under Trademark Rule 2.122(e) (printed publications and official records).

Conversely, written responses to document production requests, for example, indicating that no responsive documents exist, may be submitted via a notice of reliance. See *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1886 at n.5 (TTAB 2008). Since TCCC is only relying on Ambev's written responses, the objection is overruled.

### **Preliminary Issues**

#### **A. Whether Genericness was Tried by the Parties**

As indicated above, opposer pleaded in its notice of opposition that the term ZERO is merely descriptive of applicant's goods and that opposer, by virtue of being in the beverage industry, "is in a position to use in the future the term ZERO descriptively in its ordinary descriptive sense in connection with its beverage products." Notice of Opposition dated August 15, 2007. Ambev did not raise the issue of genericness in any of its seventeen notices of opposition. Ambev argues in its brief that that "ZERO defines a genus of soft drink

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and is incapable of becoming a trademark for Coke's colas and other soft drinks." Opposer's Br. at 19. TCCC objects to this characterization of the issues before the Board on the ground that Ambev is raising the issue of genericness for the first time and the issue was neither pleaded nor litigated by the parties. Applicant's Br. at 38. TCCC's objection is well taken.

Since Ambev did not raise the issue of genericness in any of its notices of opposition, we may consider the issue only if we find that the issue was tried by the consent of the parties. Implied consent to the trial of an unpleaded issue can be found only where the nonoffering party (1) raised no objection to the introduction of evidence on the issue, and (2) was fairly apprised that the evidence was being offered in support of the issue. There must be no doubt that the non-moving party was aware that the issue was being tried. TBMP § 507.03(b) (3d ed. 2011) and cases cited therein.

We find no evidence that TCCC was aware that Ambev intended to argue genericness until opposer filed its brief. Ambev argues that the very nature of the term ZERO and TCCC's use of ZERO makes the issue "obvious." Opposer's Reply Br. at 6. However, much of the evidence discusses ZERO only when used as part of phrases such as ZERO-CALORIE, or ZERO-CARB and not by itself, or even as used by TCCC, with its other marks such as COKE, SPRITE, and FANTA. Thus, we do not find the issue to be as obvious as Ambev claims and it would be unfair to permit opposer to raise

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genericness at this late date. See *The U.S. Shoe Corp. v. Kiddie Kobbler Ltd.*, 231 USPQ 815, 817 (TTAB 1986); *Long John Silver's, Inc. v. Lou Scharf Inc.*, 213 USPQ 263, 266 (TTAB 1982). We conclude that genericness was not tried by either implied or express consent and is not an issue in this opposition.

**B. Whether Mere Descriptiveness is an Issue in this Opposition**

TCCC states that one of the issues in this opposition is whether "the preponderance of the evidence establish[es] that ZERO in the TCCC ZERO marks either is suggestive (and inherently distinctive) or has acquired distinctiveness." Applicant's Br. at 5. The suggestiveness (or inherent distinctiveness) of the term ZERO as part of TCCC's marks is not an issue in this opposition. All of TCCC's ZERO marks published showing a claim of acquired distinctiveness of the term ZERO under Section 2(f) of the Trademark Act. Publication under Section 2(f) is a concession that the relevant term or matter is not inherently distinctive. "Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of inherent distinctiveness as an established fact. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1571, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) (emphasis in original).

TCCC argues that its claim of acquired distinctiveness "was made in the alternative and did not constitute a concession by TCCC that ZERO, as used in the ZERO marks, is not inherently distinctive." Applicant's Br. at 15. TCCC cites to TMEP



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§ 1212.02(c) for support for this proposition but this section is of no avail. Section 1212.02(c) applies to the examination stage prior to publication and allows applicants to argue against a finding of descriptiveness while also submitting evidence of acquired distinctiveness. There is no evidence that TCCC complained to the Office after the Office published its applications that the Office had made a mistake showing that applicant claimed acquired distinctiveness in part as to the term ZERO. Having accepted publication of its ZERO marks under Section 2(f), TCCC may not now argue that ZERO is inherently distinctive or suggestive. *Yamaha*, 6 USPQ2d at 1005; TMEP Section 1212.02(c) (8th ed. 2011).

Accordingly, the only issue in this consolidated opposition is whether ZERO in each of TCCC's marks has acquired distinctiveness under Section 2(f).

#### **The Parties**

Ambev is a Brazilian company that manufactures and sells soft drinks and beers "throughout North and South America." Opposer's Br. at 2. Ambev also has filed an application to register the mark GUARANA ANTARCTICA ZERO AÇÚCAR and design for soft drinks.<sup>20</sup>

Applicant is The Coca-Cola Company, "the world's largest beverage company." Applicant's Br. at 13. Beginning in 2005, applicant (hereinafter, "TCCC") began marketing and selling COCA-

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COLA ZERO as well as SPRITE ZERO, FANTA ZERO, and number of other beverages, all including the term ZERO.

### Standing

"Any person who believes that he would be damaged by the registration of a mark upon the principal register . . . may, file an opposition . . . stating the grounds therefor." Section 13 of the Trademark Act of 1946, 15 U.S.C. § 1063(a). Thus, a party has standing to oppose in a Board proceeding if it can demonstrate a real interest in the proceeding. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982), citing *Universal Oil Prods. Co. v. Rexall Drug and Chem. Co.*, 463 F.2d 1122, 174 USPQ 458 (CCPA 1972).

It is recognized that a party need not be a manufacturer or seller of the goods in connection with which a descriptive, misdescriptive, or merely ornamental designation is used in order to object to the registration thereof. It is sufficient that the party objecting to such registration be engaged in the manufacture and/or sale of the same or related goods and that the product in question be one that could be produced in the normal expansion of that person's business. If the designation in question is found to be merely descriptive, merely ornamental or the like, damage is presumed since a registration thereof with the statutory presumptions afforded the registration would be inconsistent with the right of another person to use these designations or designs in connection with the same or similar goods as it would have the right to do when and if it so chooses. Thus, opposer as a competitor of applicant, is a proper party to challenge applicant's right of registration.

*Federal Glass Co. v. Corning Glass Works*, 162 USPQ 279, 282-83 (TTAB 1969). See also 3 J. Thomas McCarthy, *McCarthy on*

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<sup>20</sup>Application Ser. No. 77181474, filed May 15, 2007, pursuant to

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*Trademarks and Unfair Competition*, § 20:11 (4<sup>th</sup> ed. 2007)

("Standing to oppose is presumed when the mark sought to be registered is allegedly descriptive of the goods and the opposer is one who has a sufficient interest in using the descriptive term in his business.").

Ambev has introduced evidence that it is a beverage company engaged in the marketing and sale of beverages in the United States and that it has filed an application for a trademark including the term ZERO for soft drinks. Ambev's application has been suspended pending the outcome of this proceeding. In view thereof, and because opposer's potential interest in using the term ZERO on beverages sold in the United States is sufficient to demonstrate that opposer has a real interest in this proceeding, opposer has established its standing.

#### **Acquired Distinctiveness**

As *Yamaha* explains, when matter proposed for registration under Section 2(f) is approved by the United States Patent and Trademark Office for publication, there is a presumption that the examining attorney found a prima facie case of acquired distinctiveness by the applicant for registration. *Yamaha*, 6 USPQ2d at 1004. In an opposition, "the opposer has the initial burden to establish prima facie that the applicant did not satisfy the acquired distinctiveness requirement of Section 2(f)." *Id.* "If the opposer does present its prima facie case

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Section 1(b) of the Trademark Act.

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challenging the sufficiency of applicant's proof of acquired distinctiveness, the applicant may then find it necessary to present additional evidence and argument to rebut or overcome the opposer's showing. . . ." *Id.* However, under this analysis, the "ultimate burden of persuasion" is on the applicant. *Id.* Finally, the standard for applicant to meet is preponderance of the evidence, "although logically that standard becomes more difficult to meet as the mark's descriptiveness increases." *Yamaha*, 6 USPQ2d at 1008.

As discussed above, descriptiveness is not an issue given applicant's resort to Section 2(f) of the Trademark Act. Nonetheless, it is necessary to determine, at the outset, the degree of descriptiveness of ZERO as used in connection with the identified goods given that this determination will have a direct bearing on the amount of evidence necessary to show acquired distinctiveness. *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case and particularly on the nature of the mark sought to be registered. *See Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 829, 166 USPQ 34, 39 (CCPA 1970). Typically, more evidence is required where a mark is so highly descriptive that purchasers seeing the matter in relation to the named goods or services would be less likely to believe that it indicates source in any one party. *See, e.g.,*

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*In re Bongrain Int'l Corp.*, 894 F.2d 1316, 1318, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990).

There is no question that the beverage industry, including the soft drink industry, commonly uses the term ZERO in direct association with nutritional facts or the names of ingredients such as "calories," "carbohydrates," "carbs," or "sugar" to identify the contents of soft drinks. Both parties have introduced ample evidence to show that terms such as "zero-calorie," "zero-carb," "zero-sugar," and the like are widely used by soft drink manufacturers. The testimony of Mary Krizan, Ambev's witness who testified that she purchased numerous beverages bearing the term ZERO, disclosed products such as ROCKSTAR ZERO CARB energy drink; EATING RIGHT, a "zero calorie" enhanced water beverage; ZEVIA, a diet soda with "ZERO calories"; and PEPSI MAX, a "zero calorie cola." Krizan Test. P. 5, Exh. Nos. 2, 18, 26, 64, and 72.

Ambev also introduced a number of third party trademark registrations for beverage marks including the disclaimed term ZERO such as "NO-CAL ZERO CALORIE SODA POP" and design (non-alcoholic beverages), "NO CARBS ZERO CALORIES" and design (drinking water with vitamins), "ZERO CALORIE SARATOGA SPLASH (flavored spring water beverages)," and "ZERO CAL" and design (soft drinks). Ambev's second NOR, dated April 28, 2010. While we do not consider these registrations as evidence proving use, these third party registrations can be considered in the manner

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of a dictionary to show the descriptive nature of ZERO for soft drinks.

Similarly, TCCC introduced product samples for a number of its beverages featuring the term ZERO in direct association with nutritional ingredients, such as "zero calorie cola," "zero sugar lemon lime soda," and "zero calorie sports drink." Baker Test., Exh. Nos. 1, 3, and 15.

While the foregoing evidence demonstrates that ZERO is treated as merely descriptive when used in connection with the nutritional facts or the names of ingredients of a variety of beverages including soft drinks, some of the evidence of record is more ambiguous. During the examination of Serial No. 78580598 for the mark COCA-COLA ZERO, TCCC introduced a number of third party registrations for beverage marks including the term ZERO on the Principal Register without a disclaimer of ZERO. Thus, LACTO ZERO (milk), BRUT ZERO (sparkling wines), SUB ZERO (alcoholic drinks), ZERO MANIPULATION (wines), TRIPLE ZERO (tequila and liqueurs), and ZERO LIMIT (smoothies) are all registered for various beverages without a disclaimer of zero. Application Serial No. 78580598, applicant's Response to Office Action, dated October 3, 2005.

These instances tend to show that when ZERO is not used in direct association with beverage ingredients, the treatment of ZERO as merely descriptive is mixed, at best. The evidence indicates that while ZERO may describe the particular amount of

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an ingredient or the nutritional content, by itself, ZERO only describes a general absence of some ingredient normally present. Thus, we are convinced that while ZERO merely describes a feature or characteristic of soft drinks, it is not so highly descriptive as to identify a product category.

Acquired distinctiveness may be shown by direct and/or circumstantial evidence. Direct evidence includes actual testimony, declarations or surveys of consumers as to their state of mind. Circumstantial evidence is evidence from which consumer association might be inferred, such as years of use, extensive amount of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers. There is no fixed rule for the amount of proof necessary to demonstrate acquired distinctiveness. *Yamaha*, 6 USPQ2d at 1008 (evidence required to show acquired distinctiveness is directly proportional to the degree of non-distinctiveness of the mark at issue). Thus, even long periods of substantially exclusive use may not be sufficient to demonstrate acquired distinctiveness. Moreover, the burden is particularly heavy when that use has not been exclusive. *In re Gibson Guitar Corp.*, 61 USPQ2d 1948, 1952 (TTAB 2001) (66 years of use not sufficient given similarity of configuration to other guitars).

We first consider opposer's claim that applicant's evidence is insufficient to establish acquired distinctiveness. Ambev argues that TCCC must prove acquired distinctiveness as of the

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date the Section 2(f) claim was made, and not as of the pendency of these proceedings. Opposer's Br. at 22. This is incorrect. It is well-settled that acquired distinctiveness and buyer recognition are to be tested in an opposition proceeding as of the date the issue is under consideration. The filing date or even the publication date is not a cutoff for any evidence developing after that time. Evidence of sales and advertising after the filing date of the application will be considered. See *McCormick & Co. v. Summers*, 354 F.2d 668, 148 USPQ 272 (CCPA 1966); *Harsco Corp. v. Elec. Sci., Inc.*, 9 USPQ2d 1570 (TTAB 1988); and *Kaiser Aluminum & Chem. Corp. v. Am. Meter Co.*, 153 USPQ 419 (TTAB 1967).

TCCC's eight years of continuous use since at least 2004 on SPRITE ZERO, COCA-COLA ZERO and the other ZERO marks is more than five years contemplated by Section 2(f), but this is not necessarily conclusive or persuasive on the showing of acquired distinctiveness. In prior cases involving usage of comparable or even longer duration, and with some of these uses even being coupled with significant sales and advertising expenditures (not to mention direct evidence of customers' perceptions), the Board or its primary reviewing court has found a failure to demonstrate acquired distinctiveness within the meaning of Section 2(f). See *In re Andes Candies, Inc.*, 478 F.2d 1264, 178 USPQ 156, 158 (CCPA 1973); and *In re Packaging Specialists, Inc.*, 221 USPQ 917, 920 (TTAB 1984).



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Applicant's sales, on the other hand, suggest that applicant has enjoyed a substantial degree of success with its ZERO line of beverages. In application Ser. No. 78580598 for the mark COCA-COLA ZERO, TCCC identified sales in the two years preceding its 2007 claim of acquired distinctiveness as exceeding one billion dollars, with over one-third of that amount attributable to sales of COCA-COLA ZERO alone. By 2007, over fifty million 288-fluid ounce cases of COCA-COLA ZERO had been sold by Applicant.

Application Serial No. 78580598, applicant's Response to Office Action, dated January 27, 2007; Baker Test. at 62, Exh. 19.

These are significant numbers by any measure. Furthermore, according to the non-confidential portions of the Baker testimony, sales of the ZERO line of beverages, including COCA-COLA ZERO, SPRITE ZERO, PIBB ZERO, FANTA ZERO, and other ZERO beverages have increased in the ensuing years to over four billion dollars, with over eight hundred and sixty million cases of COCA-COLA ZERO being sold. Baker Test. at 67, 70.

Advertising expenditures since 2004 likewise are a substantial sum. By early 2007, TCCC claimed that it had spent

in excess of one hundred fifty million dollars advertising and promoting its ZERO family of beverage products, which includes COCA-COLA ZERO, SPRITE ZERO, FANTA ZERO, VAULT ZERO, and PIBB ZERO, through a myriad of advertising and promotional channels. Applicant has spent over one hundred million dollars advertising and promoting COCA-COLA ZERO alone.

Application Serial No. 78580598, applicant's Response to Office Action, dated January 27, 2007. Again, we note that these are

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significant numbers by any measure. According to the non-confidential portions of the Baker testimony, TCCC's advertising expenditures for its entire line of ZERO line of beverages had risen to five hundred and thirty seven million dollars by mid-2010. Baker Test. at 111-112.

TCCC also has submitted a variety of advertising samples showing how the ZERO line of beverages is presented to consumers. The following representative example is from the Section 2(f) showing in application Serial No. 78580598:



Application Serial No. 78580598, applicant's Response to Office Action, dated January 27, 2007. We agree with TCCC that such advertisements attempt to convey to the consumer that ZERO as used on the goods is intended to serve in a "trademark sense as part of the product brand name" and not merely as conveying nutritional information. Applicant's Br. at 21.

Both during examination and during this proceeding, TCCC submitted numerous articles demonstrating unsolicited media coverage of its ZERO line of marks. Most of these fall into the category of press releases picked up by media outlets or stories about marketing campaigns. Nevertheless, the articles show that the ZERO line of beverages and TCCC's numerous marketing campaigns have been widely discussed in the media.

Finally, both parties submitted surveys. Ambev introduced the survey and testimony deposition of Dr. Dupont who sought to determine "the main function of the word "zero" . . . in the brand name Coca-Cola Zero." Dupont testimony at 6. The concern with the Dupont survey is that it is a survey more of meaning than source identification. The source identifying function of a trademark and the "main function" - as Dr. Dupont put it - of a word in that mark are not necessarily the same things. If, as Ambev argues, the term ZERO is merely descriptive, it would not be inconsistent for consumers to view the term ZERO as both describing a characteristic of COCA-COLA ZERO while still perceiving the term to be a source indicator. The "main function" premise of the survey and source identification are not mutually exclusive. Put another way, it is possible that a "main function" of ZERO in TCCC's marks is to identify a characteristic of applicant's goods, but consumers nevertheless may have come to recognize that applicant is the only entity that identifies the characteristic of its goods in that manner. It is not enough

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that consumers merely know that ZERO means "something" is missing from COCA-COLA ZERO. The survey needs to test whether consumers view ZERO in the marks as indicating a source of the goods.

TCCC's rebuttal survey was more on point. Rather than look for the "main function" of ZERO, the Simonson survey attempted to rebut the Dupont survey by determining whether ZERO in COCA-COLA ZERO served a trademark function. The Simonson survey examined acquired distinctiveness to see if ZERO was associated with one company or more than one company. Applicant's Br. at 26. Simonson found that 61% of respondents "perceive" that ZERO was associated with only one company as opposed to 6% for the term DIET. Simonson Test. pp. 56-57.

We find that the Simonson survey validates the significant sales and advertising numbers discussed above. Consumers have been exposed to TCCC's ZERO products and advertising on television, over the radio, via print media, and in every conceivable retail outlet. Billions of the products have been sold since 2004. Ambev's attempt to show that the ZERO marks have not acquired distinctiveness simply fails in light of the scope of TCCC's significant sales and marketing numbers.

Opposer also argues that applicant has not enjoyed exclusive use of ZERO on beverages due to third-party use of ZERO on a variety of beverages as well. Opposer's Br. at 27. As an initial matter, there is no requirement that TCCC's use be entirely exclusive. It need only be substantially exclusive.

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The substantially exclusive standard makes allowance for use by others that may be inconsequential or infringing, which does not necessarily invalidate the applicant's claim. *L.D. Kichler Co. v. Davoil, Inc.*, 52 USPQ2d 1307, 1309 (Fed. Cir. 1999).

Opposer's evidence does not establish substantial third party use of ZERO in connection with soft drinks and/or syrups. While several third parties may have made use of ZERO in connection with beverages and numerous third parties have used "zero-calorie," "zero-carbs," and other such highly descriptive zero-formative phrases, such use does not undercut TCCC's claim of acquired distinctiveness. We find that the cumulative effect of TCCC's use of ZERO in connection with its line of beverages is so extensive that it qualifies as "substantially exclusive" as required under Section 2(f). *Kichler* at 1309.

We conclude that applicant's use has been substantially exclusive and that the evidence of record is sufficient to support registration on the Principal Register under Section 2(f).

DECISION: The oppositions are dismissed with prejudice.