

ESTTA Tracking number: **ESTTA603348**

Filing date: **05/08/2014**

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.
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Date	05/08/2014
Attachments	REDACTED Initial Trial Brief for DPSG (F1447288x96B9E).pdf(498041 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.,	:	<u>Consolidated Proceedings:</u>
	:	Opposition No. 91178927
Opposers,	:	Opposition No. 91180771
	:	Opposition No. 91180772
- against -	:	Opposition No. 91183482
	:	Opposition No. 91185755
THE COCA-COLA COMPANY,	:	Opposition No. 91186579
	:	Opposition No. 91189847
Applicant.	:	Opposition No. 91190658
-----X		
--and--		
-----X		
THE COCA-COLA COMPANY,	:	
	:	<u>Consolidated Proceedings:</u>
Opposer,	:	Opposition No. 91184434
	:	
- against -	:	
	:	
ROYAL CROWN COMPANY, INC. and	:	
DR PEPPER/SEVEN UP, INC.,	:	
	:	
Applicants.	:	
-----X		

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

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I. INTRODUCTION

In these consolidated opposition proceedings, which are nearly through their seventh year, Royal Crown Company, Inc. and Dr. Pepper/Seven Up, Inc. (together, “Royal Crown”) have challenged 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.” These proceedings involve a critical issue for the beverage industry: will TCCC, the industry’s dominant player, be allowed to monopolize the term “zero” for zero-calorie beverages, a word that other beverage companies have been using for as long as anyone can remember and that the public understands to denote zero-calorie drinks? No beverage company has been given exclusive rights in “diet” or “lite,” and no beverage company should be given exclusive rights in “zero.” Royal Crown therefore respectfully requests the Board to preserve the beverage industry’s right to use the term “zero” for zero-calorie beverages and deny TCCC the monopoly it seeks.

II. FACTUAL RECORD

A. Stipulations of the Parties

The parties entered into the following stipulations related to trial procedure:

- A party may rely at trial on documents produced by the other party through a “Notice of Reliance on Stipulated Documents.” (*See* Dkt. # 87, 90.)
- Direct testimony of party and counsel employees at trial may be entered through a sworn declaration or affidavit, subject to oral cross-examination. (*See* Dkt. # 89, 90.)
- Simplification of procedures related to the preparation and filing of testimonial deposition transcripts, including relieving the court reporter from the obligation to provide the

certification described in Trademark Rule of Practice 2.123(f)(1) and to maintain and file the transcript in accordance with Trademark Rule of Practice 2.123(f)(3). (*See* Dkt. # 95, 104.)

- The testimonial deposition transcript of third-party Reed’s, Inc., through Christopher John Reed, need not be signed in the presence of a notary. (*See* Dkt. # 127, 129.)

B. Royal Crown’s Evidence

Royal Crown submitted testimony and exhibits through the following witnesses:

(i) Andrew Springate, Senior Vice-President of Marketing Services and Long-Range Planning of Dr Pepper Snapple Group (“DPSG”), the parent corporation of Dr Pepper/Seven Up, Inc., by Trial Declaration dated July 2, 2013 (“Springate Trial Decl.”) (Dkt. # 134), and Second Trial Declaration dated November 25, 2013 (“Second Springate Trial Decl.”). (Dkt. # 135.) Mr. Springate is responsible for leading media, integrated content development, innovation, Hispanic marketing, research and planning for DPSG. (Springate Trial Decl. ¶ 2.) He also is familiar with the company’s business under the DIET RITE PURE ZERO brand. (*Id.*) TCCC cross-examined Mr. Springate on July 9, 2013, with respect to his first trial declaration (“Springate Trial Dep.”) (Dkt. # 134), and on December 4, 2013, with respect to his second trial declaration (“Second Springate Trial Dep.”). (Dkt. # 135.)

(ii) Chris Barnes, Director of Corporate Communications of DPSG, by Trial Declaration dated July 3, 2013 (“Barnes Trial Decl.”). (Dkt. # 131.) Mr. Barnes is responsible for corporate communications and brand public relations, as well as issues management. (Barnes Trial Decl. ¶ 2.) TCCC cross-examined Mr. Barnes on July 9, 2013 (“Barnes Trial Dep.”). (Dkt. # 131.)

(iii) Mario Ortiz, paralegal, Fross Zelnick Lehrman & Zissu, P.C., attorneys for Royal Crown in these proceedings, by Trial Declaration dated July 12, 2013 (“Ortiz Trial Decl.”).

(Dkt. # 130.) TCCC cross-examined Mr. Ortiz on July 23, 2013 (“Ortiz Trial Dep.”). (Dkt. # 130.)

A description of each exhibit Royal Crown made of record through the foregoing witnesses is included in Appendix A hereto.

Royal Crown further submitted testimony and exhibits through the following third-party witnesses:

(i) Southern Group Enterprises, Inc., owner of the mark IMPULSE ZERO, through Harold Miller, Managing Member, by testimonial deposition taken on July 24, 2013 (“SGE Dep.”). (Dkt. # 143.)

(ii) PepsiCo Inc., owner of the mark PROPEL ZERO, through Esperanza Teasdale, Senior Director of Marketing, by testimonial deposition taken on July 25, 2013 (“PepsiCo Dep.”). (Dkt. # 138.)

(iii) Reed’s, Inc., owner of the mark VIRGIL’S ZERO, through Christopher Reed, CEO, by testimonial deposition taken on July 26, 2013 (“Reed’s Dep.”). (Dkt. # 133.)

(iv) Beverage Marketing USA, Inc., owner of the mark ARNOLD PALMER ZERO, by Robert Marciano, Vice President of Sales, by testimonial deposition taken on August 15, 2013 (“Bev. Mktg. Dep.”). (Dkt. # 115.)

A description of each exhibit made of record during the testimonial depositions of the foregoing witnesses is included in Appendix A hereto.

Royal Crown also submitted the following Notices of Reliance: (i) Notice of Reliance on Stipulated Documents (Dkt. # 94); (ii) Notice of Reliance on Discovery Responses (Dkt. # 98); (iii) Notice of Reliance on Deposition Testimony (Dkt. # 99); (iv) Notice of Reliance on Printed Publications (Dkt. # 101); (v) Notice of Reliance on Official Records (Dkt. # 102); (vi) Second

Notice of Reliance on Discovery Responses (Dkt. # 118); (vii) Second Notice of Reliance on Deposition Testimony (Dkt. # 119); (viii) Second Notice of Reliance on Printed Publications (Dkt. # 120); and (ix) Notice of Reliance on Additional Portions of Deposition Testimony of Opposers' Witnesses (Dkt. # 121). A description of each exhibit made of record through Royal Crown's Notices of Reliance is included in Appendix A hereto.

C. TCCC's Evidence

TCCC submitted testimony and exhibits through the following witnesses: (i) Russell W. Baker, Vice President of Sales Capabilities of TCCC, by testimonial deposition taken on October 3, 2013 ("Baker Dep.") (not yet filed); and (ii) Alex Simonson of Simonson Associates, Inc., by testimonial deposition taken on October 24, 2013. ("Simonson Dep.") (not yet filed).

TCCC also submitted the following Notices of Reliance: (i) Notice of Reliance on Printed Publications, Official Records and Discovery Request Responses (Dkt. # 110), with a Supplement to Notice of Reliance on Printed Publications, Official Records and Discovery Request Responses (Dkt. # 117); (ii) Notice of Reliance on the Discovery Depositions of Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc. Witnesses (Dkt. # 108); (iii) Notice of Reliance on Additional Portions of Discovery Depositions of The Coca-Cola Company Witnesses (Dkt. # 107); and (iv) Second Notice of Reliance on Additional Portions of Discovery Depositions of the Coca-Cola Company Witnesses (Dkt. # 124).

III. EVIDENTIARY OBJECTIONS TO TCCC's EVIDENCE

Royal Crown's objections to the admissibility of evidence proffered by TCCC are set forth in Royal Crown's Statement of Objections to TCCC's Proffered Evidence, dated May 8, 2014. Because the Board has not yet had an opportunity to rule on Royal Crown's evidentiary objections, for purpose of this brief, Royal Crown has assumed that all of TCCC's evidence is

part of the record. By treating TCCC's evidence as properly made of record for purposes of this brief, Royal Crown does not waive any of its evidentiary objections.

IV. STATEMENT OF THE PROCEEDINGS

A. Royal Crown's Oppositions to TCCC's Marks

Royal Crown timely filed oppositions to TCCC's applications at issue as follows:

<i>Application No.</i>	<i>Mark</i>	<i>Opposition Date</i>	<i>Opposition No.</i>
78/580,598	COCA-COLA ZERO	Aug. 14, 2007	91178927
78/316,078	SPRITE ZERO	Nov. 15, 2007	91180771
78/664,176	COKE ZERO	Nov. 15, 2007	91180772
77/176,279	COCA-COLA CHERRY ZERO	April 10, 2008	91183482
77/176,127	CHERRY COKE ZERO	April 10, 2008	91183482
77/176,108	COCA-COLA VANILLA ZERO	April 10, 2008	91183482
77/175,127	CHERRY COCA-COLA ZERO	April 10, 2008	91183482
77/175,066	COKE CHERRY ZERO	April 10, 2008	91183482
77/097,644	PIBB ZERO	April 10, 2008	91183482
77/176,099	VANILLA COKE ZERO	Aug. 13, 2008	91185755
76/674,382	COKE ZERO ENERGY	Aug. 13, 2008	91185755
76/674,383	COKE ZERO BOLD	Aug. 13, 2008	91185755
77/257,653	VANILLA COCA-COLA ZERO	Sept. 24, 2008	91186579
78/620,677	FANTA ZERO	Sept. 24, 2008	91186579
77/309,752	POWERADE ZERO	Sept. 24, 2008	91186579
77/413,618	FULL THROTTLE ZERO	April 22, 2009	99189845
78/698,990	VAULT ZERO	June 16, 2009	91190658

The Board consolidated the oppositions, designating Opposition 91178927 as the "parent case." (Dkt. # 13, 17, 19, 32, 37.)

Upon application by TCCC, the Board, on June 2, 2009, ordered Royal Crown to file a single consolidated Notice of Opposition with respect to all applications. (Dkt. # 32.) Royal Crown filed an Amended Consolidated Notice of Opposition on June 22, 2009, opposing all

Applications that were the subject of Opposition Nos. 91178927, 91180771, 91180772, 91183482, 91185755, 91186579, 91189847 and 91190658. (Dkt. # 39.) Royal Crown also on June 22, 2009, moved with TCCC's consent to dismiss the fraud counts in Opposition Nos. 91178927, 91180771 and 91180772 (Dkt. # 38), which motion the Board granted on July 10, 2009. (Dkt. # 40.)

The remaining grounds for Royal Crown's oppositions against TCCC's applications, at issue here, are descriptiveness of the term "zero" under Lanham Act Section 2(e) and genericness of the term "zero" under Lanham Act Section 2 and/or Section 2(e).

B. TCCC's Oppositions to Royal Crown's Marks

On June 4, 2008, TCCC opposed Royal Crown's Applications Serial No. 78/576,257 for the mark DIET RITE PURE ZERO and Serial No. 78/581,917 for the mark PURE ZERO on the grounds of priority and likelihood of confusion under Lanham Act Section 2(d) and false suggestion of a connection under Lanham Act Section 2(a). The Board instituted TCCC's oppositions to Royal Crown's applications as Opposition No. 91184434, and consolidated TCCC's Opposition No. 91184434 with Royal Crown's consolidated Oppositions to TCCC's applications on October 17, 2008. (Dkt. # 19.)

V. STATEMENT OF FACTS

A. DPSG and The DIET RITE PURE ZERO Brand

1. Overview of DPSG

Opposers Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc. are both part of Dr Pepper Snapple Group ("DPSG"). (Springate Trial Decl. ¶ 1.) DPSG, the third largest refreshment beverage company in North America, manufactures, bottles, markets and distributes more than 50 brands of carbonated soft drinks, juices, ready to drink teas, mixers and other

premium beverages across the United States, Canada, Mexico and the Caribbean. (*Id.* ¶ 7.) Its operations generate nearly \$6 billion in annual revenue. (*Id.*)

The history of DPSG's many brands spans more than 200 years, and the company's brand portfolio includes some of the most-recognized and best-loved beverages in the United States. (*Id.* ¶ 8.) In addition to its flagship DR PEPPER and SNAPPLE brands, DPSG's brands include 7UP, MOTT'S, A&W, CANADA DRY, SCHWEPPEES, and DIET RITE, among many others. (*Id.*)

2. Brief History of the DIET RITE Brand

DPSG's predecessor acquired the DIET RITE brand and business in 2000 as part of the acquisition of Royal Crown Company, Inc. (*Id.* ¶ 9.) Royal Crown launched DIET RITE soda in 1958 as the beverage industry's first diet carbonated soft drink ("CSD"), thereby giving birth to the diet soda category. (*Id.* ¶ 10.) DIET RITE proved extremely popular, becoming the fourth-ranked CSD within 18 months of its launch. (*Id.*)

Over the decades, DIET RITE soda has gone through several incarnations, including formula changes, flavor additions and packaging changes, but always has stayed true to its heritage as a zero-calorie CSD. (*Id.* ¶ 11.) To highlight that fact, nearly nine years ago, in the summer of 2005, DIET RITE was relaunched as DIET RITE PURE ZERO. (*Id.* ¶ 11; TCCC 202 (Jacobs Disc. Dep.) 67:5-18.)

Prior to the name change, advertising for DIET RITE had long emphasized what the company called the "zero" positioning of the brand: a product with zero calories, zero carbohydrates, zero caffeine and zero sodium. (Springate Trial Decl. ¶ 12; RC 316 (Jacobs Disc. Dep.) 41:20-42:5.) This "zero" positioning was communicated to the market through packaging elements and through print and television advertising campaigns. (Springate Trial Decl. ¶ 12 & RC1.)

The name change from DIET RITE to DIET RITE PURE ZERO reaffirmed DIET RITE soda's heritage as a zero-calorie beverage and highlighted that DIET RITE had more of the "zeros" that the company believed were important to consumers: zero calories, zero carbohydrates, zero caffeine and zero sodium. (*Id.* ¶ 13.) Because the word "zero" standing alone communicated to consumers only zero calories, DPSG adopted the phrase PURE ZERO to capture all of the "zero" attributes of DIET RITE in a way that the word "zero" standing alone would not. (*Id.*; *see also* TCCC 200 (Springate Disc. Dep.) 116:21-117:11, 120:16-121:4; RC314 (Springate Disc. Dep.) 117:21-118:5.) Further, the addition of PURE ZERO deemphasized the word "diet" and the negative connotations associated with it. (Springate Trial Decl. ¶ 13.)

DPSG announced the name change to its bottler network in March 2005, released packaging with the new name and graphics to bottlers in June 2005, and rolled out the new packaging to the marketplace beginning in July and August 2005. (*Id.* ¶ 14 & RC3-RC4.) The product has been sold continuously since its launch.

3. Sales of DIET RITE PURE ZERO

DIET RITE PURE ZERO beverages are sold throughout the fifty United States and through virtually every channel of trade in which consumers would expect to find soft drinks, including through big-box mass merchandisers (such as Wal-Mart), supermarkets and grocery stores, club stores (such as Sam's Club), drug stores, and convenience stores, as well as over the Internet. (*Id.* ¶ 16; *see also* TCCC 200 (Springate Disc. Dep.) 72:6-73:5, 74:3-5.) DIET RITE PURE ZERO beverages also have been distributed through vending machines and at fountain locations, such as restaurants and entertainment venues. (Springate Trial Decl. ¶ 16.) The retail penetration of DIET RITE PURE ZERO beverages is extensive, with the product appearing in nearly 25,000 retail outlets throughout the United States. (*Id.* ¶¶ 16, 20.)

DPSG's net revenues from its own sales of DIET RITE PURE ZERO concentrate and finished beverage from 2007 through end of year 2012 were over \$327 million (*id.* ¶ 17 & RC5-RC6); retail revenues would have been much higher. Retail sales volumes of DIET RITE PURE ZERO soda from 2007 through the end of 2012 equated to an estimated 1.8 billion cans. (*Id.* ¶ 18 & RC5-RC6.)

4. Advertising and Promotion of DIET RITE PURE ZERO

Marketing efforts related to DIET RITE PURE ZERO have included television commercials, print media, radio advertisements, Internet advertising, point-of-sale materials, in-store displays, in-store sampling, coupons, sale pricing and shelf presence in nearly 25,000 retailers. (*Id.* ¶¶ 20-21 & RC7-RC8, RC189; *see also* TCCC 200 (Springate Disc. Dep.) 78:18-80:14, 82:3-7, 82:23-83:4, 89:2-8; RC314 (Springate Disc. Dep.) 84:18-85:5, 86:16-87:5) DIET RITE PURE ZERO beverages also have been promoted through partnerships with third parties, most notably with the television show *The Biggest Loser*. (Springate Trial Decl. ¶¶ 22-23 & RC9; *see also* TCCC 200 (Springate Disc. Dep.) 78:18-79:4, 83.) DIET RITE PURE ZERO also has occasionally received unsolicited media references. (*See* RC190.)

DPSG's own expenditures on DIET RITE PURE ZERO marketing totaled more than \$5 million dollars between 2007 and 2012. (Springate Trial Decl. ¶ 24 & RC5-RC6.)

5. Applications to Register DIET RITE PURE ZERO and PURE ZERO

Royal Crown applied to register the mark DIET RITE PURE ZERO with the United States Patent and Trademark Office ("USPTO") on February 28, 2005, and applied to register the mark PURE ZERO on March 7, 2005. (*Id.* ¶ 26 & RC10-RC11; *see also* RC263-RC266.)¹ Both

¹ The applications to register the DIET RITE PURE ZERO and PURE ZERO marks were originally filed in the name of Royal Crown Company, Inc., but later were assigned to Dr Pepper/Seven Up, Inc. (Springate Trial Decl. ¶ 27 & RC12.)

applications were filed on an intent-to-use basis and cover “soft drinks, syrups and concentrates used in the preparation thereof” in International Class 32. In connection with both applications, the USPTO issued Office Actions requiring Royal Crown to disclaim “ZERO” apart from the mark as shown. (See RC10-RC11.) The USPTO explained the disclaimer was required because the term “zero” “merely describes one or more features of the identified goods, namely, that the goods have zero calories or zero carbohydrates or zero sugar.” (See *id.*) Royal Crown made the required disclaimer for both applications. (See *id.*)

B. TCCC and its Challenged Marks

1. TCCC’s Adoption of “Zero” for Zero-Calorie Beverages

TCCC is the largest beverage company in the world, named for its flagships soda brand, Coca-Cola. TCCC owns a large portfolio of soft drinks, running the gamut from waters to juices to sports drinks to CSDs to energy drinks. (Baker Dep. 11:10-13:8.)

In or around the mid-2000s, TCCC, believing that there were negative associations with the term “diet,” looked for a replacement word for its zero-calorie beverages and decided upon “zero.” TCCC tried out the new “zero” term in stages. First, it changed the name of its DIET SPRITE product to DIET SPITE ZERO in late 2004, and then changed DIET SPRITE ZERO to SPRITE ZERO in 2006. (*Id.* 55:16-24, 61:17-62:4.) The formula stayed the same. (*Id.* 60:1-4.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

TCCC next created a new zero-calorie formulation of Coca-Cola and launched it under the name COCA-COLA ZERO in the summer of 2005. (Baker Dep. 62:13-20, 63:18-20, 168:17-21.) Thereafter, TCCC swapped out the term “diet” for “zero” across its portfolio: DIET FANTA became FANTA ZERO, DIET PIBB became PIBB ZERO, etc. (*Id.* 78:8-16.) Based on information provided by TCCC, the company has sold 13 beverages² under a ZERO-inclusive name to date, though not all are currently available:

Coca-Cola Zero	Fanta Zero	Mello Yellow Zero	Powerade Zero
Coca-Cola Cherry Zero	Full Throttle Zero	NOS Zero	Sprite Zero
Coca-Cola Vanilla Zero	Honest Tea Zero	Pibb Zero	Vault Zero
			VitaminWater Zero

Other than the three Coca-Cola Zero products which share a similar trade dress, each of TCCC’s ZERO-named products has a unique trade dress, and not even the “zero” portion of the product names shares a similar font style or format. (*Compare* RC47, RC51-RC52, RC80-RC92;

[REDACTED]

[REDACTED]

[REDACTED] There is no evidence that TCCC’s various ZERO-named products are advertised similarly or are advertised collectively as a family of sub-brands. The only commonality across the products is that “zero” is used in place of “diet” and they have zero calories.

2. TCCC’s Applications to Register ZERO-inclusive Marks

Shortly before TCCC started substituting “zero” for “diet” on its zero-calorie beverages, TCCC began trying to monopolize the term “zero” for beverages by filing multiple ZERO-inclusive trademark applications with the USPTO:

² Fourteen, if you count caffeine-free Coca-Cola Zero as a separate beverage.

<i>Application No.</i>	<i>Mark</i>	<i>Filing Date</i>
78/316,078	SPRITE ZERO	Oct. 20, 2003
78/580,598	COCA-COLA ZERO	March 4, 2005
78/620,677	FANTA ZERO	May 2, 2005
78/664,176	COKE ZERO	July 6, 2005
78/698,990	VAULT ZERO	August 24, 2005
77/097,644	PIBB ZERO	Feb. 2, 2007
76/674,382	COKE ZERO ENERGY	March 22, 2007
76/674,383	COKE ZERO BOLD	March 22, 2007
77/175,127	CHERRY COCA-COLA ZERO	May 8, 2007
77/175,066	COKE CHERRY ZERO	May 8, 2007
77/176,279	COCA-COLA CHERRY ZERO	May 9, 2007
77/176,127	CHERRY COKE ZERO	May 9, 2007
77/176,108	COCA-COLA VANILLA ZERO	May 9, 2007
77/176,099	VANILLA COKE ZERO	May 9, 2007
77/257,653	VANILLA COCA-COLA ZERO	Aug. 17, 2007
77/309,752	POWERADE ZERO	Oct. 22, 2007
77/413,618	FULL THROTTLE ZERO	March 5, 2008

(The marks listed above, collectively, the “Challenged Marks”).

The USPTO issued an Office Action in connection with each application, requiring TCCC to disclaim “zero” because it “merely describes a feature of the applicant’s goods, namely, calorie or carbohydrate content of the goods.” (*See, e.g.*, Office Action, Application Serial No. 78/580,598 (Mar. 30, 2005).) After failing to convince the USPTO that the term “zero” in the context of TCCC’s goods is suggestive rather than descriptive, and rather than disclaiming the term “zero,” TCCC accepted registration under Section 2(f) of the Lanham Act. This strategy demonstrates TCCC’s intent to monopolize a term that is no more distinctive than the term it replaces, “diet.”

TCCC’s Section 2(f) submissions did not claim acquired distinctiveness for each individual, applied-for mark. Instead, TCCC claimed acquired distinctiveness in a so-called

family of ZERO marks, both in connection with marks that were in use, and in connection with marks that were not in use. TCCC supported its claim of acquired distinctiveness largely by relying on the sales and marketing of a single product, COCA-COLA ZERO.

3. TCCC Uses “Zero” as Short-Hand for Zero Calories

TCCC substituted “zero” for “diet,” a term that it does not and can not own. And TCCC’s use of “zero” is no different than its use of “diet”: as short-hand for zero calories. Each of TCCC’s products bearing a ZERO-inclusive mark has zero calories per serving according to the product labels disclosed by TCCC. (*See* RC81-RC92.) Packaging for the products vividly communicates this key attribute. (*See, e.g.*, RC79-RC80 (packaging for POWERADE ZERO);

[REDACTED]

[REDACTED]

And the term “zero” in the product’s name concisely communicates this key attribute.

In addition, TCCC’s marketing activities highlight that its ZERO-named products have zero calories. The core marketing message of COCA-COLA ZERO, since almost its launch, has been “Real Coca-Cola Taste and Zero Calories” (*see, e.g.*, RC66 (“... the brand’s core message – Coke Zero has ‘Real Coke Taste and Zero Calories.’”); RC127 (Baker Disc. Dep.) 62:13-18, 65:16-23, 118:18-120:7, 126:2-127:8), and advertising for COCA-COLA ZERO products consistently reinforces this message. (*See, e.g.*, RC71; RC127 (Baker Disc. Dep.) 200:23-201:16 (television ads), 207:10-20 (radio ads); RC120 (TCCC’s Response to RFAs) response nos. 7-8 (admitting that advertisements for COCA-COLA ZERO and COKE ZERO state that the beverages have “zero calories”).) Advertising for other of TCCC’s ZERO-named products also primarily communicates zero-calories as being a key attribute. (*See, e.g.*, RC72-RC78 (advertisements for POWERADE ZERO); RC120 (TCCC’s Response to RFAs) response no. 9

(admitting that advertisements for SPRITE ZERO state that the beverages has “zero calories”);

[REDACTED]

[REDACTED]

Further, virtually every press release issued by TCCC concerning its ZERO-named beverages identifies zero-calories as the primary beverage attribute. For example, in the first press release announcing the COCA-COLA ZERO product, a TCCC executive stated, “Coca-Cola Zero is exactly what young adults told us they wanted – real Coca-Cola taste, zero calories and a new brand they can call their own.” (RC56.) That statement was reinforced by a later press release, in which another representative stated, “When we created Coca-Cola Zero, we put together the only things that matter – real Coca-Cola taste and zero calories.” (RC57.) The same message is repeated over and over again in subsequent press releases. (*See, e.g.*, RC58 (“... Coca-Cola Zero, the soft drink with real Coca-Cola taste and zero calories”); RC61 (“People who are unwilling to compromise on taste choose Coke Zero for its real Coke taste and zero calories”); *see also* RC62-RC69 (additional press releases); RC 120 (TCCC’s Response to RFAs) response nos. 16-17 (admitting that press releases for COCA-COLA ZERO and COKE ZERO state that such beverages have “zero calories”).) Press releases for other of TCCC’s ZERO-named products include similar statements. (*See* RC59 (“... Cherry Coke Zero, which offers great Cherry Coke taste with zero calories”); RC60 (“Vanilla Coke Zero . . . delivering the unmistakable taste of authentic Vanilla Coke – with zero calories.”); RC70 (“vitaminwater zero – a naturally sweetened, great-tasting beverage option that (in case you don’t get the hint) has zero calories per 8 fl oz serving!”.)

4. Consumers Understand that TCCC’s “Zero” Means Zero Calories

Of course, TCCC doesn’t need to advertise that its ZERO-named products have zero calories, since consumers understand this based solely on the use of “zero” in the product name.

[REDACTED]

C. Marketplace Use of “Zero”

That consumers understand the “ZERO” in TCCC’s ZERO-named beverages as shorthand for zero calories and not an indication of source is no surprise given the soft drink industry for years has extensively used the term and numeral zero for the same purpose as TCCC: to identify zero-calorie beverages. Such use comes in several different forms.

1. “Zero” in Beverage Nutritional Panels

First, scores of soft drinks – dozens if not hundreds – use the numeral zero on required “Nutritional Facts” panels to designate that the beverage has zero calories per serving.³ (Springate Trial Decl. ¶ 31). Such use is ubiquitous in the soft drink industry, as shown by examples across different product types from DPSG (*see* RC28, RC44-46; *see also* TCCC 200 (Springate Disc. Dep.) 56:11:20, 56:25-57:3, 57:13-21); from TCCC (RC31-32, RC47-52, RC81-84; RC88-89, RC91-92; *see also* RC120 (TCCC’s Response to RFAs) response nos. 25, 28, 31 (admitting that Nutrition Facts tables on Coca-Cola Zero, Coke Zero and Sprite Zero state that the beverages have zero calories per serving); and from PepsiCo and many others (*see* RC20-RC27, RC29-30, RC33-43, RC55, RC143).

2. “Zero” in Packaging Call-Outs

But use of the term and numeral zero is not limited to nutritional panels. It is also widely used in what are termed “call-outs” on product labeling or packaging, again to indicate that a particular beverage product has zero calories. For example, Diet Rite Pure Zero has a call-out reading “0 calories.” (RC 44.) TCCC also uses “zero” call-outs on several of its products,

³ Nutritional panels have been required on soft drinks sold in the United States for decades. (Springate Trial Decl. ¶ 31 & n.2.) Any beverage that has fewer than five calories per serving is permitted to signify the number of calories on the nutritional panel as “0.” (*Id.*; *see also* 21 C.F.R. 101.9 (c)(1) (“amounts less than 5 calories may be expressed as zero”).)

including “zero calorie cola” on Coca-Cola Zero (RC47), “zero calorie sports drink” on Power Zero (RC51, RC80), “zero calorie” on HONEST ZERO (RC85-RC87), “zero calorie” on Honest Fizz (RC94), “sparkling zero calorie” on Fruitwater (RC93), “0 calories per serving on Diet Coke (RC50) and “zero calories per serving” on Dasani Plus (RC48). PepsiCo uses a call-out reading “0 cal” for Diet Pepsi (RC 24, RC25, RC27) and a call-out reading “zero calorie cola” for Pepsi Max (RC 36.) Numerous other third-party beverage brands also utilize “zero” call-outs to identify their beverages as having zero calories. (*See* RC21, RC22, RC29, RC33-34, RC37-40, RC42-43, RC45, RC147, RC158, RC162, RC164-165, RC169, RC239, RC260 at RC0005371, and RC262 at RC0005429-30, RC0005462, RC0005470; *cf.* TCCC 200 (Springate Disc. Dep.) 130:24-131:4, 131:16-132:14.)

3. “Zero” in Product Names

Finally, “zero” is used in beverage product names – not just by TCCC, but by numerous companies within the beverage industry. Despite being aware that multiple companies offer ZERO-named beverage products (Baker Dep. 217:14-221:10; RC121 (TCCC’s Response to RFAs) response nos. 63-64, 102-05 and 120-23), TCCC has never instituted a lawsuit to stop use of any ZERO-inclusive marks and has not even objected to a vast majority of those uses. (RC121 (TCCC’s Response to RFAs) response nos. 68, 70, 101, 106-07, 112-13, 124-25, 136-37; RC125 (TCCC’s Responses to Interrogatories) response no. 11; SGE Dep. 39:13-19; PepsiCo Dep. 46:22-47:4; Reed’s Dep. 30:12-15; Arizona Dep. 49:5-15.) In fact, far from objecting, TCCC distributes two of a competitor’s ZERO-named products! (Baker Dep. 219:10-220:2.) In addition, there is no evidence that any consumers have been confused as a consequence of multiple companies offering ZERO-named beverages.

As discussed above, DIET RITE PURE ZERO soda has been widely available throughout the United States since the summer of 2005. (Springate Trial Decl. ¶ 14.) DPSG also acted as the primary distributor of third-party product ALL SPORT NATURALLY ZERO (*Id.* ¶ 33 & RC15), launched in 2009, which now is offered as ALL SPORT ZERO. (*See* RC130.)

[REDACTED]

[REDACTED] Not only does SGE use the IMPULSE ZERO mark, it owns an incontestable federal registration for the mark covering “[b]everages, namely energy drinks and sports drinks” in International Class 32 – U.S. Registration No. 3,110,915, which matured into registration on July 4, 2006, from an application filed November 15, 2004. (*Id.* 37:10-23 & RC105; *see also* RC259.)

PepsiCo sells a zero-calorie, enhanced water under the mark PROPEL ZERO. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

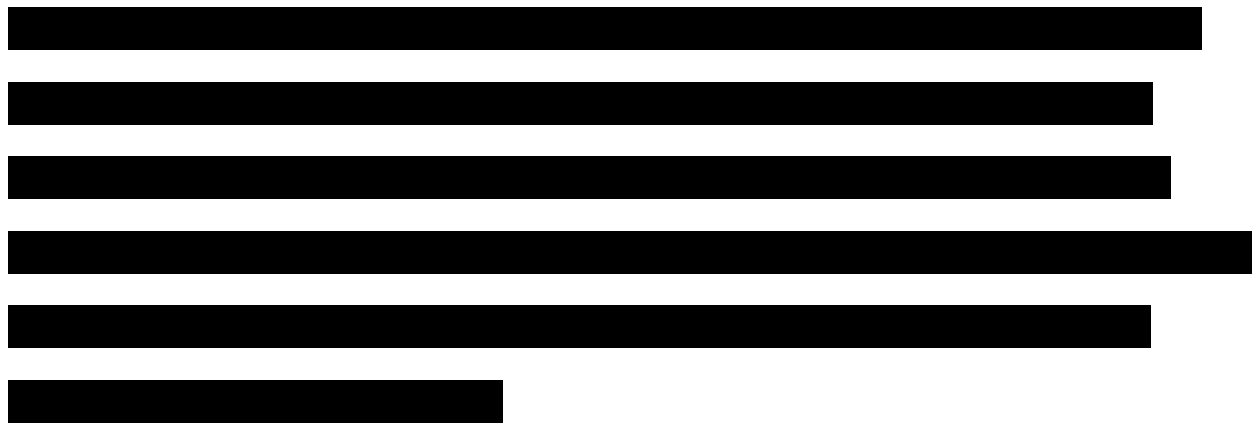
[REDACTED]

Reed's, Inc. ("Reed's") sells a line of zero-calorie CSDs under the mark VIRGIL'S ZERO. [REDACTED]

[REDACTED]

Arizona Beverages USA, LLC ("Arizona") sells ARNOLD PALMER ZERO, a combination of iced tea and lemonade with zero calories. [REDACTED]

[REDACTED]



All told, Royal Crown has submitted evidence of the existence of 32 zero-calorie soft drinks with ZERO-inclusive names that are *not* products of TCCC:

All Sport Zero	Diet Crisp Zero	Monster Energy Zero Ultra	Rox Zero
Arnold Palmer Zero	Diet Rite Pure Zero	Pre Zero	Runa Zero
Beast Zero	Holistics Zero	Pomberry Zero	Sodastream Zero Cola
Big Red Zero ⁴	Icee Zero	Propel Zero	Sqwincher Zero
Blue Sky Zero	Impulse Zero	Red Bull Total Zero	Victory Zero
Bubba Zero	Jones Whoopass Zero	Roaring Lion Zero	Virgil’s Zero
Caballa Negro Zero	Margarita Zero	Rob’s Really Good Zero	Vita Rain Zero
Clearly Zero	Monster Energy Absolutely Zero	Rockstar Pure Zero	Zero Margarita Mix

(Springate Decl. ¶¶ 33-34 & RC14, RC16; Ortiz Trial Decl. ¶¶ 15, 23, 25, IV(1), IV(2), IV(3); RC34, RC42, RC44, RC53-RC55, RC129-RC132, RC134-RC138, RC140-141, RC143-RC157, RC159-RC161, RC163, RC166-RC168, RC189, RC309-RC313.)

For those products that were not the subject of third-party depositions, Royal Crown has shown not only that most of these products are available for sale (*see, e.g.*, RC14, RC16, RC134-RC136, RC141, RC143, RC146, RC149, RC152, RC154-RC156, RC160-RC161, RC163,

⁴ Although the packaging for BIG RED ZERO officially reads “BIG RED ZERO CALORIES,” the company calls the product BIG RED ZERO, as does the public. (*See* RC134, RC184.)

RC166, RC309-RC312), but also the retail sales volumes of several of these ZERO-named beverages for the 52-week period ending March 23, 2013. (Springate Trial Decl. ¶ 35 & RC17.)

The reason that the beverage industry has adopted ZERO as part of beverage names is clear: it quickly and clearly communicates to consumers a key product attribute that many consumers take into account when choosing beverages: zero calories.⁵ (Springate Trial Decl. ¶ 36.) In sum, “zero” is the new “diet,” conveying the same calorie information but without the negative associations.

(*Id.*)

4. “Zero” in Third-Party Trademark Applications and Registrations

In addition to the many third parties who have used a ZERO-inclusive beverage name, many more have applied to register ZERO-inclusive marks for various types of beverages, showing common acceptance of “zero” as an industry term. (*See* RC192-258.)⁶ These ZERO- and 0-inclusive trademark applications and registrations fall into two primary categories: (i) marks in which the term or numeral zero modifies the word “calorie” (or a variation) (*see* Appx. B); and (ii) marks in which the term or numeral zero is not coupled with the word calorie (or a variation) (*see* Appx. C).

⁵ In fact, zero-named beverages are not the only example of beverage names communicating to consumers the calorie content of the beverage. In 2011, for example, DPSG launched DR PEPPER TEN, a ten-calorie version of the DR PEPPER product. (Springate Trial Decl. ¶ 37.) In 2012, DPSG launched 7-UP TEN, A&W TEN, CANADA DRY TEN, RC TEN and SUNKIST TEN, all ten-calorie versions of the namesake sodas. (*Id.*) Similarly, prior to TCCC’s launch of VITAMIN WATER ZERO, the zero-calorie version of the VITAMIN WATER product, there was VITAMIN WATER 10, a ten-calorie version. (*Id.*) In addition, many years ago PepsiCo introduced a PEPSI product variant called PEPSI ONE that had one calorie per serving. (*Id.*)

⁶ For the convenience of the Board, the ZERO-inclusive marks that appear in exhibits RC192 to RC258 are summarized in Appendices B and C according to the categories described in the text.

5. Industry Recognition of “Zero” as a Category

Not only have consumers come to recognize “zero” as a category of beverages, but so too has the American Beverage Association (“ABA”) – a trade organization that represents the beverages industry in the United States and that counts both DPSG and TCCC among its members. (Barnes Trial Decl. ¶¶ 5-6.) Specifically, in 2012, the ABA ran an advertising campaign on the New York City transit system and on the Internet promoting the choices that beverage companies offer consumers, including beverages that have fewer or even zero calories, smaller portions and clear calorie labels. (*Id.* ¶¶ 8-9.) Part of the campaign included the following advertisement, which includes “H₂O,” “Zero” and “Lite” as categories or types of beverages:



(*Id.* ¶¶ 9-10 & Ex. RC18.) Both DPSG and TCCC approved this advertisement. (*Id.* ¶ 11.)

D. Consumer and Media Use of “Zero” Generically

Both consumers and the media have adopted “zero” as an alternative to “diet” to indicate a category of beverages with zero calories.

Generic use of “zero” by consumers is exemplified on Internet message boards and answer sites. For example, on the WhatToExpect.com pregnancy and parenting website, a discussion board entitled “‘Zero’ Sodas” starts with the question, “Are Zero sodas (Coke Zero, Sprite Zero, Big Red Zero, etc.) still okay to drink?” Responsive posts include the following: “I would say cut the zeros out too”; “I think you’d be better off switching to caffeine free than zero. The zeros have artificial sweeteners”; and “Zero pops aren’t good even if you aren’t [trying to conceive].” (RC184).

Message boards on other sites include the following:

- “What kind of zero beverages are there to choose from besides coffee and diet sodas?” (RC173);
- “I drink diet sodas, or zero sodas, when I wanna [sic] fool myself into thinking I’m having some sugar.” (RC175);
- “Zero and diet are one in the same” under the topic “Zero sodas?” (RC180);
- “And don’t let those so called ‘zero’ sodas fool you either!” (RC 172); and
- “How many diet/zero sodas in a day?” thread discussion. (RC183).

On the Internet answer site Answers.com, someone queried, “What is the difference between zero drinks and diet drinks?”; the response was “Zero means Zero calories. Diet means less calories.” (RC176.) Similarly, on the “Yahoo! Answers” website, someone answered the question, “Are sugar free drinks just as bad for you?” with “Diet (‘zero’) sodas contain artificial sweeteners” (RC178.) The Yahoo! Answers website also contains the question, “How come those ZERO sodas dont [sic] have any calories . . .?” One answer explains “Zero sodas . . . is another word for ‘diet’,” while another answer explains, “the zero soda dont [sic] have calories because they are made not to . . . thats y [sic] they are called zero o-O.” (RC182.) *See also* RC170 (tweet consisting of “is it just me or do diet/‘zero’ sodas taste a little better when they’re just a wee bit warm?”)

The press similarly uses “zero” to refer to the generic category of diet soft drinks. For example, on the “Physicians Regional Healthcare Systems” website, an article entitled “Healthy Start! Tips & Recipes” encourages people to “Try these lower calorie beverages,” naming “Diet/Zero Sodas” on the top of the list. (RC171.) An article from the *Dayton Daily News* entitled, “Experts: Drinks Have Health Consequences,” has a section called “Diet and Zero soda labels.” (RC181.) An article in AdvertisingAge concerning PepsiCo’s launch of PROPEL ZERO started off with the statement, “Propel is remaking itself as a Zero,” a recognition of “zero” as a category of products. (RC179.) Another article, entitled “Great Diet Drinks with Little to No Carbs” mentioned

“Zero soda” in reference to both Coke and Pepsi (despite the fact that there is no product called PEPSI ZERO).⁷ (RC177.) On the website LiveWholeBeFree.com, an article entitled, “Week#2 Challenge – No Sodas!” references “‘zero’ sodas” as equivalent to diet sodas. (RC185.) An article entitled “Reviewing ‘Zero’ sodas” defined the category as “no carb, no sugar, no calories” sodas, rather than referencing TCCC as the sole purveyor. (RC174.) Another Internet article entitled, “What is sabotaging your weight loss?,” states, “Even those zero sodas have an impact on nutrition.” (RC186.)

E. Foreign Decisions Holding “Zero” Generic

While foreign trademark decisions are not generally binding on the Board, TCCC has made them relevant by stating that “it would be anomalous if applicant received protection for its marks in foreign countries . . . that fully recognized the nature of applicant’s rights but was denied such protection in the United States.” (TCCC’s Request for Reconsideration, App. Ser. No. 78/580,598, at 4 (June 20, 2006).) The reverse is true as well: it would be anomalous if TCCC received monopoly rights in the United States for a term that another English speaking country has already determined is generic – as the United Kingdom has done.

In the U.K. proceeding, PepsiCo opposed TCCC’s application to register the mark ZERO in a design format for “[m]ineral and aerated waters and non-alcoholic drinks (not including non-alcoholic beer); fruit drinks and fruit juices; syrups and other preparations for making beverages.” The Appointed Person (which acts as an appeals tribunal to decisions of the hearing officer of the U.K. trademark office) held that the ZERO mark was devoid of any distinctive character. *In the Matter of Opposition No. 95457 by Pepsi Co, Inc.*, No. BL O-246-09, ¶ 51

⁷ Some consumers seem to use “Pepsi Zero” as the name for the Diet Pepsi product with a “0” call-out. (See RC187-RC188.)

(Appointed Person) (Aug. 17, 2009). (RC283; *see also* RC282.) In other words, the U.K. trademark office determined that “zero” is generic.

**F. Harm to the Beverage Industry, Consumers and Royal Crown
If TCCC is Permitted to Monopolize “ZERO”**

Just as no one beverage company has the exclusive right to use “diet” in its product names, no one beverage company should have the exclusive right to use the successor term to “diet,” namely, “zero.” The term is used by consumers, the press, the beverage industry and even TCCC to refer to zero-calorie soft drinks. TCCC cannot be sanctioned as the only company allowed to communicate a zero message to consumers in the most effective way possible: as part of the product name. To allow TCCC to obtain registrations without disclaiming ZERO would give TCCC control over how third parties can communicate a key product attribute. TCCC has already filed thirteen oppositions to ZERO-inclusive marks – Royal Crown’s marks among them – alleging likelihood of confusion with its own ZERO-inclusive marks, among other claims. (RC267-RC280.) And no one can know how extensively TCCC would try to enforce a trademark monopoly in the term “zero”: TCCC could attempt to stop not only third parties who use “zero” as part of the name of zero-calorie beverages, but also third parties who have “zero” call-outs on beverages or otherwise use the term “zero” in connection with the sale and promotion of zero-calorie beverages. The trademark law cannot be used to grant such power to TCCC.

VI. QUESTION PRESENTED

The question presented to the Board is whether the term “ZERO” in the Challenged Marks is either generic or descriptive without secondary meaning, such that TCCC should be foreclosed from registering the Challenged Marks without disclaiming the term, or whether

TCCC has established secondary meaning in the term “ZERO” alone so as to permit registration of the Challenged Marks without disclaimer.⁸

VII. ARGUMENT

A. Standing

Royal Crown’s standing cannot be disputed. When the genericness or descriptiveness of a claimed mark is at issue, an opposer establishes standing by demonstrating that it is engaged in the manufacture or sale of the same or related goods that are the subject of the application at issue, such that the opposer has an interest in using the term in a descriptive or generic manner. *Sheetz of Del., Inc. v. Doctor’s Assocs. Inc.*, 108 U.S.P.Q.2d 1341, 1350 (T.T.A.B. 2013). Royal Crown not only is engaged in the sale of beverages, the same goods that are the subject of TCCC’s applications at issue (Sections V.A.1, V.B.2, *infra*), but it also has an interest in using the challenged term – “zero” – in connection with such products, as evidenced by its applications for and use of the trademarks DIET RITE PURE ZERO and PURE ZERO. (Section V.A.5, *infra*.) Permitting TCCC to register the various Challenged Marks without disclaimer of the term “zero” would give TCCC a *prima facie* exclusive right to use the Challenged Marks as trademarks for beverages and would give legal color to TCCC’s claim that it owns a family of marks, the common, distinctive, and source-identifying feature of which is the term “zero.” In fact, TCCC already has asserted the Challenged Marks and its purported ZERO “family” by filing oppositions to Royal Crown’s applications to register the marks DIET RITE PURE ZERO

⁸ Because TCCC has sought registration of the Challenged Marks under Lanham Act Section 2(f) on the basis of acquired distinctiveness, it is an “established fact” that the Challenged Marks are *not* inherently distinctive. *Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 6 U.S.P.Q.2d 1001, 1005 (Fed. Cir. 1988) (“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.”) (emphasis in original); *see also Companhia de Bebidas das Americas – AMBEV v. Coca Cola Co.*, Consolidated Opp. No. 91178953, 2012 WL 1881492, at *4 (T.T.A.B. May 2, 2012) (“Having accepted publication of is ZERO marks under Section 2(f), TCCC may not now argue that ZERO is inherently distinctive or suggestive.”).

and PURE ZERO and by filing oppositions to multiple third-party marks that include the term “ZERO.” (Sections IV.B, V.F, *infra.*)

B. Disclaimers Generally

In opposing the Challenged Marks, Royal Crown does not seek to prevent registration of the marks, only registration without a disclaimer of the term “zero.” “A disclaimer is a statement that the applicant or registrant does not claim the exclusive right to use a specified element or elements of a mark in a trademark application or registration.” *In re La. Fish Fry Prods., Ltd.*, S.N. 77816809, 2013 WL 3191197, at *2 (T.T.A.B. May 24, 2013). Under Lanham Act Section 6(a), 15 U.S.C. § 1052(a), the USPTO “may require the applicant to disclaim an unregistrable component of a mark otherwise registrable.” Where a term in an applied-for mark is generic or is descriptive with respect to at least some of the goods covered by the application, registration of the mark is properly refused in the absence of a disclaimer. *In re La. Fish Fry Prods.*, 2013 WL 3191197, at *3 (citation omitted). As shown herein, the term “zero” is either generic as applied to TCCC’s goods, or is descriptive without acquired distinctiveness, and thus must be disclaimed.

C. TCCC Bears the Ultimate Burden of Proof

Royal Crown bears only the *initial* burden of rebutting the validity of TCCC’s marks. TCCC, in contract, bears the *ultimate* burden of establishing that that “ZERO” is either not generic or, if descriptive, has secondary meaning such that the Challenged Marks are registrable without a disclaimer of the term “zero.” *E. R. Squibb & Sons, Inc. v. Cooper Labs., Inc.*, 214 U.S.P.Q. 441, 446 (S.D.N.Y. 1982) (“Because Squibb has not registered ‘ANGLE’ as a trademark, it bears the burden of proving that it is not generic as applied to the products at issue.”); *Yamaha*, 6 U.S.P.Q.2d at 1008 (applicant seeking registration under Lanham Act

Section 2(f) bears ultimate burden of establishing acquired distinctiveness; to place the ultimate burden of disproving acquired distinctiveness 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”). Royal Crown can satisfy its initial burden by “present[ing] sufficient evidence or argument on the which the board c[an] reasonably conclude that [TCCC] had not proven at least one of the elements necessary to obtain a trademark registration” without a disclaimer. *Id.* at 1004.

Royal Crown has more than satisfied its initial burden. In fact, the burden of proof is academic in this case, as regardless of who bears the ultimate burden, the overwhelming evidence establishes that “zero” is either generic or lacks acquired distinctiveness and must be disclaimed.

D. “ZERO” Is Generic for Soft Drinks With Zero Calories

1. Standard

A term is generic if its primary significance is to describe the *type of product* rather than the *producer*. *Filipino Yellow Pages, Inc. v. Asian Journal Publ’n, Inc.*, 53 U.S.P.Q.2d 1001, 1004 (9th Cir. 1999) (quoting *Anti-Monopoly, Inc. v. Gen. Mills Fun Grp.*, 204 U.S.P.Q. 978, 983 (9th Cir. 1979); *see also In re Dial-A-Mattress Operating Corp.*, 57 U.S.P.Q.2d 1807, 1810 (Fed. Cir. 2001). Generic terms are neither protectable nor registrable as trademarks, as they must remain free for anyone to use to identify his or her goods. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 199-200 (1896); *In re Merrill Lynch*, 4 U.S.P.Q.2d 1141, 1142 (Fed. Cir. 1987) (protecting a generic term as a mark “would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are”). To the extent a good or its class or category is known by more than one generic name, none of them are registrable. *In re*

Sun Oil Co., 165 U.S.P.Q. 718, 719 (C.C.P.A. 1970) (Rich, J., concurring) (“All of the generic names for a product belong in the public domain”); *In re Eddie Z’s Blinds & Drapery, Inc.*, 74 U.S.P.Q.2d 1937, 1042 (T.T.A.B. 2005) (“that there may be other generic terms that are functionally equivalent to [the term at issue] does not make that term any less generic”).

An adjective referring to a key characteristic of a good can be generic as readily as the name of the product. *Sheetz of Del.*, 108 U.S.P.Q.2d at 1366 (“adjectival use . . . does not remove ‘Footlong’ from being generic when used in connection with sandwiches”); *In re Cent. Sprinkler Co.*, 49 U.S.P.Q.2d 1194, 1199 (T.T.A.B. 1998) (because the term “attic” “directly names the most important or central aspect or purpose of applicant’s goods, that the sprinklers are used in attics, this term is generic and should be freely available for use by competitors”); *Miller Brewing Co. v. G. Heileman Brewing Co.*, 195 U.S.P.Q. 281, 285 (7th Cir. 1977) (“The fact that ‘light’ is an adjective does not preclude it from being a generic or common descriptive word” for beer); *see, e.g., Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 35 U.S.P.Q.2d 1342, 1348-49 (9th Cir. 1995) (“self-realization” generic for a type of religious organization); *In re Northland Aluminum Prods., Inc.*, 227 U.S.P.Q. 961, 962 (Fed. Cir. 1985) (“bundt” generic for coffee cake); *In re Sun Oil Co.*, 165 U.S.P.Q. at 719 (“customblended” generic for gasoline); *In re Helena Rubenstein, Inc.*, 161 U.S.P.Q. 606, 608 (C.C.P.A. 1969) (“pasteurized” generic for face cream); *Roselux Chem. Co. v. Parsons Ammonia Co.*, 132 U.S.P.Q. 627, 632 (C.C.P.A. 1962) (“sudsy” generic for aqua ammonia containing a synthetic detergent); *Classic Foods Int’l Corp. v. Kettle Foods, Inc.*, 468 F. Supp. 2d 1181, 1194 (C.D. Cal. 2007) (“kettle” generic for potato chips); *Schwan’s IP, L.L.C. v. Kraft Pizza Co.*, 79 U.S.P.Q.2d 1790, 1793 (8th Cir. 2006) (“brick oven” generic for pizza).

Under well-established precedent, the test for determining whether a term is generic involves a two-step inquiry: “First, what is the genus of goods or services at issue? Second, is the term sought to be registered . . . understood by the relevant public primarily to refer to that genus of goods or services?” *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 228 U.S.P.Q. 528, 530 (Fed. Cir. 1986); *Frito-Lay N. Am. Inc. v. Princeton Vanguard, L.L.C.*, 109 U.S.P.Q.2d 1949, 1952 (T.T.A.B. 2014); *Sheetz of Del.*, 108 U.S.P.Q.2d at 1350.

2. The Genus of Goods at Issue is Zero-Calorie Soft Drinks

To determine the genus of goods at issue, the first part of the genericness inquiry, the Board looks to the description of goods set forth in the applications at issue. *Sheetz of Del.*, 108 U.S.P.Q.2d at 1350 (citation omitted). Here, the goods specified in the opposed applications are various non-alcoholic beverages – *i.e.*, soft drinks – and syrups, concentrates and powders for making soft drinks. Because these goods encompass zero-calorie soft drinks, the Board must consider whether “ZERO” is generic for zero-calorie soft drinks. *In re Cent. Sprinkler*, 49 U.S.P.Q.2d at 1197 (although application specified “automatic sprinklers for fire protection,” “applicant’s goods also fall within the narrower category of sprinklers for fire protection of attics,” for which sub-category “attic” determined to be generic); *see In re Dakota Natural Foods, Inc.*, S.N. 78326818, 2007 WL 2698291, at *3 (T.T.A.B. Aug. 28, 2007) (holding JUMBOZ generic for jumbo-sized sunflower seeds, notwithstanding that the application specified only “processed sunflower seeds” without a size limitation); *In re Nutraceutical Corp.*, S.N. 78975072, 2006 WL 802405, at *2 (T.T.A.B. Mar. 13, 2006) (relevant category of goods and services considered to be organic foods and organic food markets, notwithstanding that application did not specify “organic”).

3. The Relevant Public Understands “Zero” to Mean a Soft Drink With Zero Calories

“The second part of the genericness test is whether the relevant public understands the term at issue to primarily refer to [the identified] class of goods.” *Sheetz of Del.*, 108 U.S.P.Q.2d at 1350-51. The relevant public is the purchasing or consuming public for the identified goods. *Id.* at 1351. Here, because the opposed applications have no limitations as to channels of trade or classes of consumers, the relevant public would be ordinary consumers who purchase and consume soft drinks. *See id.*

“Evidence of the public’s understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications.” *Frito-Lay N. Am.*, 109 U.S.P.Q.2d at 1952 (citations omitted). The evidence here, including TCCC’s own research, beverage industry advertisements, third parties in the beverage industry, and publications, along with other competent sources, confirms that consumers understand “zero,” when used in connection with soft drinks, to mean those with zero calories.

i. Competitors Use “Zero” Generically

Competitive use of a term is one “competent source” from which Courts and the TTAB derive the public’s understanding of a term. *See Classic Foods Int’l*, 468 F. Supp. 2d at 1190 (a term’s use by competitors is “strong evidence of how the public perceives the term”); *Pilates, Inc. v. Current Concepts, Inc.*, 57 U.S.P.Q.2d 1174, 1183 (S.D.N.Y. 2000) (use “by competitors and other persons in the trade weighs strongly in favor of genericness”); *see, e.g., BellSouth Corp. v. DataNational Corp.*, 35 U.S.P.Q.2d 1554, 1558 (Fed. Cir. 1995) (affirming Board’s reliance on competitive use to find logo generic); *Sheetz of Del.*, 108 U.S.P.Q.2d at 1367.

The evidence is overwhelming that the term and numeral zero are used throughout the beverage industry in reference to soft drinks having zero calories. The ABA trade organization

ran an advertising campaign identifying “zero” as a category of beverages, and multiple beverages companies use the term and numeral zero in several forms, including on nutritional panels, in packaging call-outs, and in product names. (Sections V.C.1, V.C.2, V.C.3, V.C.5, *infra*.) The array and prevalence of such use has conditioned consumers to understand that “zero” refers to the calorie content of beverages and thus a specific type of beverages.⁹ *See Classic Foods Int’l*, 468 F. Supp. 2d at 1195 (Although plaintiff claimed to be the only one to use KETTLE as a trademark while competitors used “kettle” in a descriptive manner, the court determined that “consumers who encounter ‘Kettle Chips,’ ‘Kettle Classics,’ and the wide variety of other ‘kettle’ products on the market will not associate the term ‘kettle’ with Kettle Foods’ products, but will merely view it as a designation for a type of chips.”); *Flowers Indus. Inc. v Interstate Brands Corp.*, 5 U.S.P.Q.2d 1580, 1589 (T.T.A.B. 1987) (although some competitors used “honey wheat” as a trademark and others used it descriptively, the Board concluded that “purchasers who encounter the bread products of applicant, opposer, and others bearing the designation ‘HONEY WHEAT’ would regard the designation as nothing more than the descriptive name of a type of bread”; holding “honey wheat” generic).

Even if the Board focuses only on the use of “zero” in product names, the record is replete with examples of beverage companies employing ZERO-inclusive trademarks for zero-calorie soft drinks: Royal Crown has submitted evidence of 32 ZERO-inclusive beverage trademarks by companies other than TCCC that have appeared in the marketplace. (Section V.C.3, *infra*). Such use makes it impossible for TCCC to suggest that “zero” is understood as

⁹ Consumers also have been conditioned to see other numbers in product names as designating calorie content, as in the one-calorie PEPSI ONE products, the ten-calorie VITAMINWATER TEN product of TCCC, and the ten-calorie DR. PEPPER TEN, 7-UP TEN, A&W TEN, CANADA DRY TEN, RC TEN and SUNKIST TEN products of DPSG. (*See n.7, infra*.)

anything other than a generic designation for a type of soft drink. Multiple cases have held that even a small number of competitors using a challenged term means that the term is generic. For example, in *Schwan's IP, L.L.C.*, 460 F.3d at 973, the Court held that the presence of only four competitors in the frozen pizza market using “brick oven” meant that the phrase was generic. *See also CG Roxane L.L.C. v. Fiji Water Co.*, 569 F. Supp. 2d 1019, 1027-28 (N.D. Cal. 2008) (finding “bottled at the source” generic where evidence showed almost two dozen competitors using the phrase on their bottles, and 50 other competitors that use the phrase in advertising and marketing materials).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁰ Opinions of DPSG and Pepsico, as leaders in the industry, are “particularly helpful . . . in determining the genericness of a term.” *Classic Food Int'l*, 468 F. Supp. 2d at 1192 (citing 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 12:13 (4th ed. 2013) (hereinafter “*McCarthy*”)).

¹⁰ It is also noteworthy that PepsiCo opposed TCCC’s application to register a ZERO mark in the U.K. (Section V.E, *infra*.)

In sum, the evidence shows that “zero” is in wide use within the soft drink market, and has in effect become interchangeable with “diet” for zero-calorie beverages. As the Board has cautioned, “all possible generic names of a product must reside in the public domain.” *Frito-Lay N. Am.*, 109 U.S.P.Q.2d at 1953 (citing 2 *McCarthy* § 12.9 (“Any product may have many generic designations. Any one of those is incapable of trademark significance.”)); *In re 1800Mattress.com IP, L.L.C.*, 92 U.S.P.Q.2d 1682, 1685 (Fed. Cir. 2009) (“[A]ny term that the relevant public understands to refer to the genus . . . is generic.”)). Just as “diet” resides in the public domain, so too must “zero.”

ii. Competitors Use “Zero” Generically in Trademark Applications and Registrations

In addition to the examples of “zero” being used the marketplace for beverages discussed above, there are also dozens of examples in the record of federal trademark applications and registrations that employ the term or numeral zero in a generic manner. (Section V.C.4, *infra*, Appx. B & C.) A number of these applications and registrations have disclaimed “zero.” (*See* Appx. B & C.)

These applications and registrations, regardless of whether they are live or not, “show the sense in which a term, word, prefix or suffix of a mark [here, “zero”] is used in ordinary parlance. That is, third-party registrations are similar to dictionaries showing how language is generally employed. . . . [They] prove that some segment of the composite marks which both contesting parties use has a normally understood and well-recognized . . . meaning.” 2 *McCarthy*, § 11.90; *Spraying Sys. Co. v. Delavan, Inc.*, 19 U.S.P.Q.2d 1121, 1125 (N.D. Ill. 1991), *aff’d*, 24 U.S.P.Q.2d 1181 (7th Cir. 1992) (when third-party registrations are used to establish the meaning of a term “it is unimportant . . . that many of the registered trademarks were not in current use”); *Gen. Mills Inc. v. Health Valley Foods*, 24 U.S.P.Q.2d 1270, 1277 (T.T.A.B. 1992) (registrations show the sense in

which a term “is employed in the marketplace”); TBMP § 704.03(b)(1)(B) (“third-party registrations may be entitled to some weight to show the meaning of a mark, or a portion of a mark, in the same manner as a dictionary definition”).

iii. Consumers and the Press Use “Zero” to Refer to a Category of Beverages

The record evidences not only that competitors use “zero” generically, but that consumers and the press do as well. In particular, Internet evidence submitted by Royal Crown shows that consumers view “zero” as similar to if not interchangeable with “diet” as a term to refer to a beverage that has zero calories. (Section V.D, *infra*.) See *La. Fish Fry Prods.*, 2013 WL 3191197, at *5 (relying, *inter alia*, on Internet evidence including blog posts to conclude that “fish fry” is generic). Further, TCCC’s own consumer research showed that 92% of respondents understood “zero” in a product name to mean a zero-calorie soft drink. (Section V.B.4, *infra*). Because the ultimate question is how the relevant consumers understand the term, even if there were no other evidence, TCCC’s consumer research and the Internet evidence supplied by Royal Crown standing alone establishes that “zero” is generic.

iv. TCCC Itself Uses “Zero” Generically

Finally, the record evidences that TCCC itself reinforces the generic nature of “zero.” As discussed above, TCCC regularly uses the term and numeral zero in connection with its zero-calorie beverages in the same way as the rest of the industry: in nutrition labels, in packaging call-outs, and in product names. (Section V.B.3, *infra*.) Moreover, virtually every advertisement for TCCC’s ZERO-named products reinforces that “zero” in the product name refers not to the source of the product but to the zero-calorie nature of the product. (Section V.B.3, *infra*.) TCCC’s use of “zero” in connection with its ZERO-named products is similar to the use of “jumbo” made by the applicant in *In re Dakota Natural Foods, Inc.*, S.N. 78326818, 2007 WL

2698291 (T.T.A.B. Aug. 28, 2007), in which the Board determined that JUMBOZ was generic for processed sunflower seeds. In *Dakota Natural Foods*, the applicant's package called out the product's size with the text "When size matters!". 2007 WL 2698291, at *2. Similarly, TCCC's packaging calls out the zero-calorie nature of the products by slogans such as "Real Coca-Cola Taste with Zero Calories." (Section V.B.3, *infra*.) The Board in *Dakota Natural Foods* also pointed to the applicant's website, which referenced the "jumbo" size of the company's sunflower seeds. 2007 WL 2698291 at *2-3. Similarly, TCCC's press releases and other marketing materials consistently reinforce the zero-calorie nature of TCCC's ZERO-named products. (Section V.B.3, *infra*.) As in *Dakota Natural Foods*, "this evidence of applicant's own generic usage of '[zero]' in relation to its [soft drinks] is strong evidence of genericness." 2007 WL 2698291, at *3 (citation omitted); *see also In re Cent. Sprinkler*, 49 U.S.P.Q.2d at 1199 (holding that "[i]n reaching our decision [that ATTIC is generic for sprinklers], we cannot overlook how the relevant public will encounter the matter sought to be registered," and pointing out that applicant's marking materials indicate that "applicant's particular sprinklers are designed for use in attics").

4. TCCC's Marketing Efforts Cannot Save "Zero" From Genericism

Admittedly, TCCC has widely used and advertised the marks COCA-COLA ZERO and COKE ZERO. But this does not prevent "zero" from being deemed generic. If a term is generic, "then no amount of evidence of acquired distinctiveness can establish that the mark is registrable"; "[e]ven long and successful use of a term does not automatically convert a generic term into a non-generic term." *In re Candy Bouquet Int'l, Inc.*, 73 U.S.P.Q.2d 1883, 1888 (T.T.A.B. 2004) (citations omitted); *see also Abercrombie & Fitch Co. v. Hunting World, Inc.*, 189 U.S.P.Q. 759, 764 (2d Cir. 1976) ("No matter how much money and effort the user of a

generic term has poured into promoting the sale of its merchandise and what success it has achieved in securing public identification, it cannot deprive competing manufacturers of the product of the right to call an article by its name.”); *Miller Brewing Co. v. Falstaff Brewing Corp.*, 211 U.S.P.Q. 665, 668 (1st Cir. 1981) (evidence showing that public perceived Miller to be the source of LITE beer such that this meaning was “dominant in the public mind” was irrelevant, since there was no evidence that “‘LITE’ has *ceas[ed]* to have in current usage among consumers of beer the generic meaning, ‘beer of low caloric content’”) (emphasis in original); *HMH Publ’g Co. v. Brincat*, 183 U.S.P.Q. 141, 145 (9th Cir. 1974) (“a businessman should not be permitted to ‘pluck a word with favorable connotations for his goods or services out of the general vocabulary and appropriate it to his exclusive use no matter how much efforts and money he may expend in the attempt.’”) (citation omitted).¹¹

* * * * *

In this case, the record makes clear that zero, both in word and numeral form, has been and continues to be widely used in the beverage industry to refer to zero-calorie soft drinks, both by the parties to these proceedings, their competitors, and the industry generally, and that zero is recognized and used by consumers and the press as such. In this context, it made imminent sense for TCCC to adopt “zero” for zero-calorie soft drinks given the term’s known meaning. But the same cannot be said for its attempt to obtain a monopoly in a term that is so inextricably tied to the nature of the products to which it is applied. *See Anti-Monopoly*, 216 U.S.P.Q. at 593

¹¹ Even if TCCC had been the first company to adopt “zero” first as part of a brand name – and the evidence shows that it was not – that would not matter. “The law does not permit ‘anyone to obtain a complete monopoly on use of a descriptive or generic term simply by grabbing it first.’” *Frito-Lay N. Am.*, 109 U.S.P.Q.2d at 1959 (quoting *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122 (2004); citing *In re Pennington Seed, Inc.*, 80 U.S.P.Q.2d 1758, 1761-62 (Fed. Cir. 2006) (first user of seed varietal name not entitled to monopoly); other citation omitted); *see also In re Greenliant Sys., Ltd.*, 97 U.S.P.Q.2d 1078, 1083 (T.T.A.B. 2010) (“the fact that an applicant may be the first or only user of a generic designation . . . does not justify registration”).

(because the purpose of the game of Monopoly is, as stated by Parker Brothers, to become a “monopolist,” “[b]y choosing the word [“monopoly”] as a trademark, Parker Brothers subjected itself to a considerable risk that the word would become so identified with the game as to be ‘generic.’”) Since “zero” identifies a category of beverages, namely, zero-calorie soft drinks, it must be freely available for use by competitors. And because “zero” must be free for use by competitors, the Board should not grant TCCC a monopoly in the term by permitting TCCC to register the Challenged Marks without a disclaimer of “zero” and thus ratifying its purported family of ZERO marks.¹²

E. If Not Generic, “ZERO” Is Descriptive Without Acquired Distinctiveness

While TCCC asserts rights in “zero” based on acquired distinctiveness in the term. TCCC has *never* used or advertised ZERO standing alone as a mark. (Cf. Baker Dep. 103:18-04:1, 223:5-20; [REDACTED]) Instead, TCCC premises its claim of acquired distinctiveness in the term “zero” on use of a purported family of marks in which “zero” is the common, defining feature. (See, e.g., Response to Office Action, Application Serial No. 78/580,598 (Jan. 25, 2007).) But TCCC’s claim fails on at least two levels. First, TCCC has failed to establish that it owns a family of ZERO marks. Second, even if TCCC could establish a family of ZERO marks, it has failed to establish acquired distinctiveness in the “zero” portion of those marks.¹³

¹² If the Board determines that the evidence is insufficient to support a conclusion that “zero” is generic for zero-calorie beverages, the Board should alternatively conclude, on the basis of all the evidence discussed above, that “zero” is so highly descriptive of such goods that it is incapable of acquiring distinctiveness so as to be monopolized as a mark. See, e.g., *In re Bos. Beer Co.*, 53 U.S.P.Q.2d 1056, 1058 (Fed. Cir. 1999) (“The Best Beer in America” is “so highly laudatory and descriptive as to be incapable of acquiring distinctiveness as a trademark”).

¹³ TCCC’s claim also appears to fail on a third level. Royal Crown is unaware of any case law, statute or rule sanctioning the use of a “family of mark” theory to establish acquired distinctive-ness so as to avoid a disclaimer requirement, including in connection with marks *that were not in use*, as TCCC has done

1. TCCC Cannot Establish a Family of “ZERO” Marks

A family of marks is a group of marks having a recognizable common characteristic, wherein the marks are composed and used in such a way that the public associates not only the individual marks, but also the common characteristic of the family, with the trademark owner.

J & J Snack Foods Corp. v. McDonald’s Corp., 18 U.S.P.Q.2d 1889, 1891 (Fed. Cir. 1991).

Thus, in order for a family of marks claim to succeed, “[t]here must be recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods.”

Id. “Simply using a series of similar marks does not of itself establish the existence of a family.”

Id. Further, the claimed common family must be distinctive, that is, not descriptive or so highly descriptive that it cannot function as a distinguishing characteristic of the marks. *Marion Labs.,*

Inc. v. Biochemical/Diagnostics Inc., 6 U.S.P.Q.2d 1215, 1219 (T.T.A.B. 1988); *see also*

Spraying Sys., 24 U.S.P.Q.2d at 1187 (“[A]pplication of the doctrine requires a showing that the family feature or ‘surname’ is distinctive enough to trigger recognition ‘in and of itself.’”).

Consequently, in assessing a claim of a family of marks, the Board considers not only the character of the use and advertising of the marks, but also the distinctiveness of the claimed common feature and its “contribution . . . to the recognition of the marks as of common origin.”

here. The one case that mentions the possibility of using a family of marks theory to establish acquired distinctiveness to avoid a disclaimer requirement, *In re Language Workshop for Children/Cercle Franco Americain, Inc.*, S.N. 75516045, 2003 WL 21996100 (T.T.A.B. Aug. 14, 2003), does so only in dicta and only in connection with a use-based application. The opinion further notes that even if such a theory were viable, it could not be successfully used when the common family element is “highly descriptive” of the applicant’s goods. *Id.* at *10 n.4 (“[E]ven assuming that proof of a family of marks could be used to demonstrate acquired distinctiveness of the family element or surname, . . . the words FOR TOTS are highly descriptive of the [applicant’s] services[,] which . . . are provided to young children, i.e., ‘tots,’ and thus application of the family of marks doctrine does not support registration of the designation FOR TOTS.”) (internal quotation omitted). In any event, the USPTO’s acceptance of TCCC’s family of marks theory in connection with marks that were not in use is antithetical to the very concept of acquired distinctiveness and moreover is contrary to Section 2(f) of the Lanham Act, which provides that “nothing herein shall prevent the registration of a mark *used* by the applicant which has become distinctive of the applicant’s goods in commerce.” 15 U.S.C. § 1052(f) (emphasis added).

Sexy Hair Concepts, L.L.C. v. Christal, Opp. No. 91177752, 2008 WL 5454159, at *3 (T.T.A.B. Dec. 23, 2008).

i. “Zero” Is Not Distinctive Enough to Form the Basis for a Family of Marks

The record establishes that “zero,” if not generic, is highly descriptive. As such, it is, at best, a doubtful basis for TCCC’s family of marks. *See Grant Street Grp., Inc. v.*

RealAuction.com L.L.C., Opp. No. 91177493, 2009 WL 4086582, at *4 (T.T.A.B. Sept. 29, 2009) (“A family of marks generally will not be found to exist where the asserted family elements is a descriptive or common term that does not serve as a distinguishing feature of the marks under consideration.”); “auction” failed to function as a distinctive element in opposer’s claimed family); *see Ferrotc (USA) Corp. v. Ferro Labs, Inc.*, Opp. No. 91174110, 2009 WL 273256, at *4 (T.T.A.B. Jan. 29, 2009) (“Because of the descriptive nature of the term FERRO, opposer’s claim of a family of marks based on such a term is unsustainable.”); *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 220 U.S.P.Q. 1072, 1075 (T.T.A.B. 1983) (“[G]iven the generic nature of the word ‘SPICE’ as applied to opposer’s spices and the descriptive nature of the term as applied to at least some of opposer’s teas, proof of a family of marks founded upon the word ‘SPICE’ is an untenable proposition.”).

The evidence of record casts further doubt on TCCC’s ability to rely on “zero” as the common feature of its claimed family. There is ample evidence that “zero” is a common term widely used in product names for its established meaning in connection with zero-calorie soft drinks, and no evidence that any consumer confusion has resulted therefrom. (Section V.C.3, *infra*.) That so many third parties use “zero” in the product names of zero-calorie soft drinks without confusion confirms that “zero” does not function as a distinguishing or source-identifying characteristic of TCCC’s marks.

Further, there is no evidence that TCCC has ever attempted to hold out “zero” as a source-identifying feature of its marks; the brand name of the beverage – Coca-Cola, Sprite, Powerade, *etc.* – is the distinguishing feature. Since TCCC must establish that “zero” has acquired distinctiveness separate and apart from the brand names in the marks, this alone disqualifies reliance on ZERO as the basis of a claimed family of marks. *Cf. In re La. Fish Fry Prods.*, 2013 WL 3191197, at *14 (“[A]pplicant’s sales and advertising figures while extensive do not shed any light on whether consumers perceive the term FISH FRY PRODUCTS as a source indicator since the term is used only in association with the name ‘Louisiana’ that . . . engenders the commercial impression of LOUISIANA brand ‘Fish Fry Products.’”); *compare Sexy Hair Concepts*, 2008 WL 5454159, at *3 (where opposer’s claimed family included marks consisting of the term “sexy” followed by a generic noun, “sexy” functioned as the common family element because it was the only distinctive element of the claimed family).

ii. TCCC Has Not Submitted Sufficient Evidence to Establish a Family

TCCC also has failed to submit sufficient evidence to prove that its ZERO-named beverages “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 upon a feature common to each mark.” *Am. Standard, Inc. v. Scott & Fetzer Co.*, 200 U.S.P.Q. 457, 461 (T.T.A.B. 1978). TCCC introduced into evidence only five documents that purport to be advertising materials referencing more than one of the Challenged Marks. (Baker Dep. 231:21-237:5, TCCC 117-121). These five documents show only three different advertising concepts, none of which include the full range of TCCC’s claimed family of marks. (TCCC 117-121.) More importantly, TCCC has not introduced definitive evidence of where, when or in which media such advertisements ran. In fact, TCCC’s sole witness could not

even definitely state whether the advertisements were *ever* deployed. (See Baker Dep. 231:21-237:5; [REDACTED])

This lack of evidence cannot give rise to a finding that a family of marks exist. See *Monster Cable Prods., Inc. v. Tecmo, Ltd.*, Opp. Nos. 91154125, 91154136, 91158681 & Cancellation No. 92041581, 2007 WL 411955, at *7 (T.T.A.B. Feb. 2, 2007) (refusing to find a family of MONSTER marks where there was no evidence of the extent of advertising bearing more than one MONSTER mark and there were scant examples of MONSTER marks being advertised or promoted together); *U.S. Golf Ass'n v. T-Golf L.L.C.*, Opp. Nos. 91174712 & 91181355, 2009 WL 4086581, at *4-5 (T.T.A.B. Sept. 30, 2009) (refusing to find a family of OPEN marks where there was evidence that, at most, only three of the claimed 13 family marks had been advertised or promoted together).

Not only is there insufficient evidence that TCCC markets its ZERO-named products in a way that would engender consumer recognition of a common source, but also TCCC does not employ its ZERO-inclusive marks in a way that would engender such recognition. For example, TCCC does not employ a common trade dress across its various ZERO-named beverages, not even a common font style or format for the ZERO portion of the marks. (*Compare* RC47, RC51-RC52, RC80-RC92.) Given the variety of soft drinks that TCCC markets under a ZERO-inclusive name – CSDs, tea, vitamin-enhanced water and sports drinks – this lack of a common format makes it unlikely that consumers would view the products as emanating from a single source.¹⁴

¹⁴ In fact, there is no evidence that consumers associate all of TCCC's ZERO-named products with TCCC. (*Cf.*, Baker Dep. 175:21 – 176:25 (not all of TCCC's ZERO-named products reference TCCC as the ultimate source.)

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

To establish acquired distinctiveness, a trademark proponent “must show that, in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.” *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 214 U.S.P.Q. 1, 4 n.11 (1982). Thus, TCCC must prove that, in the minds of the relevant consumers, the *primary* significance of the term “zero,” as used in the Challenged Marks and as applied to zero-calorie beverages, is to identify a single source of the product, namely TCCC, rather than to identify the type of product, namely a zero-calorie soft drink. *Id.*

The “amount and character” of evidence required to establish acquired distinctiveness depends “particularly on the nature of the alleged mark.” *Roux Labs., Inc. v. Clairol Inc.*, 166 U.S.P.Q. 34, 39 (C.C.P.A. 1970). “[A] more descriptive term requires more evidence of secondary meaning,” so that an “applicant’s burden of showing acquired distinctiveness increases with the level of descriptiveness.” *In re Steelbuilding.com*, 75 U.S.P.Q.2d 1420, 1424 (Fed. Cir. 2005); *Yamaha*, 6 U.S.P.Q.2d at 1008 (“The greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning.”). Here, “zero” when used in connection with zero-calorie beverages, if not generic, is – for all the reasons discussed above – so highly descriptive that TCCC bears a very heavy burden to prove that the primary significance of “zero” in the minds of the relevant public is to identify TCCC as the source of the product and not to describe the zero-calorie nature of the products to which the term is applied. TCCC has not met this burden.

i. TCCC's Use of ZERO is Not Exclusive

TCCC is not the only beverage company using ZERO-inclusive marks. Not only do beverage industry giants like PepsiCo and DPSG market beverages utilizing the term “zero” in the product name – PROPEL ZERO and DIET RITE PURE ZERO, respectively – but so do a number of smaller players. (Section V.C.3, *infra*.) In fact, TCCC was not even the first to market a zero-calorie beverage under a ZERO-inclusive name – SGE was first with its IMPULSE ZERO energy drink. (Section V.C.E., *infra*.) Even a beverage industry marketing group, of which TCCC is a member, uses “zero” not to identify TCCC’s goods to but refer to a product category. (Section V.D, *infra*.) The common use of “zero” in trademark applications and registrations further show that, far from being source-identifying, “zero” is a recognized industry term for zero-calorie soft drinks.

That TCCC’s claimed family of ZERO marks is coexisting with so many other ZERO-inclusive marks for identical products is fatal to TCCC’s claim of acquired distinctiveness. As the Federal Circuit said in *Levi Strauss & Co. v. Genesco, Inc.*, 222 U.S.P.Q. 939, 940-41 (Fed. Cir. 1984), “[w]hen the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term . . . distinctiveness on which purchasers may rely is lacking.” *See also CG Roxane*, 569 F. Supp. 2d at 1027 (“Naturally, when more members of the public see a mark used by several producers in the industry, the less likely they will identify a particular produce with that mark.”); *see, e.g., Gen. Motors Corp. v. ICRC – Integrated Concepts & Research Corp.*, Opp. No. 91152661, 2007 WL 683779, at *16 (T.T.A.B. Mar. 2, 2007) (where numerous third parties had used and registered SMART-inclusive marks for related goods and services, “opposer is faced with a formidable challenge in attempting successfully to make ‘SMART-’ into its [family of marks] surname”); *Flowers Indus.*, 5 U.S.P.Q.2d at 1584,

1586 (although applicant had sold bread under the mark HONEY WHEAT since 1936, secondary meaning not established due to numerous third parties using the designation to describe a type of bread); *Classic Food Int'l*, 468 F. Supp. 2d at 1195 (although plaintiff was first to use “kettle” term, had used term for 36 years, and controlled 34% of the market, plaintiff failed to establish acquired distinctiveness in term where at least 15 competitors also used the term “and the number and presence of competitors [using “kettle”] ha[d] only increased over the years”).

ii. TCCC Does Not Use ZERO in a Source-Identifying Fashion

TCCC’s claim of acquired distinctiveness also fails because there is no evidence that TCCC uses “zero” in a source-identifying fashion. As discussed above, TCCC is claiming acquired distinctiveness through the purported use of a family of ZERO-inclusive marks. However, each of TCCC’s marks has a distinctive component other than the term “zero,” namely, the brand name of the product (Coca-Cola, Sprite, Powerade, etc.). And as discussed above, there is no evidence that TCCC has marketed its ZERO-named products together in such a way so as to engender recognition among consumers that the term “zero” in a product name designates a single source. Moreover, nothing about any of the advertisements or packaging for any of the particular ZERO-named products emphasizes the ZERO portion of the mark as designating anything other than that the product has zero calories. Without evidence that ZERO is used or advertised by TCCC in such a way that consumers would recognize it as an independent, source-identifying feature, and considering that TCCC’s packaging and marketing emphasize the descriptive nature of the term “zero,” none of TCCC’s sales and marketing evidence is probative of secondary meaning in the term. *See First Brands Corp. v. Fred Meyer, Inc.*, 1 U.S.P.Q.2d 1779, 1782 (9th Cir. 1987) (finding no acquired distinctiveness where

plaintiff's advertising, though extensive, did not emphasize the mark in such a way as to support an inference of secondary meaning – e.g., advertisements did not urge consumers to look for the claimed mark); *E. R. Squibb & Sons*, 214 U.S.P.Q. at 447 (“Given . . . Squibb’s consistently descriptive use of ‘angle’ in its advertising copy, there would be no apparent reason for a consumer to assume that every brush bearing the word ‘angle’ is marketed by, sponsored by, or associated with Squibb.”) (internal quotation marks and citation omitted).

* * * * *

In light of all of the above – the highly descriptive nature of “zero” as used in connection with zero-calorie beverages, the numerous competitors also using ZERO-inclusive marks, and the fact TCCC has done nothing to engender recognition of ZERO as an independent, source-identifying feature of its marks – TCCC’s evidence of its sales and marketing, and even its consumer survey, are not persuasive to show that consumers primarily view the term “zero” as designating the beverages of TCCC. *In re Apple Inc.*, S.N. 77219819, 2011 WL 4871860, at *6 (T.T.A.B. Sept. 23, 2011) (“a successful product and even high advertising expenses for the product do not necessarily translate into a mark acquiring descriptiveness”) (citation omitted). At most, TCCC’s evidence merely confirms the marketing juggernaut that TCCC is known to be and the popularity of TCCC’s COCA-COLA ZERO product. *Braun Inc. v. Dynamics Corp. of Am.*, 24 U.S.P.Q.2d 1121, 1133 (Fed. Cir. 1992) (“[L]arge consumer demand for Braun’s blender does not permit a finding the public necessarily associated the blender design with Braun.”); *In re Bongrain Int’l (Am.) Corp.*, 13 U.S.P.Q.2d 1727, 1729 (Fed. Cir. 1990) (growth in sales may be indicative of popularity of product itself rather than recognition as denoting origin).

As the predecessor to this Board's reviewing Court advised:

[M]erchants act at their peril in attempting, by advertising, to convert common descriptive names, which belong to the public, to their own exclusive use. Even though they succeed in the creation of de facto secondary meaning, due to lack of competition or other happenstance, the law respecting registration will not give it any effect.


Weiss Noodle Co. v. Golden Cracknel & Specialty Co., 129 U.S.P.Q. 411, 414 (C.C.P.A. 1961);
see also Miller Brewing, 195 U.S.P.Q. at 286 ("The word 'light,' including its phonetic equivalent 'lite,' being a generic or common descriptive term as applied to beer, could not be exclusively appropriated by Miller as a trademark, despite whatever promotional effort Miller may have expended to exploit it.") (internal quotation marks and citations omitted).

VIII. CONCLUSION

For the reasons stated herein, and based on the evidence properly of record in these consolidated proceedings, Royal Crown respectfully requests that the Board hold ZERO, as used in connection with the Challenged Marks, to be either generic or descriptive without secondary meaning, and refuse registration of the Challenged Marks to TCCC without disclaimer of the term.

Dated: New York, New York
May 8, 2014

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

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APPENDIX A

Royal Crown Company Inc. and Dr Pepper/Seven-Up Inc. are relying on the following evidence in support of their position in these consolidated proceedings as set forth in the Trial Brief for Opposers:

1. The testimony of Andrew D. Springate, as presented in the July 3, 2013 Trial Declaration of Andrew Springate, his July 9, 2013 testimonial deposition, the November 25, 2013 Second Trial Declaration of Andrew D. Springate, and his December 4, 2013 testimonial deposition, and Opposers' Exhibits RC1-RC17 and RC19 referenced therein:

- Opposers' Exhibit RC1: Examples of DIET RITE packaging with a "call-out" touting that the product has "zero carbs";
- Opposers' Exhibit RC2: Examples of print advisements promoting the DIET RITE brand's "zero" positioning;
- Opposers' Exhibit RC3: Examples of DIET RITE PURE ZERO packaging as it existed from 2005 through late 2012;
- Opposers' Exhibit RC4: Examples of current DIET RITE PURE ZERO packaging;
- Opposers' Exhibit RC5: Summary of year 2006 through First Quarter 2013 sales and marketing figures for DIET RITE PURE ZERO from the Packaged Beverages (finished product) segment;
- Opposers' Exhibit RC6: Summary of 2007 through 2012 sales and marketing figures for DIET RITE PURE ZERO from the Beverage Concentrate segment;
- Opposers' Exhibit RC7: Example of television commercial promoting DIET RITE PURE ZERO;

- Opposers' Exhibit RC8: Printouts from DIET RITE PURE ZERO website promoting DIET RITE PURE ZERO brand and products;
- Opposers' Exhibit RC9: Photographs of the ZERO-G plane, of which DIET RITE was the official launch sponsor, showing the “zero” positioning of the DIET RITE product;
- Opposers' Exhibit RC10: Contents of USPTO’s prosecution database (the “file wrapper”) for DPSG’s Application Serial No. 78576257 for the mark DIET RITE PURE ZERO;
- Opposers' Exhibit RC11: File wrapper for DPSG’s Application Serial No. 78581917 for the mark PURE ZERO;
- Opposers' Exhibit RC12: Assignment agreement transferring Application Serial Nos. 78576257 and 78581917 from Royal Crown Company, Inc. to Dr Pepper/Seven Up, Inc.;
- Opposers' Exhibit RC13: Examples of nutritional panels for various beverage products listing the numeral “0” next to the word “Calories,” and with zero calorie call-outs on the labels;
- Opposers' Exhibit RC14: Examples of products that include “zero” or “0” in the product name;
- Opposers' Exhibit RC15: Press release announcing DPSG’s introduction of ALL SPORT NATURALLY ZERO beverage;
- Opposers' Exhibit RC16: Examples of products that include “zero” or “0” in the product name;

- Opposers' Exhibit RC17: Information provided by the Nielsen company showing the retail dollar sales associated with certain listed products, which include DIET RITE PURE ZERO, for the 52-week period ending March 23, 2013; and

- Opposers' Exhibit RC19: Summary of 2003 through 2012 marketing figures for DIET RITE PURE ZERO.

2. The testimony of Chris Barnes, as presented in the July 3, 2013 Trial Declaration of Chris Barnes and his July 9, 2013 testimonial deposition, and Opposers' Exhibit RC18 referenced therein:

- Opposers' Exhibit RC18: Advertisements for the "Delivering Choices" campaign that appeared on the New York City transit system.

3. The testimony of Mario Ortiz, as presented in the July 12, 2013 Trial Declaration of Mario Ortiz and his July 29, 2013 testimonial deposition, and Opposers' Exhibits RC20-RC55 referenced therein:

- Opposers' Exhibit RC20: Photographs showing an ARIZONA DIET GREEN TEA beverage;

- Opposers' Exhibit RC21: Photographs showing AYALA HERBAL WATER beverages;

- Opposers' Exhibit RC22: Photographs showing CLEAR AMERICAN beverages;

- Opposers' Exhibit RC23: Photographs showing DIET MUG Cream Soda and Root Beer beverages;

- Opposers' Exhibit RC24: Photographs showing a DIET PEPSI beverage;

- Opposers' Exhibit RC25: Photographs showing a caffeine free DIET PEPSI beverage;
- Opposers' Exhibit RC26: A photograph showing a DIET PEPSI MAX beverage;
- Opposers' Exhibit RC27: Photographs showing a DIET PEPSI WILD CHERRY beverage;
- Opposers' Exhibit RC28: Photographs showing a DIET 7UP beverage;
- Opposers' Exhibit RC29: Photographs showing DIET SIERRA MIST beverages;
- Opposers' Exhibit RC30: Photographs showing a DR. BROWN'S DIET CREAM SODA beverage;
- Opposers' Exhibit RC31: Photographs showing a DIET GOLD PEAK TEA beverage;
- Opposers' Exhibit RC32: Photographs showing an UNSWEETENED GOLD PEAK TEA beverage;
- Opposers' Exhibit RC33: Photographs showing HINT beverages;
- Opposers' Exhibit RC34: Photographs showing a MONSTER ENERGY ABSOLUTELY ZERO beverage;
- Opposers' Exhibit RC35: Photographs showing a PENNSYLVANIA DUTCH DIET BIRCH BEER beverage;
- Opposers' Exhibit RC36: Photographs showing PEPSI MAX beverages;
- Opposers' Exhibit RC37: Photographs showing PURE AMERICAN ZERO CALORIE beverages;

- Opposers' Exhibit RC38: Photographs showing SOBE LIFEWATER beverages;
- Opposers' Exhibit RC39: Photographs showing TAVA beverages;
- Opposers' Exhibit RC40: Photographs showing TAZO DIET GIANT PEACH and TAZO DIET MOJITO GREEN beverages;
- Opposers' Exhibit RC41: Photographs showing a TEAS' TEA beverage;
- Opposers' Exhibit RC42: Photographs showing VITARAIN ZERO beverages;
- Opposers' Exhibit RC43: Photographs showing ZEVIA beverages;
- Opposers' Exhibit RC44: Photographs showing DIET RITE PURE ZERO beverages;
- Opposers' Exhibit RC45: Photographs showing a SNAPPLE DIET GREEN TEA beverage;
- Opposers' Exhibit RC46: Photographs showing DIET STEWART'S CREAM SODA beverages;
- Opposers' Exhibit RC47: Photographs showing a COCA-COLA ZERO beverage;
- Opposers' Exhibit RC48: Photographs showing DASANI PLUS beverages;
- Opposers' Exhibit RC49: Photographs showing a DIET COKE beverage;
- Opposers' Exhibit RC50: Photographs showing a FRESCA beverage;
- Opposers' Exhibit RC51: Photographs showing POWERADE ZERO beverages;

- Opposers' Exhibit RC52: Photographs showing VITAMINWATER ZERO beverages;
- Opposers' Exhibit RC53: Internet printout showing a beverage product with the name THE BEAST ZERO;
- Opposers' Exhibit RC54: Internet printout from the website www.victoryenergize.com showing, *inter alia*, a VICTORY beverage product with the name ZERO; and
- Opposers' Exhibit RC55: Internet printout from the website www.reedsinc.com showing a selection of "Virgil's Zero Sodas."

4. Opposers' July 19, 2013 Notice of Reliance on Stipulated Documents and Opposers' Exhibits RC56-RC101 referenced therein:

- Opposers' Exhibit RC56: March 21, 2005 TCCC press release entitled "Coca-Cola Announces Plans to Launch Coca-Cola Zero," produced by The Coca-Cola Company ("TCCC") as TCCC 000014;
- Opposers' Exhibit RC57: June 13, 2005 TCCC press release entitled "Coca-Cola Zero Invites Everybody to Chill," produced by TCCC as TCCC 000017;
- Opposers' Exhibit RC58: June 27, 2005 TCCC press release entitled "New Coca-Cola Zero Commercial Teaches the World to 'Chill'," produced by TCCC as TCCC 000019;
- Opposers' Exhibit RC59: February 6, 2007 TCCC press release entitled "Cherry Coke to Debut New Can Designed by Jay-Z's Lifestyle Apparel Brand Rocawear," produced by TCCC as TCCC 000670-671;

- Opposers' Exhibit RC60: May 25, 2007 TCCC press release entitled "Vanilla Coke is Back!," produced by TCCC as TCCC 002919-20;
- Opposers' Exhibit RC61: February 8, 2008 TCCC press release entitled "Coke Zero Becomes Title Sponsor of July NASCAR Sprint Cup Series Race at Daytona International Speedway," produced by TCCC as TCCC 002930-32;
- Opposers' Exhibit RC62: February 12, 2008 TCCC press release entitled "Coke Zero Pulls Fast One on Top NASCAR Drivers," produced by TCCC as TCCC 002933-34;
- Opposers' Exhibit RC63: February 14, 2008 TCCC press release entitled "Coke Zero Seeing Qualified 'Job Candidates' Who Never Back Down During NCAA® March Madness®," produced by TCCC as TCCC 002935-36;
- Opposers' Exhibit RC64: March 13, 2008 TCCC press release entitled "Coke Zero Takes the Guess Work out of Bracketology with Launch of NCAA(®) Bracket-O-Matic '08," produced by TCCC as TCCC 002943-45;
- Opposers' Exhibit RC65: July 1, 2008 TCCC press release entitled "It's Free Coke Zero For Fans Across U.S. If One of 13 NASCAR Drivers Wins Inaugural Coke Zero 400 at Daytona," produced by TCCC as TCCC 002948-50;
- Opposers' Exhibit RC66: July 5, 2008 TCCC press release entitled "NASCAR® Driver Kyle Petty Comes Through for Fans Around the Country with Offer of Free Coke Zero," produced by TCCC as TCCC 002951-53;
- Opposers' Exhibit RC67: September 20, 2010 TCCC press release entitled "Happy Birthday, Coke Zero!," produced by TCCC as TCCC 004028;

- Opposers' Exhibit RC68: July 1, 2011 TCCC press release entitled "Coke Zero Makes Race Fans' Wildest Dreams Come True with Prizes from Daytona to Homestead," produced by TCCC as TCCC 004031;
- Opposers' Exhibit RC69: April 17, 2013 TCCC press release entitled "Day or Night, New Caffeine Free Coke Zero™ Helps Fans Enjoy their Favorite Drink At Any Time," produced by TCCC as TCCC 004044-45;
- Opposers' Exhibit RC70: November 17, 2009 Glaceau press release entitled "glacéau brings low calorie to the next level!" (updated April 25, 2010), produced by TCCC as TCCC 004026;
- Opposers' Exhibit RC71: "Driven By Taste" and "Serious Rivals Demand Serious Taste" advertisements for Coca-Cola Zero, produced by TCCC as TCCC 000519-520;
- Opposers' Exhibit RC72: Advertisement for POWERADE ZERO, produced by TCCC as TCCC 002969;
- Opposers' Exhibit RC73: Advertisements for POWERADE ZERO, produced by TCCC as TCCC 003038-41;
- Opposers' Exhibit RC74: Advertisement for POWERADE ZERO, produced by TCCC as TCCC 003044;
- Opposers' Exhibit RC75: Advertisement for POWERADE ZERO, produced by TCCC as TCCC 003045;
- Opposers' Exhibit RC76: Advertisement for POWERADE ZERO, produced by TCCC as TCCC 003046;

- Opposers' Exhibit RC77: Advertisement for POWERADE ZERO, produced by TCCC as TCCC 003048;
- Opposers' Exhibit RC78: Photograph of point of sale display for POWERADE ZERO, produced by TCCC as TCCC 003043;
- Opposers' Exhibit RC79: Photograph of POWERADE ZERO packaging, produced by TCCC as TCCC 004055;
- Opposers' Exhibit RC80: Photograph of POWERADE ZERO products, produced by TCCC as TCCC 004056;
- Opposers' Exhibit RC81: Printout from TCCC website with Nutrition Facts for Coca-Cola Zero product, produced by TCCC as TCCC 004002;
- Opposers' Exhibit RC82: Printout from TCCC website with Nutrition Facts for Coca-Cola Cherry Zero product, produced by TCCC as TCCC 004000;
- Opposers' Exhibit RC83: Printout from TCCC website with Nutrition Facts for Coca-Cola Vanilla Zero product, produced by TCCC as TCCC 004001;
- Opposers' Exhibit RC84: Printout from TCCC website with Nutrition Facts for Fanta Orange Zero product, produced by TCCC as TCCC 004003;
- Opposers' Exhibit RC85: Printout from Honest Tea website regarding Honest Zero Passion Fruit Green Tea product, produced by TCCC as TCCC 004004;
- Opposers' Exhibit RC86: Printout from Honest Tea website regarding Honest Zero Zero Calorie Lemonade product, produced by TCCC as TCCC 004005;
- Opposers' Exhibit RC87: Printout from Honest Tea website regarding Honest Zero products, produced by TCCC as TCCC 004006;

- Opposers' Exhibit RC88: Printout from NOS website with Nutritional Facts for NOS Zero product, produced by TCCC as TCCC 004010-11;
- Opposers' Exhibit RC89: Printout from TCCC website with Nutrition Facts for Pibb Zero product, produced by TCCC as TCCC 004012;
- Opposers' Exhibit RC90: Printouts from TCCC website with Nutrition Facts for Grape, Lemon Lime, Mixed Berry, Orange and Strawberry POWERADE ZERO products, produced by TCCC as TCCC 004013-17;
- Opposers' Exhibit RC91: Printout from TCCC website with Nutrition Facts for Sprite Zero product, produced by TCCC as TCCC 004018;
- Opposers' Exhibit RC 92: Printouts from TCCC website with Nutrition Facts for drive, glow, go-go, mega-c, rise, squeezed and xxx vitaminwater zero products, produced by TCCC as TCCC 004019-25;
- Opposers' Exhibit RC93: Printouts from Fruitwater website regarding Glacéau lemon-lime, orange mango, black raspberry, strawberry kiwi and watermelon punch FruitWater products, produced by TCCC as TCCC 004068-72;
- Opposers' Exhibit RC94: Printout from Honest Tea website regarding HONEST fizz products, produced by TCCC as TCCC 004073;
- Opposers' Exhibit RC95: "Junior Naming Research Report," dated November 9, 2004, prepared by GfK ARBOR LLC for TCCC, produced by TCCC as TCCC 000233-258;
- Opposers' Exhibit RC96: Photographs of COCA-COLA ZERO, COCA-COLA LIGHT and COCA-COLA FREE products used for survey summarized in Junior Naming Research Report, produced by TCCC as TCCC 002996-3002;

- Opposers' Exhibit RC97: Applicant's Answer And Affirmative Defenses To Opposers' Notice Of Opposition filed by Ben & Jerry's Homemade, Inc. in Opposition No. 91181930 on April 23, 2008, produced by TCCC as TCCC 003088-90;
- Opposers' Exhibit RC98: Motion to Suspend Proceedings filed by Ben & Jerry's Homemade, Inc. in Opposition No. 91181930 on April 23, 2008, produced by TCCC as TCCC 003092-100;
- Opposers' Exhibit RC99: Letter dated February 8, 2008 from Peter D. Rosenthal of Roberts & Ritholz LLP to Caroline K. Pearlstein of TCCC, produced by TCCC as TCCC 003453;
- Opposers' Exhibit RC100: Agreement dated April 5, 2012 between TCCC and LTZ, LLC, produced by TCCC as TCCC 004275-85; and
- Opposers' Exhibit RC101: Agreement dated March 16, 2010 between TCCC and Herbal Water Inc., produced by TCCC as TCCC 004295-307.

5. The July 24, 2013 testimonial deposition of Harold Miller of Southern Group Enterprises, Inc. and Opposers' Exhibits RC102-RC105 referenced therein:

- Opposers' Exhibit RC102: Subpoena to Testify at a Testimonial Deposition in a Civil Action to Harold Miller, Managing Member of Southern Group Enterprises, Inc., dated July 16, 2013;
- Opposers' Exhibit RC103: Summary of January 2005 to July 2013 sales of IMPULSE ZERO beverage;
- Opposers' Exhibit RC103A: Photographs, sell sheets and posters featuring IMPULSE ZERO beverage, descriptions and reviews by Bevnet of IMPULSE ZERO beverage and nutritional labels of IMPULSE ZERO beverage;

- Opposers' Exhibit RC104: Printout from www.bevnet.com with description and review of IMPULSE ZERO beverage; and
- Opposers' Exhibit RC105: U.S. Registration No. 3110915, owned by Southern Group Enterprises, LLC, for the mark IMPULSE ZERO covering “beverages, namely energy drinks and sports drinks” in International Class 32.

6. The July 25, 2013 testimonial deposition of Esperanza Teasdale of Pepsico and Opposers' Exhibits RC107-RC115 referenced therein:

- Opposers' Exhibit RC107: Summary of 2011-2013 gross sales and advertising and marketing for PROPEL ZERO products;
- Opposers' Exhibit RC108: Photographs of PROPEL ZERO powder packaging;
- Opposers' Exhibit RC109: Photographs of PROPEL ZERO powder packaging;
- Opposers' Exhibit RC110: Photographs of PROPEL ZERO powder packaging;
- Opposers' Exhibit RC111: Photographs of PROPEL ZERO enhanced water beverage;
- Opposers' Exhibit RC112: Photographs of PROPEL ZERO enhanced water multipack;
- Opposers' Exhibit RC113: Printout of Facebook page for PROPEL ZERO beverage;

- Opposers' Exhibit RC114: Printouts of Facebook page for PROPEL ZERO beverage; and
- Opposers' Exhibit RC115: March 17, 2011 article from the website <http://adage.com> about the beverage product PROPEL ZERO.

7. The July 26, 2013 testimonial deposition of Chris Reed of REEDS, Inc. and Opposers' Exhibits RC116-RC118 referenced therein:

- Opposers' Exhibit RC116: Subpoena to Testify at a Testimonial Deposition in a Civil Action to Chris Reed, CEO of REEDS, Inc., dated July 16, 2013;
- Opposers' Exhibit RC117: Internet printout from the website www.reedsinc.com showing VIRGIL'S ZERO beverages, and sell sheet featuring VIRGIL'S ZERO beverages; and
- Opposers' Exhibit RC118: Summary of 2011 to June 2013 sales of VIRGIL'S ZERO beverages.

8. Opposers' July 29, 2013 Notice of Reliance on Discovery Responses and Opposers' Exhibits RC119-RC125 referenced therein:

- Opposers' Exhibit RC119: "Definitions" sections of (a) Opposers' First Set of Requests for Admission, dated February 25, 2008; (b) Opposers' Third Set of Requests for Admission, dated February 23, 2010; (c) Opposers' First Set of Interrogatories to Applicant, dated April 7, 2008; and (d) Royal Crown's Second Set of Interrogatories to The Coca-Cola Company, dated February 18, 2009;
- Opposers' Exhibit RC120: TCCC's responses to Opposers' Requests for Admission Nos. 7- 9, 16-17, 25, 28, 31, 52, 54 and 56, dated March 31, 2008;

- Opposers' Exhibit RC121: TCCC's responses to Opposers' Requests for Admission Nos. 63-64, 68, 70-98, 101-107, 112-113, 120-125 and 136-137, dated March 25, 2009;
- Opposers' Exhibit RC122: Exhibits attached to Opposers' Third Set of Requests for Admission, dated February 23, 2010;
- Opposers' Exhibit RC123: TCCC's responses to Opposers' Requests for Admission Nos. 211-224, dated March 30, 2010;
- Opposers' Exhibit RC124: TCCC's response to Opposers' Interrogatory No. 13, dated March 25, 2009; and
- Opposers' Exhibit RC125: TCCC's responses to Opposers' Interrogatory Nos. 9 and 11 (as supplemented), dated July 29, 2009.

9. Opposers' July 29, 2013 Notice of Reliance on Deposition Testimony and Opposers' Exhibits RC126-RC128 referenced therein:

- Opposers' Exhibit RC126: Excerpts from the discovery deposition of William Herbert Gray, IV of TCCC, taken May 28, 2008;
- Opposers' Exhibit RC127: Excerpts from the discovery deposition of Russell Wiley Baker of TCCC, taken May 28-29, 2008; and
- Opposers' Exhibit RC128: excerpts from the discovery deposition of Maurice Cooper, II of TCCC, taken May 29, 2008.

10. Opposers' July 29, 2013 Notice of Reliance on Printed Publications and Opposers' Exhibits RC129-RC191 referenced therein:

- Opposers' Exhibit RC129: Printout from the website www.monarchbeverages.com showing, *inter alia*, the beverage product ALL SPORT ZERO;
- Opposers' Exhibit RC130: Printouts from the websites www.drinkallsport.com, www.twitter.com and www.bevnet.com showing the beverage products ALL SPORT ZERO and ALL SPORT NATURALLY ZERO;
- Opposers' Exhibit RC131: Printout from the website www.drinkarizona.com showing the beverage product ARNOLD PALMER ZERO;
- Opposers' Exhibit RC132: Printouts from the websites www.costco.com, www.amazon.com and www.walgreens.com showing the beverage product ARNOLD PALMER ZERO;
- Opposers' Exhibit RC133: Printouts from the website www.herbalwater.com showing the beverage product AYALA HERBAL WATER;
- Opposers' Exhibit RC134: Printouts from the websites www.bigred.com, www.bevreview.com, www.amazon.com, <http://soda-emporium.com> and <http://foodbeast.com> showing the beverage product BIG RED ZERO;
- Opposers' Exhibit RC135: Printout from the website www.amazon.com showing the beverage product BLUE SKY ZERO;
- Opposers' Exhibit RC136: Printouts from the website <http://save-a-lot.com> showing the beverage product BUBBA ZERO;
- Opposers' Exhibit RC137: Printout from the website <http://energy-drink-ratings.blogspot.com/> showing the beverage product CABALLO NEGRO ZERO;

- Opposers' Exhibit RC138: Printouts from the websites www.energy-drink-ratings-blogspot.com and www.bevindustry.com showing the beverage product CABALLO NEGRO ZERO;
- Opposers' Exhibit RC139: Printout from the website www.whotalking.com showing the beverage product CHEK-MATE ZERO CALORIES;
- Opposers' Exhibit RC140: Printouts from the websites www.clearlyzero.com and www.facebook.com showing the beverage product CLEARLY ZERO;
- Opposers' Exhibit RC141: Printouts from the website <http://save-a-lot.com> showing the beverage products DIET CRISP ZERO and CRISP DIET LEMON-LIME ZERO;
- Opposers' Exhibit RC142: Printout from the website www.fruit2o.com showing the beverage product FRUIT₂O;
- Opposers' Exhibit RC143: Printouts from the websites www.adina4life.files.wordpress.com, www.amazon.com, www.keepitorganic.org and www.drinkwhat.com showing the beverage product HOLISTICS ZERO;
- Opposers' Exhibit RC144: Printout from the website www.heartlandsweeteners.com showing, *inter alia*, the beverage product ICEE ZERO;
- Opposers' Exhibit RC145: Printouts from the websites www.bevnet.com and www.edrinks.net showing, *inter alia*, the beverage product IMPULSE ZERO;
- Opposers' Exhibit RC146: Printouts from the websites www.jonessoda.com, www.amazon.com and www.facebook.com showing the beverage product JONES WHOOPASS ZERO;

- Opposers' Exhibit RC147: Printout from the website
www.bovisfoods.com showing, *inter alia*, the beverage product MARGARITA ZERO;
- Opposers' Exhibit RC148: Printouts from the website
www.monsterenergy.com showing the beverage product MONSTER ENERGY
ABSOLUTELY ZERO;
- Opposers' Exhibit RC149: Printouts from the websites
www.monsterenergy.com, www.dormdrinks.com and www.amazon.com showing the
beverage product MONSTER ENERGY ABSOLUTELY ZERO;
- Opposers' Exhibit RC150: Printout from the website
www.monsterenergy.com showing the beverage product MONSTER ENERGY ZERO
ULTRA;
- Opposers' Exhibit RC151: Printouts from the websites
www.loudbev.com and www.energy-drink-ratings.blogspot.com showing the beverage
product POMBERRY ZERO;
- Opposers' Exhibit RC152: Printouts from the website www.preusa.com
showing the beverage product PRE ZERO;
- Opposers' Exhibit RC153: Printouts from the websites
www.propelzero.com, www.pepsicobeveragefacts.com, www.facebook.com,
www.twitter.com, www.amazon.com and www.walmart.com, showing the beverage
product PROPEL ZERO;
- Opposers' Exhibit RC154: Printouts from the websites
www.redbullusa.com and www.beveragesdirect.com showing the beverage product RED
BULL TOTAL ZERO;

- Opposers' Exhibit RC155: Printouts from the website <http://roaringlion.com> showing the beverage product ROARING LION ZERO;
- Opposers' Exhibit RC156: Printouts from the website www.robsreallygood.com showing the beverage product ROB'S REALLY GOOD ZERO;
- Opposers' Exhibit RC157: Printout from the website www.bevnet.com showing the beverage product ROX ZERO;
- Opposers' Exhibit RC158: Printout from the website www.polyvore.com showing the beverage product SAM'S COLA ZERO CALORIES;
- Opposers' Exhibit RC159: Printout from the website www.gotbeer.com showing the beverage product SARATOGA ZERO CALORIE SPLASH;
- Opposers' Exhibit RC160: Printouts from the websites www.surlatable.com, www.gizmodia.com, www.chefcentral.com and www.brookstonemedia.com showing the beverage product SODASTREAM ZERO COLA;
- Opposers' Exhibit RC161: Printout from the website www.amazon.com showing the beverage product SODASTREAM ZERO COLA;
- Opposers' Exhibit RC162: Printout from the website www.sparklingice.com showing the beverage product SPARKLING ICE;
- Opposers' Exhibit RC163: Printouts from the website www.sqwincher.com showing the beverage product SQWINCHER ZERO;
- Opposers' Exhibit RC164: Printout from the website www.steaz.com showing the beverage product STEAZ ZERO CALORIE;

- Opposers' Exhibit RC165: Printout from the website www.steaz.com showing the beverage product STEAZ ZERO CALORIE;
- Opposers' Exhibit RC166: Printout from the website www.amazon.com showing the beverage product VICTORY ZERO;
- Opposers' Exhibit RC167: Printouts from the websites www.reedsinc.com and www.amazon.com showing the beverage product VIRGIL'S ZERO;
- Opposers' Exhibit RC168: Printouts from the website www.zeromargaritamiz.com showing the beverage product ZERO MARGARITA MIX;
- Opposers' Exhibit RC 169: Printout from the website www.zevia.com showing the beverage product ZEVIA;
- Opposers' Exhibit RC170: Printout from the website <http://twitter.com/chrisocallahan> showing a tweet stating “is it just me or do diet/‘zero’ sodas taste a little better when they’re just a wee bit warm”;
- Opposers' Exhibit RC171: Printout from the website www.physiciansregional.net identifying “Diet/Zero Sodas” as a type of “lower calorie beverages”;
- Opposers' Exhibit RC172: Printout from the website www.bitstrips.com showing a message board;
- Opposers' Exhibit RC173: Printout from the website <http://forum.lowcarber.org> showing a message board including messages on “[w]hat kind of zero beverages are there to choose from besides coffee and diet sodas”;

- Opposers' Exhibit RC174: Printout from the website <http://tinfoilchef.com> showing an article entitled, "Reviewing 'Zero' sodas," and defining the category as "no carb, no sugar, no calories" sodas;
- Opposers' Exhibit RC175: Printout from the website www.bullshido.net showing a message board on carbonated drinks which includes discussions on "zero sodas";
- Opposers' Exhibit RC176: Printout from the website <http://wiki.answer.com> with a question on the "difference between zero drinks and diet drinks";
- Opposers' Exhibit RC177: Printout from the website www.associatedcontent.com showing an article entitled "Great Diet Drinks with Little to No Carbs" that mentions "zero sodas";
- Opposers' Exhibit RC178: Printout from the website <http://answers.yahoo.com> showing a message board on sugar free drinks that includes a post on zero sodas;
- Opposers' Exhibit RC179: Article from the website <http://adage.com> about the beverage product PROPEL ZERO;
- Opposers' Exhibit RC180: Printout from the website www.sparkpeople.com of a message board with the topic "Zero Sodas?";
- Opposers' Exhibit RC181: Printout from the website www.daytondailynews.com of the article "Experts: Drinks have health consequences";

- Opposers' Exhibit RC182: Printout from the website <http://answers.yahoo.com> of a message board with the topic "How come those ZERO sodas don't have any calories?";
- Opposers' Exhibit RC183: Printout from the website <http://forum.bodybuilding.com> of a message board with the topic "How many diet/zero sodas in a day?";
- Opposers' Exhibit RC184: Printout from the website www.whattoexpect.com of a message board with the topic "'Zero' Sodas";
- Opposers' Exhibit RC185: Printout from the website livewholebefree.com/wordpress of a blog post on the side effects of soda that refers to "diet or 'zero' sodas";
- Opposers' Exhibit RC186: Printout from the website <http://zeudy.com> of a blog post on weight loss that discusses the impact of "zero sodas" on nutrition;
- Opposers' Exhibit RC187: Printout from the website <http://answers.yahoo.com> showing a message board on the difference between PEPSI MAX, DIET PEPSI and PEPSI ZERO;
- Opposers' Exhibit RC188: Printout from the website www.espotv.com showing a review of DIET PEPSI ZERO;
- Opposers' Exhibit RC189: Printouts from the website www.dietrite.com showing the beverage product DIET RITE PURE ZERO;
- Opposers' Exhibit RC190: Article from *The Meadville Tribune*; and
- Opposers' Exhibit RC191: March 10, 2009 article from the *Associated Press Alert-Business*.

11. Opposers' July 29, 2013 Notice of Reliance on Official Records and Opposers' Exhibits RC192-RC283 referenced therein:

- Opposers' Exhibit RC192: U.S. trademark Application Serial No. 77586688 for the mark 0 CAL CARB SUG (Stylized) covering "Soft drinks" in International Class 32;
- Opposers' Exhibit RC193: U.S. trademark application Serial No. 77586710 for the mark 0 CAL CARB SUG (Stylized) covering "Soft drinks" in International Class 32;
- Opposers' Exhibit RC194: U.S. trademark application Serial No. 77587579 for the mark 0 CAL CARB SUG (Stylized) covering "Soft drinks" in International Class 32;
- Opposers' Exhibit RC195: U.S. trademark application Serial No. 77612529 for the mark 0 CAL CARB SUG (Stylized) covering "Soft drinks" in International Class 32;
- Opposers' Exhibit RC196: U.S. trademark application Serial No. 85337625 for the mark BIG RED ZERO covering "Concentrates, syrups or powders used in the preparation of soft drinks; Non-alcoholic beverages, namely, carbonated beverages; Soda pops; Soft drinks" in International Class 32;
- Opposers' Exhibit RC197: U.S. trademark application Serial No. 77128743 for the mark CAFE ZERO covering "Prepared coffee and coffee-based beverages" in International Class 30;
- Opposers' Exhibit RC 198: U.S. trademark application Serial No. 78950916 for the mark CAL 0 (& Design) covering "Nationally fortified water; Vitamin enriched water" in International Class 5 and "Aerated water; Aerated water; Colas; Distilled drinking water; Drinking water; Energy drinks; Flavored waters; Flavoured waters; Fruit drinks; Fruit flavored soft drinks; Fruit-based soft drinks flavored with tea; Fruit-flavored

drinks; Glacial water; Isotonic drinks; Mineral water; Pop; Seltzer water; Soda water; Soft drinks; Sparkling water; Sports drinks; Spring water; Still water; Still waters; Syrups for making soft drinks; Syrups for making fortified waters” in International Class 32;

- Opposers’ Exhibit RC199: U.S. trademark application Serial No. 85683445 for the mark FOUR POINT ZERO covering “Fruit-flavored beverages; Non-alcoholic beverages, namely, carbonated beverages; Seltzer water” in International Class 32;

- Opposers’ Exhibit RC200: U.S. trademark application Serial No. 85685560 for the mark FOUR POINT ZERO PERFECT SELTZER LEMON WEDGE UNSWEETENED + ZERO CALORIES CLEAN + CRISP + REFRESHING GLASS BOTTLED (& Design) covering “Fruit flavored beverages; Non-alcoholic beverages, namely, carbonated beverages; Seltzer water “ in International Class 32;

- Opposers’ Exhibit RC201: U.S. trademark application Serial No. 77275916 for the mark GREAT CHOICE! · SUGAR FREE · ZERO CALORIES · ZERO CARBS covering, *inter alia*, “Powdered tea based drink mixes; Powdered mixes used to flavor milk” in International Class 30 and “Powders used in the preparation of non-carbonated drinks, namely, fruit-flavored drinks, fruit-based drinks, tea flavored drinks, sports drinks, isotonic beverages” in International Class 32;

- Opposers’ Exhibit RC202: U.S. trademark application Serial No. 77181474 for the mark GUARANA ANTARCTICA ZERO ACUCAR (& Design) covering “Soft drinks” in International Class 32;

- Opposers’ Exhibit RC203: U.S. Serial No. 77299029 for the mark HAVOC ZERO covering “Fruit-flavored drinks; Isotonic drinks; Soft drinks; Syrups for making soft

drinks; Bottled drinking water; Colas; Concentrates, Syrups or powders used in the preparation of soft drinks; Drinking water; Energy drinks” in International Class 32;

- Opposers’ Exhibit RC204: U.S. trademark application Serial No. 77603895 for the mark JARRITOS ZERO covering “Soft drink” in International Class 32;

- Opposers’ Exhibit RC205: U.S. trademark application Serial No. 78842265 for the mark JUGULAR ZERO covering “Beverages, namely, non-alcoholic beverages, namely, carbonated beverages; Non-alcoholic beverages containing fruit juices; Canned non-alcoholic energy drink; Mineral water; Aerated waters; Fruit drinks and fruit juices” in International Class 32;

- Opposers’ Exhibit RC206: U.S. trademark application Serial No. 77489223 for the mark KCLASS ZERO covering “Beverages, namely, soft drinks and fruit drinks; preparations for making soft drinks and fruit drinks, namely, powdered soft drinks and fruit drink mixes, soft drinks and fruit drink concentrates” in International Class 32;

- Opposers’ Exhibit RC207: U.S. trademark application Serial No. 77223034 for the mark LESS THAN ZERO covering “Energy drinks; soda pops; flavored waters” in International Class 32;

- Opposers’ Exhibit RC208: U.S. trademark application Serial No. 77546090 for the mark MAXIMUM TASTE. MAXIMUM ENERGY. ZERO CALORIES. covering “Soft drinks” in International Class 32;

- Opposers’ Exhibit RC209: U.S. trademark application Serial No. 77946061 for the mark NATURALLY ZERO covering “Essences for making flavoured mineral water; Essences for making non-alcoholic beverages; Essences for the preparation of mineral waters; Essences for use in making soft drinks” in International Class 32;

- Opposers' Exhibit RC210: U.S. trademark application Serial No. 75374316 for the mark NATURALLY ZERO CANADIAN NATURAL SPRING WATER (& Design) covering “Natural spring water” in International Class 32;
- Opposers' Exhibit RC211: U.S. trademark Registration No. 3179696 for the mark NO-CAL ZERO CALORIE SODA – POP GENUINE BRAND (& Design) covering “Iced teas and fruit teas” in International Class 30 and “Non-alcoholic beverages, namely carbonated beverages and non-alcoholic beverages containing fruit juices or fruit flavors” in International Class 32;
- Opposers' Exhibit RC212: U.S. trademark Registration No. 3657037 for the mark NO CARBS ZERO CALORIES (& Design) covering “Drinking water with vitamins” in International Class 32;
- Opposers' Exhibit RC213: U.S. trademark application Serial No. 77336826 for the mark POMBERRY ZERO covering “Energy drinks” in International Class 32;
- Opposers' Exhibit RC214: U.S. trademark application Serial No. 85513847 for the mark RED BULL TOTAL ZERO (& Design) covering “Energy drinks with zero calories, zero carbohydrates, and zero sugar; Sports drinks with zero calories, zero carbohydrates, and zero sugar” in International Class 32;
- Opposers' Exhibit RC215: U.S. trademark application Serial No. 85481959 for the mark RED BULL ZERO covering “Zero calories energy drink; Zero calories sport drink” in International Class 32;
- Opposers' Exhibit RC216: U.S. trademark application Serial No. 79000393 for the mark RIVER ZERO (& Design) covering “Beers; mineral and sparkling water; non-alcoholic beers; fruit beverages, namely fruit juices” in International Class 32;

- Opposers' Exhibit RC217: U.S. trademark application Serial No. 76300269 for the mark SONIC ZERO covering “Beverages, namely, soft drinks, soft drink mixes; Powders, syrups or concentrates for making soft drinks” in International Class 32;
- Opposers' Exhibit RC218: U.S. trademark application Serial No. 76608876 for the mark SUNFRUT ZERO covering “Fruit drinks and fruit juices; Mineral and aerated waters; Non-alcoholic drinks, namely beverages containing fruit juices and punch; Syrups and concentrates for making fruit drinks” in International Class 32;
- Opposers' Exhibit RC219: U.S. trademark application Serial No. 77950859 for the mark ULTIMATE ZERO covering “Isotonic drinks, isotonic drinks in concentrate form, drinking water” in International Class 32;
- Opposers' Exhibit RC220: U.S. trademark application Serial No. 78090038 for the mark WATERCOLORS ZERO CALORIE FRUIT INFUSIONS covering “Fruit flavored water” in International Class 32;
- Opposers' Exhibit RC221: U.S. trademark Registration No. 3156317 for the mark ZERO CAL covering “Soft drinks carbonated, non-carbonated and cola” in International Class 32;
- Opposers' Exhibit RC222: U.S. trademark application Serial No. 78507827 for the mark ZERO CAL (& Design) covering “Soft drinks carbonated, non-carbonated and cola” in International Class 32;
- Opposers' Exhibit RC223: U.S. trademark application Serial No. 77159539 for the mark ZERO² covering “Mineral supplemented beverages, namely, fruit beverages, fruit-flavored beverages, isotonic beverages, soft drinks, sports drinks, colas, carbonated

beverages, bottled water, flavored waters, mineral water, soda water, spring water, drinking water, orange juice beverages, non-alcoholic fruit juice beverages” in International Class 32;

- Opposers’ Exhibit RC224: U.S. trademark application Serial No. 77159607 for the mark ZERO covering “Mineral supplemented beverages” in International Class 32;

- Opposers’ Exhibit RC225: U.S. trademark application Serial No. 76660515 for the mark ZERO covering “Powders for use in the preparation of soft drinks” in International Class 32;

- Opposers’ Exhibit RC226: U.S. trademark application Serial No. 77125590 for the mark ZERO CALORIE covering “Mineral supplemented beverages” in International Class 32;

- Opposers’ Exhibit RC227: U.S. trademark application Serial No. 77119736 for the mark ZERO CALORIE REDEFINED covering “Energy drinks; Sports drinks” in International Class 32;

- Opposers’ Exhibit RC228: U.S. trademark application Serial No. 77943690 for the mark ZERO CALORIES MAXIMUM TASTE MAXIMUM KICK covering “Soft drinks” in International Class 32;

- Opposers’ Exhibit RC229: U.S. trademark application Serial No. 77330355 for the mark ZERO FACTOR covering “Energy drinks” in International Class 32;

- Opposers’ Exhibit RC230: U.S. trademark application Serial No. 77178325 for the mark ZERO IS GOOD covering “Non-alcoholic flavored beverages” in International Class 32;

- Opposers’ Exhibit RC231: U.S. trademark application Serial No. 85298339 for the mark ZERO LIGHT covering “Bottled drinking water; Coffee-flavored soft drink;

Concentrates and powders used in the preparation of energy drinks and fruit-flavored beverages; Concentrates for making fruit drinks; Concentrates, syrups or powders for making soft drinks or tea-flavored beverages; Concentrates, syrups or powders used in the preparation of soft drinks; Concentrates, syrups or powders used in the preparation of sports and energy drinks; Distilled drinking water; Drinking water; Drinking water with vitamins; Drinking waters; Fruit drinks; Fruit drinks and juices; Fruit flavored drinks; Fruit flavored soft drinks” in International Class 32;

- Opposers’ Exhibit RC232: U.S. trademark application Serial No. 76677880 for the mark ZERO LIGHT SABOR LATINO covering “Concentrates, syrups and powders for use in the preparation of soft drinks” in International Class 32;

- Opposers’ Exhibit RC233: U.S. trademark application Serial No. 78491354 for the mark ZERO MIXERS covering “Non-alcoholic drink mixes for use in making alcoholic cocktails and non-alcoholic soft drinks” in International Class 32;

- Opposers’ Exhibit RC234: U.S. trademark application Serial No. 78519151 for the mark ZERO MIXERS (& Design) covering “Non-alcoholic drink mixes for use in making alcoholic cocktails” in International Class 32;

- Opposers’ Exhibit RC235: U.S. trademark application Serial No. 77571313 for the mark ZERO SHOT covering “Energy drinks; Sports drinks” in International Class 32;

- Opposers’ Exhibit RC236: U.S. trademark Registration No. 3992546 for the mark 0 CALORIES 0 SUGAR 0 SODIUM 0 GUILT covering, *inter alia*, “Isotonic beverages; Isotonic drinks: all the aforementioned goods contain no calories, sugar or sodium” in International Class 32;

- Opposers' Exhibit RC237: U.S. trademark application Serial No. 79118667 for the mark ASAHI DRY ZERO (Stylized) covering “Non-alcoholic beer-flavoured beverages” in International Class 32;
- Opposers' Exhibit RC238: U.S. trademark application Serial No. 79097398 for the mark ASAHI POINT-ZERO (Stylized) covering “Beer, low-malt beer, non-alcoholic beers, non-alcoholic beer flavored beverages, other refreshing beverages, extracts of hops for making beer, non-alcoholic fruit juice beverages, whey beverages, other refreshing beverages, namely, carbonated soft drinks and fruit juice drinks” in International Class 32;
- Opposers' Exhibit RC 239: U.S. trademark application Serial No. 79092226 for the mark ASAHI W-ZERO covering “Beer; low- malt beer; alcohol-free beer; non-alcoholic beer flavored beverages; carbonated soft drinks, low calorie soft drinks, non-carbonated soft drinks and fruit drinks; extracts of hops for making beer; non-alcoholic fruit juice beverages” in International Class 32;
- Opposers' Exhibit RC240: U.S. trademark application Serial No. 85498866 for the mark CLEARLY ZERO covering “Drinking water; Drinking water with vitamins; Drinking waters; Flavored enhanced water; Flavored waters; Flavoured waters; Water beverages” in International Class 32;
- Opposers' Exhibit RC241: U.S. trademark application Serial No. 77788732 for the mark DOUBLE ZERO covering “Non-alcoholic beverages, namely, soft drinks” in International Class 32;
- Opposers' Exhibit RC242: U.S. trademark application Serial No. 85501159 for the mark JCORE ZERO-LITE covering “Dietary and nutritional supplements; meal

replacement drinks” in International Class 5 and “Sports drinks; powders for use in the preparation of isotonic sports drinks and sports beverages” in International Class 32;

- Opposers’ Exhibit RC243: U.S. trademark Registration No. 4206840 for the mark JONES WHOOPASS ZERO (& Design) covering “Energy drinks” in International Class 32;
- Opposers’ Exhibit RC244: U.S. trademark application Serial No. 85562811 for the mark KIDS 0 covering “Beverages namely, fruit flavored water, drinking water, mineral and vitamin enhanced drinking water” in International Class 32;
- Opposers’ Exhibit RC245: U.S. trademark application Serial No. 85562824 for the mark KIDS ZERO covering “Beverages namely, fruit flavored water, drinking water, mineral and vitamin enhanced drinking water” in International Class 32;
- Opposers’ Exhibit RC246: U.S. trademark application Serial No. 77662597 for the mark KLASS ZERO (& Design) covering “Beverages, namely, soft drinks and fruit drinks; Preparations for making soft drinks and fruit drinks, namely, powered soft drinks and fruit drink mixes, soft drinks and fruit drink concentrates” in International Class 32;
- Opposers’ Exhibit RC247: U.S. trademark application Serial No. 77884507 for the mark SKINNY WATER ZERO covering, *inter alia*, “Isotonic drinks, isotonic drinks in concentrate form, drinking water” in International Class 32;
- Opposers’ Exhibit RC248: U.S. trademark application Serial No. 77950859 for the mark ULTIMATE ZERO covering “Isotonic drinks, isotonic drinks in concentrate form, drinking water” in International Class 32;
- Opposers’ Exhibit RC249: U.S. trademark Registration No. 4206841 for the mark WHOOPASS ZERO covering “Energy drinks” in International Class 32;

- Opposers' Exhibit RC250: U.S. trademark application Serial No. 85053733 for the mark ZERO CALORIE SPORTS DRINK covering “Sports drinks” in International Class 32;
- Opposers' Exhibit RC251: U.S. trademark Registration No. 3832297 for the mark ZERO IS GOOD covering “Non-alcoholic flavored beverages, namely, flavored waters” in International Class 32;
- Opposers' Exhibit RC252: U.S. trademark application Serial No. 76675901 for the mark ZERO LIGHT covering “Concentrates, syrups or powders used in the preparation of soft drinks” in International Class 32;
- Opposers' Exhibit RC253: U.S. trademark application Serial No. 85434951 for the mark ZERO LIGHT SABOR TROPICAL covering “Concentrates and powders used in the preparation of energy drinks and fruit-flavored beverages; Concentrates for making fruit drinks; Concentrates, syrups or powders for making soft drinks or tea-flavored beverages; Concentrates, syrups or powders used in the preparation of soft drinks” in International Class 32;
- Opposers' Exhibit RC254: U.S. trademark Registration No. 1862689 for the mark ZERO TEA covering “Sports drinks” in International Class 32;
- Opposers' Exhibit RC255: U.S. trademark Registration No. 3245132 for the mark ZEROBALANCE (& Design) covering, *inter alia*, “Water, namely, aerated water, distilled drinking water, flavored water, glacial water, Lithia water, mineral water, quinine water, seltzer water, soda water, sparkling water, spring water, still water, table water; non-alcoholic fruit juice beverages; beer; extracts of hops for making beer; whey beverages; vegetable juices” in International Class 32;

- Opposers' Exhibit RC256: U.S. trademark application Serial No. 85727407 for the mark ZEVIA ZERO CALORIE SODA (& Design) covering “Soft drinks” in International Class 32;
- Opposers' Exhibit RC257: U.S. trademark application Serial No. 85727413 for the mark ZEVIA ZERO CALORIE SODA (& Design) covering “Soft drinks” in International Class 32;
- Opposers' Exhibit RC258: U.S. trademark application Serial No. 85734102 for the mark ZOOM ZERO covering “Diet energy drink” in International Class 32;
- Opposers' Exhibit RC259: File wrapper for U.S. trademark Registration No. 3110915 for the mark IMPULSE ZERO;
- Opposers' Exhibit RC260: File wrapper for U.S. trademark application Serial No. 85384208 for the mark MARGARITA ZERO;
- Opposers' Exhibit RC261: File wrapper for U.S. trademark Registration No. 3048276 for the mark ZERO CALORIE SARATOGA SPLASH;
- Opposers' Exhibit RC262: File wrapper for U.S. trademark application Serial No. 85298339 for the mark ZERO LIGHT;
- Opposers' Exhibit RC263: U.S. trademark Registration No. 600085 for the mark DIET-RITE covering “Dietetic soft drinks and concentrates for making the same” in International Class 5;
- Opposers' Exhibit RC264: U.S. trademark Registration No. 1302990 for the mark DIET RITE covering “Soft drinks and syrup used in the preparation thereof” in International Class 32;

- Opposers' Exhibit RC265: File wrapper for U.S. trademark application Serial No. 78576257 for the mark DIET RITE PURE ZERO;
- Opposers' Exhibit RC266: File wrapper for U.S. trademark application Serial No. 78581917 for the mark PURE ZERO;
- Opposers' Exhibit RC267: Notice of Opposition filed by TCCC against U.S. trademark application Serial No. 77066411 for the mark 0;
- Opposers' Exhibit RC268: Notice of Opposition filed by TCCC against U.S. trademark application Serial No. 79097398 for the mark ASAHI POINT-ZERO;
- Opposers' Exhibit RC269: Notice of Opposition filed by TCCC against U.S. trademark application Serial No. 79092226 for the mark ASAHI W-ZERO;
- Opposers' Exhibit RC270: Notice of Opposition filed by TCCC against U.S. trademark application Serial No. 77128743 for the mark CAFE ZERO;
- Opposers' Exhibit RC271: Notice of Opposition filed by TCCC against U.S. trademark application Serial No. 85498866 for the mark CLEARLY ZERO;
- Opposers' Exhibit RC272: Notice of Opposition filed by TCCC against U.S. trademark application Serial No. 77788732 for the mark DOUBLE ZERO;
- Opposers' Exhibit RC273: Notice of Opposition filed by TCCC against U.S. trademark application Serial No. 77181474 for the mark GUARANA ANTARCTICA ZERO ACUCAR;
- Opposers' Exhibit RC274: Notice of Opposition filed by TCCC against U.S. trademark application Serial No. 77489223 for the mark KLASS ZERO and U.S. Serial No. 77849224 for the mark KLASS CERO;

- Opposers' Exhibit RC275: Notice of Opposition filed by TCCC against U.S. trademark application Serial No. 77223034 for the mark LESS THAN ZERO;
- Opposers' Exhibit RC276: Notice of Opposition filed by TCCC against U.S. trademark application Serial No. 85384208 for the mark MARGARITA ZERO;
- Opposers' Exhibit RC277: Notice of Opposition filed by TCCC against U.S. trademark application Serial No. 77946061 for the mark NATURALLY ZERO;
- Opposers' Exhibit RC278: Notice of Opposition filed by TCCC against U.S. trademark application Serial No. 77884507 for the mark SKINNY WATER ZERO;
- Opposers' Exhibit RC279: Notice of Opposition filed by TCCC against U.S. trademark application Serial No. 77159539 for the mark ZERO²;
- Opposers' Exhibit RC280: Notice of Opposition filed by TCCC against U.S. trademark application Serial No. 77195975 for the mark ZERO IS GOOD;
- Opposers' Exhibit RC281: TCCC's Response to an Office Action issued with respect to TCCC's Application Serial No. 78459300, dated September 16, 2005;
- Opposers' Exhibit RC282: *In the matter of Application No. 2418511 by The Coca-Cola Company to Register a Trade Mark in Class 32 and In the Matter of Opposition No. 95457 by Pepsi Co, Inc., No. BL O-333-08 (Dec. 19, 2008); and*
- Opposers' Exhibit RC283: *In the matter of Application No. 2418511 by The Coca-Cola Company to Register a Trade Mark in Class 32 and In the Matter of Opposition No. 95457 by Pepsi Co, Inc., No. BL O-246-09 (Appointed Person) (Aug. 17, 2009).*

12. The August 15, 2013 testimonial deposition of Robert Marciano of Beverage Marketing USA, Inc. and Opposers' Exhibits RC284-RC291 referenced therein:

Appendix-A

- Opposers' Exhibit RC284: Subpoena to Testify at a Testimonial Deposition in a Civil Action to Robert Marciano, Vice President of Sales of Beverage Marketing USA, Inc., dated July 16, 2013;
- Opposers' Exhibit RC285: Photographs of ARNOLD PALMER ZERO beverage;
- Opposers' Exhibit RC286: Photographs of ARNOLD PALMER ZERO beverage;
- Opposers' Exhibit RC287: Photographs of ARNOLD PALMER ZERO beverage;
- Opposers' Exhibit RC288: Photographs of ARNOLD PALMER ZERO beverage;
- Opposers' Exhibit RC289: Photographs of ARNOLD PALMER ZERO beverage;
- Opposers' Exhibit RC290: Photographs of ARNOLD PALMER ZERO beverage; and
- Opposers' Exhibit RC291: Summary of sales of ARNOLD PALMER ZERO beverage.

13. Opposers' Exhibits RC292-RC297 introduced via cross-examination during the October 24, 2013 testimonial deposition of TCCC's expert witness Dr. Alex Simonson and referenced therein:

- Opposers' Exhibit RC 292: *McNeil-PPC, Inc. v. Walgreen Co.*, Opposition No. 91184978 (T.T.A.B. Jan. 22, 2013);

- Opposers' Exhibit RC 293: Underlying data of survey conducted by Dr. Alex Simonson;
- Opposers' Exhibit RC 295: Declaration of Dr. Alex Simonson regarding report entitled "Consumer Perception of Meaning of 'Zero' in 'Coca-Cola' Zero," by Thomas Dupont, submitted by TCCC in *Companhia de Bebidas das Americas – AMBEV v. The Coca-Cola Company*, Consolidated Opposition No. 91178953;
- Opposers' Exhibit RC 296: Article entitled "Surveying Secondary Meaning," by Vincent N. Palladino; and
- Opposers' Exhibit RC 297: October 23, 2013 printout from www.raosoft.com with sample size and margin of error calculator.

14. Opposers' December 23, 2013 Second Notice of Reliance on Discovery Responses and Opposers' Exhibits RC298-RC305 referenced therein:

- Opposers' Exhibit RC 298: "Definitions" sections of (e) Opposers' First Set of Requests for the Production of Documents and Things to Applicant, dated April 7, 2008; (f) Opposers' Second Set of Requests for the Production of Documents and Things to The Coca-Cola Company, dated February 13, 2009; and (g) Opposers' Third Set of Requests for the Production of Documents and Things to The Coca-Cola Company, dated January 14, 2010;
- Opposers' Exhibit RC299: TCCC's responses to Opposers' Requests for Admission Nos. 62 and 138-43, dated March 25, 2009;
- Opposers' Exhibit RC300: TCCC's responses to Opposers' Requests for Admission Nos. 144-145, 147-162, 164-179 and 181-207, dated March 30, 2010;

- Opposers' Exhibit RC301: TCCC's response to Opposers' Interrogatory No. 7, dated March 25, 2009;
- Opposers' Exhibit RC302: TCCC's response to Opposers' Interrogatory No. 8 (as supplemented), dated December 14, 2009;
- Opposers' Exhibit RC303: TCCC's response to Opposers' Document Request No. 11, dated May 14, 2008;
- Opposers' Exhibit RC304: TCCC's responses to Opposers' Document Requests Nos. 26 and 30 (as supplemented) dated December 14, 2009; and
- Opposers' Exhibit RC305: TCCC's responses to Opposers' Document Requests Nos. 64-71, dated March 30, 2010.

15. Opposers' December 23, 2013 Second Notice of Reliance on Deposition Testimony and Opposers' Exhibits RC306-RC308 referenced therein:

- Opposers' Exhibit RC 306: Excerpts from the discovery deposition of William Herbert Gray, IV, taken May 28, 2008;
- Opposers' Exhibit RC307: Excerpts from the discovery deposition of Russell Wiley Baker, taken May 28-29, 2008; and
- Opposers' Exhibit RC308: Excerpts from the discovery deposition of Maurice Cooper, II, taken May 29, 2008.

16. Opposers' December 23, 2013 Second Notice of Reliance on Printed Publications and Opposers' Exhibits RC309-RC313 referenced therein:

- Opposers' Exhibit RC 309: Printouts from the website www.rockstarenergy.com showing, *inter alia*, the beverage product ROCKSTAR PURE ZERO;
- Opposers' Exhibit RC310: Printouts from the website www.rockstarenergyshop.com offering for sale the beverage product ROCKSTAR PURE ZERO;
- Opposers' Exhibit RC311: Printouts from the website www.amazon.com, offering for sale the beverage product ROCKSTAR PURE ZERO;
- Opposers' Exhibit RC312: Printouts from the website <http://runa.org> showing, *inter alia*, the beverage product RUNA ZERO and store locator information; and
- Opposers' Exhibit RC313: Printout from the website www.bevindustry.com, of an article entitled, "Runa brings Amazonian guayusa to American beverage market," which depicts, *inter alia*, the beverage product RUNA ZERO.

17. Opposers' December 23, 2013 Notice of Reliance on Additional Portions of Deposition Testimony of Opposers' Witnesses and Opposers' Exhibits RC314-RC316 referenced therein:

- Opposers' Exhibit RC 314: Excerpts from the discovery deposition of Andrew David Springate, taken June 19, 2008;

- Opposers' Exhibit RC315: Excerpts from the discovery deposition of Russell Schleiden, taken April 7, 2010; and
- Opposers' Exhibit RC316: Excerpts from the discovery deposition of Tony Jacobs, taken April 7, 2010.

APPENDIX B

Serial/Registration No.	Mark
78/090,038	WATERCOLORS ZERO CALORIE FRUIT INFUSIONS
3,156,317	
3,048,276	ZERO CALORIE SARATOGA SPLASH
3,179,696	
78/950,916	
77/125,590	ZERO CALORIE
77/119,736	ZERO CALORIE REDEFINED
77/275,916	 <ul style="list-style-type: none"> • Sugar Free • Zero Calories • Zero Carbs
77/546,090	MAXIMUM TASTE. MAXIMUM ENERGY. ZERO CALORIES
3,657,037	
77/586,688	

Serial/Registration No.	Mark
77/586,710	
77/587,579	
77/612,529	
77/181,474	
77/943,690	ZERO CALORIES MAXIMUM TASTE MAXIMUM KICK
85/053,733	ZERO CALORIE SPORTS DRINK
3992,546	0 CALORIES 0 SUGAR 0 SODIUM 0 GUILT
85/683,445	FOUR POINT ZERO
85/685,560	
85/727,407	

Serial/Registration No.	Mark
85/727,413	

APPENDIX C

Serial/Registration No.	Mark
1,862,689	ZERO TEA
75/374,316	
76/300,269	SONIC ZERO
79/000,393	
76/608,876	SUNFRUT ZERO
78/491,354	ZERO MIXERS
3,110,915	IMPULSE ZERO
78/519,151	
3,245,132	ZEROBALANCE ゼロバランス
78/842,265	JUGULAR ZERO
76/660,515	ZERO
77/128,743	CAFÉ ZERO
77/159,607	ZERO
77/159,539	ZERO ²
76/675,901	ZERO LIGHT
77/178,325	ZERO IS GOOD
3,832,297	ZERO IS GOOD
76/677,880	ZERO LIGHT SABOR LATINO

Serial/Registration No.	Mark
77/223,034	LESS THAN ZERO
77/299,029	HAVOC ZERO
77/330,355	ZERO FACTOR
77/336,826	POMBERRY ZERO
77/489,223	KLASS ZERO
77/571,313	ZERO SHOT
77/603,895	JARRITOS ZERO
77/788,732	DOUBLE ZERO
77/884,507	SKINNY WATER ZERO
77/946,061	NATURALLY ZERO
77/950,859	ULTIMATE ZERO
77/662,597	
79/092,226	
79/097,398	
4,206,840	
4206841	WHOOPASS ZERO
85298339	ZERO LIGHT
85384208	MARGARITA ZERO
85337625	BIG RED ZERO
85434951	LIGHT SABOR TROPICAL
85481959	RED BULL ZERO
85498866	CLEARLY ZERO

Serial/Registration No.	Mark
85501159	JCORE ZERO-LITE
85513847	
85562811	KIDS 0
85562824	KIDS ZERO
79118667	
85734102	ZOOM ZERO

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **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 8th day of May 2014.



Emily Weiss