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

Proceeding	91178927
Party	Plaintiff Royal Crown Company, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ROYAL CROWN COMPANY, INC.,	
Opposer,	Opposition No. 91178927
- against -	
THE COCA-COLA COMPANY,	
Applicant.	

OPPOSER'S OPPOSITION TO MOTION OF THE COCA-COLA COMPANY TO CONSOLIDATE PROCEEDINGS

Opposer Royal Crown Company, Inc. ("Opposer") submits this memorandum in opposition to the Motion of The Coca-Cola Company to Consolidate Proceedings, dated October 31, 2007 (the "Motion to Consolidate").

BACKGROUND

This opposition proceeding concerns the right of The Coca-Cola Company ("Applicant") to register the mark COCA-COLA ZERO without a disclaimer of the term "zero," despite the fact that "zero" is descriptive of one or more features of Applicant's product to be sold under the mark, and despite the fact that the term is commonly used in a descriptive sense throughout the beverage industry. Opposer has opposed registration of this mark on two grounds: first, that registration without disclaimer of the term "zero" is barred by Lanham Act Section 2(e) because the term "zero" is merely descriptive; and, second, that registration is barred by Applicant's fraud in connection with the application, because Applicant claimed "substantially exclusive" use of the term when Opposer (and others) also had been using the term.

Two other entities also are challenging Applicant's right to register the COCA-COLA ZERO mark. On May 17, 2007, Ehrlich, Matt and Fried, Shlomo and/or Mayim Tovim ("Mayim Tovim") filed a Notice of Opposition, instituted as Opposition No. 91177358, asserting that Applicant's registration of the COCA-COLA ZERO mark should be refused under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), due to a likelihood of confusion with Mayim Tovim's prior-used and registered ZER0 CAL (Stylized) mark, Registration No. 3156317. On August 15, 2007, Companhia de Bebidas das Americas – AMBEV ("AmBev") filed a Notice of Opposition, instituted as Opposition No. 91178953, asserting that Applicant's registration of the COCA-COLA ZERO mark should be refused under Section 2(e) of the Lanham Act, 15 U.S.C. § 1052(e), on the basis that the term "zero" is merely descriptive.

On October 11, 2007, Opposer filed a motion seeking suspension of its opposition proceeding until such time as the first opposition proceeding filed by Mayim Tovim against the COCA-COLA ZERO application is resolved, on the grounds that if the first opposer is successful, Opposer's opposition would be moot. Applicant opposed the motion for suspension, arguing, *inter alia*, that there are "significant differences" between Mayim Tovim's opposition and Opposer's opposition. (*See* Memorandum in Opposition to Opposer's Motion to Suspend Proceedings (Docket No. 7) (hereinafter, "Applicant's Opp. Mem.") at 5.) Yet the very day that Applicant made this argument, Applicant also filed a motion and memorandum in support thereof seeking to consolidate this proceeding with the Mayim Tovim proceeding and the AmBev proceeding, claiming exactly the opposite – namely, that the Mayim Tovim proceeding and the instant proceeding share common issues of fact and law. (*See* Memorandum in Support of Motion to Consolidate Proceedings (Docket No. 9) (hereinafter, "Applicant's Consolidation

Mem.") at 5-6.) Given Applicant's recognition that, in fact, the three opposition proceedings are not premised on the same claims, Applicant's Motion to Consolidate should be denied.

ARGUMENT

By opposing Opposer's Motion to Suspend and filing its own Motion to Consolidate on the same day, Applicant has exemplified the old saying: it wants to have its cake and eat it, too. Applicant argues that suspension is improper because there are "significant differences" between the Mayim Tovim opposition and this opposition (*see* Applicant's Opp. Mem. at 5), and yet, paradoxically, at the same time argues that consolidation of these proceedings is appropriate to avoid "duplication of evidence, testimony and arguments." (*See* Applicant's Consolidation Mem. at 5.) Applicant cannot have it both ways, and its motion to consolidate should be denied.

Although the Board may, in its discretion, consolidate pending cases, *see* Fed. R. Civ. P. 42(a); TBMP § 511, the circumstances here only argue against consolidation. "In determining whether to consolidate proceedings, the Board will weigh the savings in time, effort, and expense, which may be gained from consolidation, against any prejudice or inconvenience that may be caused thereby." TBMP § 511. Contrary to Applicant's arguments, consolidating these three unique opposition proceedings brought by three unique parties will not save either time, effort, or expense, and will cause only inconvenience.

As Applicant itself has stressed to the Board, there are "significant differences" that weaken Applicant's arguments that judicial economy will be served by consolidation. (*See* Applicant's Opp. Mem. at 5.) The most obvious difference between the three proceedings is the party in the position of opposer. Each proceeding has been brought by a different party, represented by different attorneys. Each opposer comes to the proceeding with its own unique

background, with its own unique goals, and with its own unique agenda for achieving those goals. Applicant's motion for consolidation ignores this fact, and attempts to foist upon each of these three individual parties the burden of working in conjunction. Because consolidation would require the three opposing parties to work together at some level,[1] consolidation will only multiply the parties' administrative burdens in the case, and accordingly cause delays and drive up costs unnecessarily, without substantive purpose or result, thus inconveniencing the parties.

Another obvious difference – and, again, one stressed by Applicant to the Board (*see* Applicant's Opp. Mem. at 5) – is the claims asserted in each proceeding. Although both Opposer and AmBev have alleged that registration of the COCA-COLA ZERO mark should be refused under Lanham Section 2(e) because "zero" is merely descriptive, Mayim Tovim has opposed on the completely separate basis that there is a likelihood of confusion between its prior-used and prior-registered ZER0 CAL (Stylized) mark and the COCA-COLA ZERO mark. And Opposer has asserted an additional basis for refusal of registration that Applicant committed fraud in connection with the application. Contrary to Applicant's assertions (*see* Applicant's Consolidation Mem. at 6), these various claims will not involve similar evidence, similar discovery, or similar arguments, and may not even involve similar witnesses. As Applicant itself has argued, "a final decision regarding likelihood of confusion between COCA-COLA ZERO and [Mayim Tovim's] ZER0 CAL (Stylized) mark will have little if any bearing on whether ZERO is descriptive or is lacking in acquired distinctiveness, or whether [Applicant] committed

[1] For example, Applicant seems to believe that if the three separate proceedings are consolidated, Applicant's "witnesses will need to be deposed only once." (Applicant's Consolidation Mem. at 6.) To make that true, the three opposing parties would have to communicate with each other and manage to find a single day on which all three opposers could be available for the deposition. This process would have to be repeated for each of Applicant's witnesses that any of the opposers might choose to depose. In addition, it is unclear that a single deposition of Applicant's witnesses would be appropriate in any event: because the claims in the proceedings differ, taking only one deposition would be complicated and could possibly prejudice the right of each party to obtain necessary deposition testimony.

fraud." (Applicant's Opp. Mem. At 5.) If that is the case, consolidation provides no benefit or judicial economy. Indeed, owing to the "significant differences" between the parties' claims (Applicant's Opp. Mem. at 5), consolidation is unlikely to save time, expense or effort.[2]

CONCLUSION

For the reasons stated above, Opposer respectfully requests that the Board deny Applicant's motion to consolidate the three opposition proceedings brought by three separate parties on separate grounds.

Dated: New York, New York
November 16, 2007

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: _____
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Attorneys for Opposer Royal Crown Co., Inc.

[2] Because each opposer is asserting different claims, consolidation is more appropriately made on the basis of the *opposer's identity* rather than on the basis of the application at issue. Accordingly, concurrently with its submission of this brief in opposition to Applicant's motion to consolidate, Opposer is filing its own motion to consolidate the three opposition proceedings Opposer itself has filed against Applicant and its various ZERO-inclusive applications, namely the COCA-COLA ZERO application opposed in this proceeding, Applicant's COKE ZERO mark opposed in Opposition No. 91180772, and Applicant's SPRITE ZERO mark opposed in Opposition No. 91180771.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Opposer's Opposition to The Coca-Cola Company's Motion to Consolidate Proceedings** is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to counsel for Applicant, Bruce Baber, Esq., King & Spalding LLP, 1180 Peachtree Street, Atlanta, GA 30309, this 16th day of November, 2007.

Laura Popp-Rosenberg

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