

ESTTA Tracking number: **ESTTA302281**

Filing date: **08/21/2009**

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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Submission	Motion to Compel Discovery
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Date	08/21/2009
Attachments	Motion to Compel (F0503717).PDF (15 pages)(1758773 bytes)

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

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ROYAL CROWN COMPANY, INC.,	:	<u>Consolidated Proceedings</u>
	:	Opposition No. 91178927
Opposer,	:	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,	:	
	:	
Opposer,	:	
	:	
- against -	:	Opposition No. 91184434
	:	
ROYAL CROWN COMPANY, INC.,	:	
	:	
Applicant.	:	
-----X		

**ROYAL CROWN’S MOTION TO COMPEL
AND MOTION TO EXTEND TIME**

Pursuant to Rule 2.120(e) of the Trademark Rules of Practice and Rule 37(a) of the Federal Rules of Civil Procedure, opposer and applicant Royal Crown Company, Inc. (“Royal Crown”) hereby moves the Trademark Trial and Appeal Board (the “Board”) for an order (i) compelling applicant and opposer The Coca-Cola Company (“TCCC”) to supplement or amend its response to Interrogatory No. 8; (ii) compelling TCCC to produce documents in response to Document Requests Nos. 24, 26 and 29-32; (iii) deeming TCCC to have waived privilege and compelling TCCC to produce all documents which it has withheld under a claim of privilege;

and (iv) compelling TCCC to supplement its written responses and document production in response to all served discovery requests as necessary.

Royal Crown further requests that the discovery period in this proceeding for Royal Crown only be extended an additional sixty days after TCCC fulfills its discovery obligations, and that all trial dates in this proceeding accordingly be extended 60 days.

CERTIFICATION OF COUNSEL

Pursuant to Trademark Rule of Practice 2.120(e), this motion is made following repeated good faith attempts by counsel for Royal Crown to resolve with counsel for TCCC the issues presented in this motion. Despite such good faith efforts, TCCC's counsel has refused to commit to providing the outstanding discovery materials. (*See* Declaration of Laura Popp-Rosenberg in Support of Royal Crown's Motion to Compel and Motion to Extend Time ("Popp-Rosenberg Decl."), ¶¶ 7-30 & Exhs. 6-15, 22-29.) Based on the extensive discussions between counsel for the parties prior to bringing this motion and the fact that those discussions have not resulted in the resolution of the issues discussed herein, Royal Crown does not believe that further discussions with TCCC are likely to resolve the dispute.

STATEMENT OF FACTS

Royal Crown served its second requests for the production of documents on February 13, 2009, and served its second set of interrogatories and second set of requests for admission on February 18, 2009. (Popp-Rosenberg Decl. at ¶¶ 2-3 and Exhs. 1-2.) Under the applicable rules, TCCC's written responses to Royal Crown's second document requests were due on or before March 20, 2009, and its responses to Royal Crown's second sets of interrogatories and requests for admissions were due on or before March 25, 2009.

Three days before its written responses to the second document requests were due, TCCC requested an extension through April 6, 2009 to respond to all of the outstanding discovery requests, including interrogatories, document requests and requests for admission. (*Id.* at ¶ 5 and Exh. 3.) Royal Crown agreed to the extension *on the condition* that TCCC produce responsive documents at the same time it produced its written responses. (*Id.*) Apparently unwilling to produce its documents in a timely fashion, TCCC, rather than accepting the proffered extension, served its written responses on the original deadlines. (*Id.* at ¶ 6 and Exhs. 4-5.)

While TCCC's written responses to the second document requests and its responses to the second set of interrogatories are deficient in numerous respects, Royal Crown could not know the extent of TCCC's deficiencies until TCCC produced responsive documents. Accordingly, Royal Crown advised TCCC of the apparent deficiencies on March 24, 2009, and requested TCCC to advise when it expected to make its document production so that Royal Crown could fully catalog the deficiencies. (*Id.* at ¶ 7 and Exh. 6.) Despite this request, and despite repeated follow-up requests, TCCC refused to provide a date by which it intended to produce responsive documents. (*Id.* at ¶¶ 8-10 and Exhs. 7-9.)

When TCCC still had not made its document production by mid-May – three months after the second document requests were served and two months after TCCC acknowledged that it had responsive documents – counsel for Royal Crown requested on May 18, 2009 a meet-and-confer with counsel for TCCC on the issue. (*Id.* at ¶ 11 and Exh. 10.) TCCC responded by asserting, with no basis, that it was not required to produce responsive documents because the proceedings had been suspended on March 30, 2009 – *after* TCCC's discovery responses were due – pending Royal Crown's motion to amend its pleadings. (*Id.* at ¶ 12 and Exh. 11.) Royal Crown repeated its request for a meet-and-confer several times before TCCC finally agreed. (*Id.*

at ¶¶ 13-16 and Exhs. 12-14.) The parties held the conference on June 5, 2009, during which TCCC committed to produce responsive documents during the week of June 8, 2009. (*Id.* at ¶ 13.)

TCCC finally made its production on June 12, 2009, four months after the second document requests had been served. (*Id.* at ¶ 18.) Despite TCCC having taken so long to make its production, the production was woefully deficient. On June 25, 2009, Royal Crown sent TCCC a letter detailing TCCC's discovery deficiencies, including deficiencies in TCCC's written responses to the second set of document requests, deficiencies in TCCC's production in response to the second set of document requests, and deficiencies in TCCC's written responses to the second set of interrogatories. (*Id.* at ¶ 19 and Exh. 22.) The deficiency letter also requested that TCCC produce a privilege log, which it had never done in the proceeding. (*Id.* at Exh. 22.) The deficiency letter closed by requesting a meet-and-confer to discuss the deficiencies during the week of June 29, 2009. (*Id.*) Royal Crown had to repeat its request for a meet-and-confer several times before TCCC would commit. (*Id.* at ¶ 20.)

The parties finally held the meet-and-confer on July 8, 2009. (*Id.*) During the conference call, counsel for TCCC promised to produce its long overdue privilege log by July 22, 2009 (which would include a listing of documents responsive to Document Requests Nos. 28, 31 and 34), to produce supplemental responses to Interrogatories Nos. 6, 8, 9, 10, 11 and 14 by July 17, 2009, and to produce additional documents in response to Document Requests Nos. 24, 26, 29, 30 and 32 also by July 17, 2009. (*Id.* at ¶ 21.) The parties agreed that TCCC could produce supplemental documents in response to Document Requests Nos. 25 (requesting sales figures) and 27 (requesting marketing expenditures) at the close of discovery. (*Id.*) TCCC's counsel stated that there were no documents responsive to Requests Nos. 33 and 35. (*Id.*)

Despite these promises, TCCC did not produce its supplemental responsive documents or supplemental responsive documents by July 17, 2009, did not produce a privilege log by July 22, 2009, and did not offer any explanation for its failure to meet the very deadlines it had agreed to. (*Id.* at ¶¶ 22-24.)

Following additional correspondence and after TCCC failed to live up to subsequent set dates to comply, TCCC finally provided supplemental responses to Interrogatories Nos. 6, 9, 10, 11 and 14 on July 27, 2009. (*Id.* at ¶¶ 25-28 and Exhs. 23-26.) However, TCCC has yet to provide the promised supplemental response to Interrogatory No. 8, its supplemental document production, or its privilege log. (*Id.* at ¶¶ 29-30.) Despite repeated requests from Royal Crown's counsel, TCCC to this date has refused to provide any information about when it would provide the long overdue discovery materials. (*Id.* at ¶¶ 25-30 and Exhs. 23-29.) TCCC's continuing and inexcusable delinquencies are unfairly jeopardizing Royal Crown's ability to take any necessary follow-up discovery.¹

While the parties were corresponding about TCCC's deficiencies with respect to the second set of discovery requests, Royal Crown also requested that TCCC supplement its written discovery requests and document production with respect to all outstanding discovery requests, including the first set of discovery requests served February and April 2008. (*Id.* at ¶ 17 and Exhs. 15.) Royal Crown made this request because TCCC's counsel has advised Royal Crown's counsel on multiple occasions during the course of this proceeding that TCCC is not obligated to supplement its discovery responses and document production without a formal request from Royal Crown. (*Id.*) Although Royal Crown disagrees with TCCC's interpretation of the

¹ TCCC's actions in discovery appear to be taken in an attempt to obtain a tactical advance, since at the same time that they are delaying their compliance with their discovery obligations, they have refused Royal Crown's request for a 60-day extension of time of the discovery and trial periods, which Royal Crown requested so that it would not be prejudiced by TCCC's ongoing and inexcusable discovery delinquencies.

applicable discovery rules, rather than fight about the rules, Royal Crown opted instead to make the formal request for supplementation that TCCC required. Yet, even with this unnecessary formal request made at TCCC's behest, TCCC continues to refuse to commit to supplementing its written discovery responses and document production. (*Id.* at ¶ 17, 30.)

ARGUMENT

A. TCCC Must Be Required to Respond to Interrogatory No. 8

Interrogatory No. 8 requests TCCC to:

Describe in detail all advertising, marketing and promotional campaigns or activities that have included more than one of TCCC's Marks, specifying for each the mark(s) involved in and the media, media outlet, time frame and geographic scope of each such campaign or activity.

(Popp-Rosenberg Decl. at Exh. 2.) In response, TCCC interposed a number of objections to the interrogatory, and stated that in lieu of providing a written response it would "produce documents sufficient to show advertisements that have been used and marketing and promotional activities that have been conducted in the United States that have included more than one of TCCC's ZERO Marks." (*Id.* at Exh. 4.)

By letter of June 25, 2009, Royal Crown advised TCCC that the response to Interrogatory No. 8 was deficient. (*Id.* at Exh. 22.) Royal Crown questioned TCCC's objections, and asked TCCC to identify which portions of the interrogatory are vague and/or ambiguous, and how the interrogatory is overbroad and unduly burdensome. (*Id.*) Royal Crown also noted that TCCC's planned production of marketing materials did not respond in full to the interrogatory, which required identification, *inter alia*, of the media and media outlets utilized, the time frame of the marketing at issue, and the geographic scope of the marketing activity. (*Id.*) Royal Crown further pointed out that TCCC had not produced responsive documents. (*Id.*)

During the parties' teleconference to discuss TCCC's discovery deficiencies held July 8, 2009, TCCC's counsel stated with respect to Interrogatory No. 8 that TCCC would supplement its response, and committed to doing so by July 17, 2009. (*Id.* at ¶ 21.) However, TCCC has never supplemented its response to Interrogatory No. 8 despite numerous repeated requests from Royal Crown to do so. (*Id.* at ¶¶ 23, 25-30 and Exhs. 23, 25, 27-29.) TCCC also has refused to provide a date certain by which it would provide the supplemental response. (*Id.*)

Now that more than six months have elapsed since Royal Crown served Interrogatory No. 8, there is simply no excuse for TCCC's continuing delay in providing the required information. Therefore, Royal Crown requests that the Board issue an order requiring TCCC to respond in full to Interrogatory No. 8 within one (1) week of the Board's decision on this motion, including by providing a detailed written response to the interrogatory, and, if appropriate, producing responsive documents and by identifying in its interrogatory response the production numbers of the responsive documents.

B. TCCC Must Be Required to Produce Documents in Response to Document Requests Nos. 24, 26 and 29-32

In broad terms, Document Requests Nos. 24, 26, 29, 30, 31 and 32 seek documents concerning the development and selection of TCCC's marks at issue in these consolidated proceedings ("TCCC's Marks"), representative advertisements and other marketing materials for each of TCCC's Marks, documents concerning Royal Crown's marks at issue in these proceedings, and documents concerning TCCC's disputes with third parties arising from rights claimed in TCCC's Marks. (*Id.* at Exh. 1.) TCCC's production in response to each of these document requests has been inadequate, in that TCCC has failed to produce documents in whole with respect to certain document requests and in part with respect to other document requests, despite admitting that it has responsive documents and despite stating that it would produce those

documents notwithstanding its objections to the requests. (*See, e.g., id.* at ¶¶ 19-22, 26 and Exhs. 4, 22, 24, 26.) Although TCCC has stated that it will produce responsive, it has not done so in the more than six months that have elapsed since the requests were served, in the nearly two months that have elapsed since Royal Crown advised TCCC of the deficiencies, or in the more than six weeks since TCCC committed to producing responsive documents. (*See, e.g., id.* at ¶¶ 2, 19-22, 26, 30 and Exhs. 4, 22, 24, 26.) Worse, TCCC keeps misleading Royal Crown about when it will make the production, undoubtedly in an attempt to avoid this motion to compel. (*See, e.g., id.* at ¶¶ 21, 26 and Exh. 24.) There is simply no excuse for TCCC's deficiencies or delinquencies.

Document Request No. 24: Document Request No. 24 requests "All Documents Concerning the development and selection of each of TCCC's Marks." (*Id.* at Exh. 1.) TCCC stated that it would produce documents concerning the "selection and adoption" of TCCC's Marks, but did not commit to producing documents concerning the "development" of the marks as required by the request. (*Id.* at Exh. 4.) TCCC has no basis for refusing to produce documents in response to Document Request No. 24. Therefore, Royal Crown requests the Board to order TCCC to produce *all* responsive documents within one (1) week of the Board's decision on this motion.

Document Request No. 26: Document Request No. 26 requires TCCC to produce "Representative samples of advertisements (regardless of media), circulars, catalogues, brochures, promotional materials and other marketing materials sufficient to show the manners in which TCCC has used each of TCCC's Marks." (*Id.* at Exh. 1.) Despite the significant advertising expenditures that TCCC claimed in its 2(f) submissions in connection with each of the applications at issue, TCCC has produced relatively scant evidence of any actual advertising.

The few advertising samples TCCC has produced are far from representative, consisting entirely of print and a small number of Internet materials despite the fact that TCCC uses multiple media for its advertisements and marketing efforts. Moreover, TCCC has produced no examples of advertising for FULL THROTTLE ZERO. TCCC's reluctance to produce the advertising materials is understandable, given that virtually every advertisement for the marks at issue makes clear that those marks refer explicitly to the zero calorie characteristic of TCCC's beverages and thus to the genericness of the "zero" term in each of TCCC's Marks. Nonetheless, TCCC should not be permitted to hide evidence in this manner. Therefore, Royal Crown requests that the Board order TCCC to supplement its production in response to Document Request No. 26 within one (1) week of the Board's decision on this motion by producing sufficiently representative advertisement for each of TCCC's Marks.

Document Request No. 29: Document Request No. 29 requires TCCC to produce "All Documents Concerning RC's use of RC's Marks or TCCC's awareness of RC's use of RC's Marks." (*Id.* at Exh. 1.) TCCC interposed a number of baseless objections in response, but nonetheless committed to producing responsive documents. (*See, e.g., id.* at ¶¶ 21, 26 and Exhs. 4, 24.) However, it has not done so. (*Id.* at ¶ 30.) Therefore, Royal Crown requests the Board to order TCCC to produce documents in response to Document Request No. 29 within one (1) week of the Board's decision on this motion.

Document Request No. 30: Document Request No. 30 requires TCCC to produce "All Documents Concerning any objection or opposition asserted by TCCC against a third party on the basis of TCCC's alleged rights in any of TCCC's Marks, including, but not limited to, all communications between TCCC and such third party." (*Id.* at Exh. 1.) TCCC interposed a number of baseless objections in response, but nonetheless committed to producing responsive

documents. (*See, e.g., id.* at ¶¶ 21, 26 and Exhs. 4, 24.) However, it has not done so. (*Id.* at ¶ 30.) Therefore, Royal Crown requests the Board to order TCCC to produce documents in response to Document Request No. 30 within one (1) week of the Board’s decision on this motion.

Document Request No. 31: Document Request No. 31 requires TCCC to produce “All Documents Concerning third party use of any mark consisting of or including the word or numeral “zero” in connection with beverages.” (*Id.* at Exh. 1.) TCCC interposed a number of baseless objections in response, but nonetheless originally committed to producing responsive documents. (*Id.* at Exh. 4.) Later, TCCC stated that any responsive documents were privileged and would be identified only on an (as yet unproduced) privilege log. (*Id.* at ¶ 21.) Royal Crown doubts that all of the documents concerning third party marks that include the term “zero” would be privileged. Royal Crown is in the same industry as TCCC, and regularly collects information about competitive products. Royal Crown finds it impossible to believe that TCCC does not have competitive information that it collects in the regular course of its business. While Royal Crown understands that TCCC might want to protect this information from discovery in an effort to hide the pervasiveness of the use of “zero” in the beverage industry, it cannot be permitted to do so. Therefore, Royal Crown requests the Board to order TCCC to produce documents in response to Document Request No. 31 within one (1) week of the Board’s decision on this motion.

Document Request No. 32: Document Request No. 29 requires TCCC to produce “Documents sufficient to identify (1) all lawsuits, oppositions, cancellation proceedings or other formal or informal legal proceedings (including but not limited to mediations and arbitrations) brought by TCCC against a third party arising out of a claim that a mark used, registered or

sought to be registered by such third party was likely to cause confusion with any of TCCC's Marks; (2) the mark(s) at issue in each such action or proceeding; and (3) the status of each such action or proceeding." (*Id.* at Exh. 1.) TCCC interposed a number of baseless objections in response, but nonetheless committed to producing responsive documents. (*See, e.g., id.* at ¶¶ 21, 26 and Exhs. 4, 24.) However, it has not done so. (*Id.* at ¶ 30.) Royal Crown therefore requests the Board to order TCCC to produce documents in response to Document Request No. 32 within one (1) week of the Board's decision on this motion.

C. TCCC Should Be Deemed to Have Waived Privilege

TCCC has asserted an objection on the basis of privilege to 32 of the 38 document requests served on it in these consolidated proceeding. (*Id.* at Exhs. 4, 19.) Despite the fact that TCCC first asserted privilege in May 2008 – more than 15 months ago – TCCC has never produced a privilege log. (*See, e.g., id.* at ¶ 24, 30 and Exhs. 19, 22.) There is no excuse for TCCC's delay. Accordingly, Royal Crown requests that TCCC be deemed to have waived *all* claims of privilege in its responses to the first and second set of documents requests for failing to perfect its claims in a timely manner. *See Ayers v. SGS Control Servs.*, No. 03 Civ. 9078RMBRLE, 2006 WL 859362, at *2 (S.D.N.Y. Apr. 3, 2006); *John Labatt Ltd. v. Molson Breweries*, Nos. 93 CV 75004, 94 CV 71540, 1995 WL 23603, at *1 (S.D.N.Y. Jan. 19, 1995), *transf'd sub nom. Dorf & Stanton Communs. v. Molsen Breweries*, 56 F.3d 13 (2d Cir. 1995), *aff'd*, 100 F.3d 919 (Fed. Cir. 1996); *see also* Fed. R. Civ. P. 26(b)(5); *cf. Breon v. Coca-Cola Bottling Co.*, 232 F.R.D. 49 (D. Conn. 2005) (defendant waived privilege by failing to provide adequate privilege log). Royal Crown further requests that TCCC be compelled to produce all such documents to which privilege has been waived within one (1) week of the Board's order on this motion.

If the Board nonetheless determines that TCCC has not waived privilege, Royal Crown alternatively requests that the Board order TCCC to produce its complete privilege log (identifying all privileged documents and accurately and adequately explaining the basis for the claim of privilege for each) within one (1) week of the Board's decision on this motion.

D. TCCC Should Be Required to Supplement Its Responses to All Discovery Requests

Royal Crown served its first set of discovery requests in April 2008, and TCCC responded to those requests in May 2008. (*Id.* at Exhs. 17, 19.) More than fifteen months have elapsed since that date. Moreover, the proceedings have now expanded to include 14 more of TCCC's marks. Given the length of time that has elapsed and the additional marks now at issue, presumably TCCC would now have additional materials and information responsive to the previously-served requests.

TCCC has taken the position that it is not required to supplement its discovery responses *at any time* without a formal request from Royal Crown to do so. TCCC's position is contrary to Rule 26(e) of the Federal Rules of Civil Procedure (applicable to these proceedings pursuant to Trademark Rule of Practice 2.116(a)), which specifically provides that parties are under an *ongoing* obligation to supplement discovery responses and document production "in a timely manner." Notwithstanding TCCC's untenable position that it is under no obligation to update its discovery responses and document production without a formal request from Royal Crown, Royal Crown made the formal request to TCCC on June 5, 2009. (*Id.* at ¶ 17 and Exh. 15.) Yet, despite this request, TCCC has failed to produce updated discovery responses and has failed to provide Royal Crown with any explanation for this failure.

Royal Crown therefore requests that the Board order TCCC to supplement its written responses and document production to all discovery requests served prior to the date of this motion within one (1) week following the Board's decision on this motion.

**E. The Board Should Prevent Prejudice to Opposer
By Extending Royal Crown's Discovery Period Only**

In order to preserve the opportunity to take follow-up discovery in the event it became necessary, Royal Crown served its second set of discovery requests well in advance of the close of the discovery period. At the time Royal Crown served its second set of discovery requests in mid-February 2009, discovery in the consolidated proceedings was set to close June 2, 2009 – two and half months after TCCC's responses to the second set of discovery requests were due.

Currently, discovery is set to close October 4, 2009, less than 45 days from the date of this motion, and TCCC still has not fulfilled basic discovery obligations. By its continued discovery delinquencies, TCCC has robbed and is continuing to rob Royal Crown of time to take follow-up discovery. This should not be countenanced by the Board, and Royal Crown should not suffer prejudice because of TCCC's failure to comply with the applicable rules.

Therefore, Royal Crown requests that the Board preserve Royal Crown's opportunity to conduct follow-up discovery by resetting Royal Crown's discovery period only, so that Royal Crown's discovery period closes at least sixty (60) days after Royal Crown receives the additional discovery responses and responsive documents from TCCC. Even this extension would give Royal Crown less time for follow-up discovery than it would have had if TCCC had timely responded in full to Royal Crown's second set of discovery requests.

As noted, the requested extension of the discovery period should apply to Royal Crown only. There is no reason for TCCC to be rewarded for its delinquent and improper conduct with additional time to conduct discovery of Royal Crown.

Royal Crown also requests that the trial dates in this matter be reset, as appropriate, with the requested extension of Royal Crown's discovery period.

CONCLUSION

For the reasons stated herein, Royal Crown respectfully requests that the Board enter an order compelling TCCC within one week of the Board's decision on this motion to (i) supplement its response to Interrogatory No. 8; (ii) produce documents in response to Document Requests Nos. 24, 26 and 29-32; and (iii) supplement its written responses and document production in response to all served discovery requests as appropriate. Royal Crown further respectfully requests the Board to enter an order deeming TCCC to have waived all claims of privilege with respect to documents responsive to all previously-served document requests, and an order compelling TCCC to produce all such documents. Royal Crown finally respectfully requests the Board to enter an order extending Royal Crown's, and not TCCC's, discovery period for an additional sixty (60) days following the date that TCCC fulfills its discovery obligations, and an order extending the trial dates as necessary to accommodate Royal Crown's extended discovery period.

Dated: New York, New York
August 21, 2009

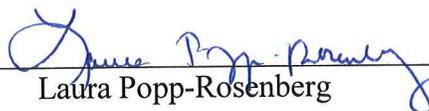
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CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of **Royal Crown's Motion to Compel and Motion to Extend Time** to be 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, 1185 Avenue of the Americas, New York, NY 10036-4003, this 21st day of August, 2009.



Laura Popp-Rosenberg