

ESTTA Tracking number: **ESTTA308173**

Filing date: **09/25/2009**

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

Proceeding	91178927
Party	Plaintiff Royal Crown Company, Inc.
Correspondence Address	Barbara A. Solomon Fross Zelnick Lehrman & Zissu, P.C. 866 United Nations Plaza New York, NY 10017 UNITED STATES lpopp-rosenberg@fzlz.com,bsolomon@fzlz.com
Submission	Reply in Support of Motion
Filer's Name	Laura Popp-Rosenberg
Filer's e-mail	lpopp-rosenberg@fzlz.com
Signature	/Laura Popp-Rosenberg/
Date	09/25/2009
Attachments	Reply brief in support of motion to compel (F0519029).PDF (9 pages)(1477269 bytes)

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

-----X		
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 REPLY BRIEF IN FURTHER SUPPORT OF ITS
MOTION TO COMPEL AND MOTION TO EXTEND TIME**

Pursuant to Rule 2.127(a) of the Trademark Rules of Practice, opposer and applicant Royal Crown Company, Inc. (“Royal Crown”) submits this reply brief in further support of its Motion to Compel and Motion to Extend Time.

In its moving brief, Royal Crown requested the Trademark Trial and Appeal Board (the “Board”) to issue 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 for failing to serve a privilege log in a timely manner 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 also requested that its discovery period be extended an additional 60 days to allow for follow-up discovery necessitated by TCCC's dilatory discovery tactics.

In its opposition brief, TCCC essentially has acknowledged that it has been dilatory in responding to discovery and has not complied with its obligations. Given these admissions and for the reasons set forth below and in Royal Crown's moving brief, Royal Crown respectfully requests that its motion be granted in its entirety.

ARGUMENT

A. TCCC Admits That It Has Not Fulfilled Its Discovery Obligations

In response to Royal Crown's motion to compel, TCCC confuses its obligation to *answer* discovery with its obligation to *fully respond* to discovery. TCCC incessantly repeats the mantra that it has "timely" answered, apparently believing that if it can invoke the word "timely" enough, the Board will eventually believe it. However, the claim of "timely" response is a hollow one. Yes, TCCC provided written answers to discovery by the deadlines to do so, but it did not in fact *respond*. These "timely" answers merely state that documents, interrogatory responses and a privilege log will be provided. Royal Crown, seven months (or more) after discovery was served, is still waiting for complete and substantive discovery responses. TCCC has never produced a privilege log in this proceeding, despite having first asserted more than 16 months ago that it was withholding certain documents on the basis of privilege. TCCC has failed to provide a full and complete response to Interrogatory No. 8, despite more than seven months

having passed since the interrogatory was served. TCCC has admitted that it has not produced all of the documents in its possession custody and control in response to Documents Requests No. 24, 26 and 29-32, again despite the passage of more than seven months since it first received those requests. And TCCC refuses to update and supplement any of its written discovery responses or its document production, despite a clear mandate in the Federal Rules of Civil Procedure that it do so.

TCCC's repeated use of the word "timely" is not its only attempt at smoke-and-mirrors. It also tries to distract the Board from the validity of Royal Crown's motion to compel by asserting that it is nothing more than the result of a "misunderstanding" between counsel as to what transpired during a July 8, 2009 teleconference. But there is no misunderstanding on the essential issue, namely that TCCC has failed to live up to its obligations to produce documents, produce its privilege log and supplement written responses. Royal Crown did not bring this motion because TCCC failed to live up to its counsel's July 8 commitments; Royal Crown brought this motion because TCCC has repeatedly failed to comply with the rules governing discovery. TCCC's July 8 promises did not occasion this motion; they simply delayed it.

TCCC's third effort at smoke-and-mirrors is to focus on what TCCC's *counsel* has allegedly done rather than what TCCC *itself* has done. But the actions of TCCC's counsel are completely irrelevant. What is clear from TCCC's brief is TCCC's failure to live up to its discovery obligations. While there are random comments scattered throughout TCCC's brief claiming that TCCC has conducted or is conducting a search for responsive information and materials, there is no factual basis for such statements: TCCC does not submit any declaration or affidavit confirming what actions TCCC has taken or has not taken in response to Royal Crown's discovery requests or whether or not there are responsive documents not yet produced. All the

Board – and all Royal Crown – has been given are either statements about what counsel has requested of TCCC, not what TCCC itself has done to respond to discovery, or conclusory statements about TCCC’s alleged actions with no factual support. Such statements cannot be taken at face value.

When stripped of the excuses that permeate TCCC’s brief, the essence of TCCC’s opposition brief is nothing more than an admission of Royal Crown’s complaints. TCCC repeated admits throughout its brief that it is still searching for responsive documents and promises to make production when such materials are located. (*See, e.g.*, TCCC Br. at 2, 3, 7, 9, 12.) These are the same vague promises that Royal Crown has been hearing for more than seven months now and the very basis for Royal Crown’s motion.¹ The most telling admission, perhaps, is the first sentence of TCCC’s footnote 1, where TCCC “acknowledges that it has taken an extended period of time for TCCC to prepare its privilege log and to make certain limited supplemental productions of documents.” That, in a nutshell, is an admission that Royal Crown’s motion is valid and should be granted in its entirety.

B. TCCC Has No Valid Excuse for its Overdue Responses to the Discovery Requests at Issue

1. *Interrogatory No. 8*

TCCC’s counsel admitted during the parties’ July 8 conference call that TCCC’s response to Interrogatory No. 8 was deficient, and committed on behalf of his client to supplement TCCC’s response to that interrogatory. In its opposition brief, TCCC does not dispute these facts. Instead, the opposition brief rests on the ridiculous excuse that TCCC’s

¹ TCCC makes some weak efforts to justify why a search for responsive materials is still ongoing more than seven months after the discovery requests were served. For example, TCCC asserts that each brand has to be approached separately and that some of the requested information goes back more than five years. Again, without an affidavit or declaration supporting such factual statements, they cannot be taken at face value.

counsel cannot provide the information because TCCC has not provided the information to it. But it does not matter what TCCC's *counsel* can or cannot do; counsel is not the party and is not seeking a federal trademark registration. What matters is that *TCCC* has not provided the information in more than seven months since receiving the interrogatory. Worse, even after the parties have discussed the deficiency *ad nauseam* and even after TCCC's continuing delay forced Royal Crown to make a motion to compel, TCCC still seems completely disinterested in making any effort to correct its response to Interrogatory No. 8 anytime soon. Nor does TCCC even attempt to prove an explanation for why it has been unable to provide the information in the more than seven months.

TCCC seems to believe that it can look for and provide information in this proceeding at its leisure. The Board should not countenance such dilatory behavior and should require TCCC to provide a full and complete response, including responsive documents, to Interrogatory No. 8 within one week of the Board's order on this motion.

2. *Outstanding Document Production*

Royal Crown's motion requests that TCCC be required to immediately produce all remaining documents responsive to Document Requests Nos. 24, 26, 29, 30, 31 and 32. TCCC's response is to assert (despite seven months having elapsed without sufficient production) that it has produced materials in a "timely" manner, to claim (with no factual support) that it is making good faith efforts to locate additional responsive material, and to make (yet again) hollow promises that it "may" produce responsive documents at some unspecified, future time.

It is unnecessary to debate the validity of Royal Crown's complaints about TCCC's document production in light of TCCC's admission that there are additional responsive documents, which have yet to be produced. However, as to Document Request No. 29, TCCC's

opposition brief misstates the facts concerning the parties' discussion. Royal Crown's counsel *never* stated during the July 8 conference that TCCC could ignore any part of Document Request No. 29. Rather, TCCC's counsel asserted during the teleconference that all documents responsive to the portion of Document Request No. 29 concerning TCCC's awareness of RC's use of RC's marks were privileged. Assuming this to be the case, Royal Crown's counsel stated that such documents should be identified on the as-yet-unproduced privilege log. However, Royal Crown never suggested that TCCC could ignore that portion of the request or not produce non-privileged documents. And there is no question that TCCC has non-privileged documents responsive to this request: TCCC's witnesses admitted during depositions that TCCC collects information about competitors. Such competitors would undoubtedly include Royal Crown and its DIET RITE PURE ZERO beverages.²

In any event, TCCC's game playing with respect to document production must come to an end. Apparently, it will take an order of this Board to convince TCCC that if it seeks rights from the Patent and Trademark Office, it must play by the rules, including those applicable to opposition proceedings. Therefore, Royal Crown respectfully requests the Board order TCCC to produce all responsive documents to Document Requests 24, 26, 29, 30, 31 and 32 within one week of the Board's order on this motion.

3. *Supplementing Discovery Responses*

As stated in Royal Crown's moving brief, TCCC advised Royal Crown on multiple occasions during the course of these proceedings that it does not believe it is under any obligation to update and supplement its discovery requests even if new responsive information

² Royal Crown finds it equally incredible to believe, in light of TCCC's practice of collecting information on competitors, that TCCC would have no non-privileged documents responsive to Document Request No. 31.

becomes available. TCCC does not deny this position in its opposing brief,³ nor does it offer any facts or law to absolve it from the requirement set forth in Rule 26(e) of the Federal Rule of Civil Procedure that it update its discovery responses as necessary on an ongoing basis.

Accordingly, Royal Crown respectfully requests that TCCC be required to comply with Rule 26(e) of the Federal Rules of Civil Procedure and to update and supplement its written discovery responses and document production as necessary.

C. TCCC Has Waived Privilege

More than sixteen months have elapsed since TCCC first asserted that it was withholding documents from production on the basis of privilege. Yet TCCC admits that it still has not produced a privilege log. The cases cited in Royal Crown’s moving brief make clear that TCCC has already waived privilege by not perfecting its claims in a timely manner. The only argument TCCC can make against those citations is that they are federal court cases, not Board cases. The futility of TCCC’s “legal” argument is self-apparent.

TCCC’s factual argument fares no better. TCCC tries to excuse its long delay by arguing that it was waiting until it had finished producing documents before providing its privilege log,⁴ and then, incredibly, blames Royal Crown for its delay. TCCC cites not one case – whether a Board case or a federal case – to justify its plans to delay perfecting its privilege claims until the end of discovery.

Accordingly, Royal Crown repeats its request that the Board deem TCCC to have waived privilege in this proceeding as to all documents previously withheld on the basis of privilege, and

³ In fact, TCCC’s brief actually admits this surprising position, stating “No basis exists for Royal Crown to require TCCC to supplement all of its written discovery responses.” Apparently, TCCC does not believe that the ongoing obligation of Rule 26(e) of Federal Rules of Civil Procedure applies to it.

⁴ TCCC also claims that producing a privilege log at the end of its production has been its plan all along and that it communicated as much to Royal Crown. This is yet another after-the-fact fabrication.

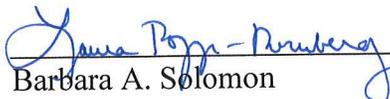
order TCCC to produce all such withheld documents within one week of the Board's decision on this motion.

CONCLUSION

For the reasons stated herein and in its moving brief, 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 that the Board 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
September 25, 2009

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: 
Barbara A. Solomon
Laura Popp-Rosenberg
866 United Nations Plaza
New York, New York 10017
Tel: (212) 813-5900
Email: bsolomon@frosszelnick.com
lpopp-rosenberg@frosszelnick.com

Attorneys for Royal Crown Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of **Royal Crown's Reply Brief in Further Support of Its 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 25th day of September, 2009.



Laura Popp-Rosenberg