

**UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451**

Mailed: November 13, 2009

Opposition No. 91178927  
Opposition No. 91180771  
Opposition No. 91180772  
Opposition No. 91183482  
Opposition No. 91185755  
Opposition No. 91186579  
Opposition No. 91189847  
Opposition No. 91190658

Royal Crown Company, Inc.

v.

The Coca-Cola Company

and

Opposition No. 91184434

The Coca-Cola Company

v.

Royal Crown Company, Inc.

Cheryl Goodman, Interlocutory Attorney:

This case now comes up on Royal Crown Company Inc.'s (hereinafter RC) motion to compel, filed August 21, 2009. The Coca Cola Company (hereinafter TCCC) has opposed the motion.

Opposer seeks an order compelling a supplemental or amended response to Interrogatory No. 8; the production of documents in response to its Document Request nos. 24, 26, 29-32, deeming the privilege waived with regard to all

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documents withheld on the basis of privilege and production of those documents, and an order compelling "TCCC to supplement its written responses and document production in response to all served discovery requests as necessary."

The Board finds that RC has made a good faith effort to resolve the discovery dispute.

*Interrogatory No. 8*

RC seeks a detailed written response to this interrogatory and written documents, if appropriate, with the production numbers of the responsive documents identified. TCCC advises that although it agreed to supplement its response to this interrogatory, it has not provided supplemental responses to this interrogatory because it is awaiting additional information from its client. TCCC's counsel advises that TCCC is making a thorough search for the requested information but counsel cannot "provide a date certain" "realistically and in good conscience" until the information is provided by TCCC.

The Board finds that TCCC has had sufficient time (July to the present) to obtain additional information to provide a better response to this interrogatory request.

In view thereof, RC's motion to compel is granted to the extent that TCCC is allowed until THIRTY DAYS from the mailing date of this order to provide a detailed written

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response, and reference to responsive documents, as appropriate, to Interrogatory No. 8.

*Document Request no. 24*

RC's complaint with regard to this request is that TCCC did not produce documents concerning development of the mark.

TCCC advises that it does not have any additional documents as to the development of the ZERO marks as any documents relating to development, by its understanding, fell within the meaning of selection and adoption of ZERO marks, and all such documents have been produced. TCCC advises that should it identify any additional responsive documents, they will be produced.

Inasmuch as TCCC has advised that any documents relating to development were categorized and produced with documents relating to selection and adoption of the ZERO marks and no further responsive documents relating to development of the ZERO marks have been identified, RC's motion to compel is denied with regard to this request.

*Document Request no. 26*

RC's complaint with regard to this request is that TCCC's production of advertising samples is not representative and that it seeks "sufficiently representative advertisements for each of TCCC's Marks."

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TCCC advises that it has provided representative samples for all ZERO marks in use except for FULL THROTTLE ZERO and that no samples exist for the ZERO marks not in use. TCCC further advises that it is checking for advertising materials relating to the FULL THROTTLE ZERO mark and that RC's counsel acknowledged that it has received representative samples for all other ZERO marks in use.

In reply, RC complains about TCCC's "hollow promises that it 'may' produce responsive documents at some unspecified, future time" but has not disputed TCCC's assertions that RC has acknowledged receipt of representative samples for all ZERO marks in use except FULL THROTTLE.

Because RC has not disputed that it has received representative samples for all ZERO marks in use except for FULL THROTTLE ZERO, RC's motion to compel is granted to the extent that TCCC is allowed until THIRTY DAYS from the mailing date of this order to produce representative samples of advertising of the FULL THROTTLE ZERO mark. RC's motion to compel is denied with regard to the production of responsive ZERO marks that are not in use, inasmuch as TCCC advises that no responsive documents exist, but is granted to the extent that TCCC is allowed until THIRTY DAYS from the mailing date of this order to amend its written response to this document request to so state.

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*Document Request Nos. 29, 30, 31, and 32*

RC's complaint with regard to these requests is that TCCC has not produced responsive documents to these requests although it has "committed to doing so."

TCCC advises that it has no non-privileged responsive documents with respect to Document Request nos. 29 and 31. With regard to Document Request no. 30, TCCC advises that the search is ongoing and with regard to Document Request no. 32, TCCC advises that it is "generating a list of the information" as agreed by the parties in their discovery teleconference.

In reply, RC argues that TCCC has non-privileged documents with regard to Request no. 29 as TCCC's witnesses admitted during depositions that TCCC collects information about its competitors. RC further advises that it never agreed that TCCC could "ignore any part of Document Request No. 29."

RC's motion to compel is granted with regard to Document Request no. 29 to the extent that TCCC is allowed until THIRTY DAYS from the mailing date of this order to produce any responsive documents to all parts of Document Request no. 29. If no non-privileged responsive documents exist, TCCC should so state in writing. Additionally, TCCC is allowed until THIRTY DAYS from the mailing date of this

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order to identify responsive privileged documents with regard to Document Request no. 29 in the privilege log.

RC's motion to compel is granted with regard to Document Request no. 30 and Document Request no. 32 (in the form agreed to by the parties) to the extent that TCCC is allowed until THIRTY DAYS from the mailing date of this order to produce responsive documents with regard to Document Request No. 30, and to produce the list of information with respect to Document Request no. 32.

RC's motion to compel is granted with respect to Document Request no. 31 to the extent that if no non-privileged documents exist, TCCC is allowed until THIRTY DAYS from the mailing date of this order to so state in writing. Additionally, TCCC is allowed until THIRTY DAYS from the mailing date of this order to identify responsive privileged documents with regard to Document Request no. 31 in the privilege log.

*Waiver of privilege*

RC states that TCCC has asserted an objection on the basis of privilege to 32 of the 38 document requests but never served a privilege log. RC requests that TCCC be deemed to have waived all claims of privilege in response to the document requests by failing to provide a privilege log in a timely manner and to be ordered to produce the

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responsive documents. Alternatively, RC requests that the Board order TCCC to produce a complete privilege log.

TCCC advises that it never indicated that it would not produce a privilege log or refused to do so and that it "always maintained that it would provide the privilege log upon conclusion of TCCC's search for documents and information." TCCC advises that it is in the process of "incorporating descriptions of the additional documents in the privilege log" and requests that the Board require production within one month of the Board's decision on the motion.

In reply, RC argues that TCCC has waited 16 months to produce a privilege log, and that TCCC's long delay is unexplained.

The Board finds that the privilege has not been waived with regard to responsive privileged documents, but that RCC is entitled to a complete privilege log without further delay.

In view thereof, the Board grants RC's alternative request for relief. TCCC is allowed until THIRTY DAYS from the mailing date of this order to provide a privilege log identifying all responsive documents withheld on the basis of privilege with regard to all of RC's discovery requests.

*Supplemental Responses to Discovery Requests*

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RC argues that TCCC has taken the position that it is not required to supplement its discovery responses despite its ongoing obligation to do so and requests that the Board order TCCC to supplement its written responses and document production to all served discovery requests.

In response, TCCC asserts that it has "met its obligation to supplement its discovery responses and document production in a timely manner" and that it "continues to produce documents and information relating to the additional marks in a timely manner in accordance with the applicable rules." TCCC further asserts that RC has provided no evidence that TCCC is withholding documents and information and that it has produced all documents in its possession, custody and control. TCCC submits that no basis exists for supplementing all of its written discovery responses.

In reply, RC argues that TCCC advised RC that it does not believe it is under an obligation to update and supplement its discovery requests even if new responsive information becomes available, and that TCCC be required to comply with Fed. R. Civ. P. 26(e) to update and supplement written discovery responses as necessary.

The duty to supplement under Fed. R. Civ. P. 26(e)(2) includes responsive documents created after service of

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discovery. *Simon Property Group, L.P. v. mySimon, Inc.* (No. IP 99-1195- C/HS), 2003 WL 1807135 (S.D. Ind. 2003).

To the extent that new information has become available with regard to any of the marks involved in this proceeding, TCCC has an obligation to supplement its discovery responses, and not just to supplement its responses with regard to additional marks that were added to the consolidated proceeding subsequent to service of discovery responses relating to the other involved marks. Although TCCC's duty to supplement has been acknowledged, it is not clear from TCCC's response that it is continuing to supplement its discovery responses with regard to all of the involved marks if new information has become available.

In view thereof, RC's motion to compel is granted to the extent that TCCC is allowed until THIRTY DAYS from the mailing date of this order to supplement its discovery responses if new information has become available with regard to any of the involved marks. Additionally, TCCC should continue to supplement these responses as new information becomes available with regard to any of the involved marks. If no further responsive documents exist at this time, TCC should so advise RC in writing.

In summary, RC's motion to compel is granted with regard to Interrogatory no. 8, Document Request nos. 29, 30, 32, and 31 as set forth above, providing a completed

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privilege log, and supplemental responses, as set forth above. The motion to compel is granted in part and denied in part with regard to Document Request no. 26, and denied with regard to Document Request no. 24.

TCCC is reminded that a failure to provide responsive discovery may bar introduction of these responsive document and things as part of its evidence on the case.

*Extension of Discovery Period*

RC seeks an extension of the discovery period for RC only for SIXTY DAYS so that it can conduct follow-up discovery, complaining of TCCC's "delinquent and improper conduct."

TCCC objects to an extension of the discovery period for RC only arguing that RC has had "more than enough time to conduct follow up discovery." TCCC also advises that it plans to serve discovery on RC and that closing the discovery period for TCCC would "unfairly and improperly deprive TCCC of its ability and right under the rules to obtain appropriate discovery" from RC.

The Board finds good cause for granting an extension of the discovery period. However, the Board does not find that discovery should be extended for RC only.

Although there has been some delay by TCCC in providing responses and/or supplemental responses to certain discovery requests and to producing the privilege log, the Board does

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not find that TCCC's delay was an attempt to frustrate RC's ability to obtain discovery or take follow-up discovery.

The Board notes too that the motion to compel involved a limited amount of discovery requests, which is an indication to the Board that overall TCCC has attempted to comply with its discovery obligations by providing initial and supplemental discovery responses. Accordingly, the Board finds that the circumstances do not warrant an extension of discovery for RC only.

RC's motion to extend is granted to the extent that the discovery period is extended for both parties by SIXTY DAYS.<sup>1</sup>

Proceedings are resumed.

Discovery and trial dates are reset as follows:

Discovery Closes	February 23, 2010
Plaintiff's Pretrial Disclosures in Opposition Nos. 91178927, 91180771, 91180772, 91183482, 91185755, 91186579 and 91189847	April 10, 2010
30-day testimony period for plaintiff's testimony to close in Opposition Nos. 91178927, 91180771, 91180772, 91183482, 91185755, 91186579 and 91189847	May 25, 2010
Defendant/Counterclaim Plaintiff's Pretrial Disclosures in Opposition Nos. 91178927, 91180771, 91180772, 91183482, 91185755, 91186579, 91189847 and (as plaintiff) in Opposition No. 91184434	June 9, 2010

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<sup>1</sup> At the time of the filing of the motion to compel, forty-four days remained in the discovery period. The additional extension of sixty days will provide the parties with over three months (104 days) for discovery.

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30-day testimony period for defendant in July 24, 2010  
Opposition Nos. 91178927,  
91180771, 91180772, 91183482,  
91185755, 91186579 and 91189847 and  
as plaintiff in Opposition No. 91184434  
to close

Rebuttal Disclosures Due- plaintiff in August 8, 2010  
Opposition Nos. 91178927, 91180771,  
91180772, 91183482, 91185755, 91186579  
and 91189847; and pretrial disclosures  
due as defendant in Opposition No.  
91184434

30-day testimony period for September 22, 2010  
defendant in Opposition No. 91184434 to  
close; and 15-day rebuttal testimony  
period to close for plaintiff in  
Opposition Nos. 91178927, 91180771,  
91180772, 91183482, 91185755, 91186579  
and 91189847

Counterclaim Plaintiff's Rebuttal October 7, 2010  
Disclosures Due, Opposition No. 91184434

15-day rebuttal period plaintiff in November 6, 2010  
Opposition No. 91184434 to close

Brief for plaintiff in Opposition Nos. January 5, 2011  
91178927, 91180771, 91180772,  
91183482, 91185755, 91186579 and  
91189847 due

Brief for defendant in Opposition Nos. February 4, 2011  
91178927, 91180771, 91180772,  
91183482, 91185755, 91186579 and  
9118984 due; and brief for plaintiff in  
Opposition No. 91184434 due

Brief for defendant in Opposition No. March 6, 2011  
911884434 due; Reply brief, if any, for  
plaintiff in Opposition Nos. 91178927,  
91180771, 91180772, 91183482, 91185755,  
91186579 and 91189847 due;

Reply brief, if any, for plaintiff in March 21, 2011  
Opposition No. 911884434 due

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In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.