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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. and Dr. Pepper/Seven Up, Inc.
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Submission	Reply in Support of Motion
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Signature	/Laura Popp-Rosenberg/
Date	01/09/2013
Attachments	Reply Brief in Further Support of (Second) Motion to Compel (F1149670).PDF (12 pages)(179331 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
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—and—

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THE COCA-COLA COMPANY,	:	
	:	
Opposer,	:	
	:	
- against -	:	Opposition No. 91184434
	:	
ROYAL CROWN COMPANY, INC.,	:	
	:	
Applicant.	:	
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REPLY BRIEF IN FURTHER SUPPORT OF ROYAL CROWN COMPANY, INC.’S
MOTION TO COMPEL AND TO TEST SUFFICIENCY OF OBJECTION

Royal Crown Company, Inc. (“Royal Crown”) did not file its Motion to Compel and to Test Sufficient of Objection (“Motion to Compel”) on a whim. Rather, Royal Crown filed the motion after The Coca-Cola Company (“TCCC”) had failed to honor its discovery obligations over a nearly five-year period. During this time, as detailed in Royal Crown’s moving brief, TCCC acknowledged that its discovery efforts were lacking and repeatedly promised documents and discovery responses to Royal Crown, yet over and over again failed to deliver on those promises. TCCC’s brief in opposition to Royal Crown’s motion is more of the same: it admits

that it owes Royal Crown documents and promises to produce them. Clearly, TCCC needs an order from the Board before it will feel obligated to make good on its promises.

Stripping down TCCC's opposition brief to the pertinent facts, it is clear that TCCC has admitted (i) that it never produced documents in response to Royal Crown's Third and Fourth Document Requests, and must do so; and (ii) that it has not supplemented its responses to Royal Crown's discovery requests after the nearly two-year suspension, and must do so. The only issue raised by Royal Crown's motion that TCCC even attempts to argue is whether TCCC is required to respond to Royal Crown's Fifth Document Requests and Fourth Requests for Admission. served August 17, 2012. Because TCCC's theory that the Board did not mean to set an August 17, 2012 discovery close date lacks merit, and because TCCC has effectively conceded the other issues raised by Royal Crown's motion, there is no question that Royal Crown's Motion to Compel should be granted in its entirety.

ARGUMENT

I. TCCC Admits That It Owes Responsive and Supplemental Documents

Through its Motion to Compel, Royal Crown seeks, among other things, an order from the Board compelling TCCC to respond to Royal Crown's Third and Fourth Document Requests, which were served in early 2010, and compelling TCCC to supplement certain of its discovery responses.¹ *See* Moving Br. at 8-9 and 11-12. In its brief in opposition, TCCC admits that it "has not yet produced to RC portions of the supplementation and other outstanding documentation that has been agreed to." *Opp. Br.* at 9. Since TCCC has admitted that the

¹ Specifically, Royal Crown seeks supplementation of TCCC's responses to Requests for Admission Nos. 50-51, 68, 70-98, 101, 106-113, 124-125 and 132-137; Document Requests Nos. 7-9, 12-19, 21-22, 24-27, 30-33, 35-36 and 38; and Interrogatories Nos. 8-14. *See* Moving Br. at 11-12.

complained-of documents are due and outstanding, its assertion that “[Royal Crown]’s complaints about documents that have not been produced are . . . unfounded” (Opp. Br. at 9) makes no sense. The record is clear that Royal Crown’s complaints *are* in fact well founded.

After admitting it failed to produce the oft-promised documents, TCCC tries to rationalize its failure by asserting, for the first time, that it is waiting until it knows “the precise scope of the documents it needs to complete searching for and produce.” Opp. Br. at 10. Despite TCCC’s claim that it has previously communicated this rationalization to Royal Crown (*see* Opp. Br. at 9), it has never done so.² *See* Supplemental Declaration of Laura Popp-Rosenberg in Support of Royal Crown Company, Inc.’s Motion to Compel and to Test Sufficiency of Objection (“Supp. Popp-Rosenberg Decl.”), ¶ 2. Moreover, considering that the Third and Fourth Document Requests and all the discovery requests that require supplementation have been outstanding since 2010 or earlier, TCCC’s newly proffered excuse – that it has been waiting until resolution of issues related to discovery requests served in *August 2012* – simply makes no sense.

TCCC also tries to avoid compelled production by arguing that it would “be improper for the Board, through an order, to require TCCC to provide any supplementation beyond that required by Rule 26(e).” Opp. Br. at 10. While Royal Crown has not requested the Board to make any order beyond the scope of the Federal Rules of Civil Procedure in any event, TCCC’s argument is nonetheless perplexing. Rule 26(e) mandates that a party must “supplement or correct” any discovery disclosure or response *either* if the response is incomplete or incorrect

² Tellingly, TCCC did not support any of the alleged “facts” asserted in its opposition brief with a declaration signed under penalty of perjury. Instead, TCCC dropped untrue statements masquerading as facts into its brief, apparently hoping the Board would swallow them without question.

(Rule 26(e)(A)) or “as ordered by the court” (Rule 26(e)(B)). Thus, Rule 26(e) by its own terms authorizes the Board to order TCCC to supplement its discovery responses in any way the Board sees fit. Here, Royal Crown has requested the Board to order TCCC to supplement the identified discovery responses (including its document production) to bring them up to date. Such supplementation is reasonable and appropriate given the long passage of time (three years or more) since TCCC first responded to the requests.

Royal Crown is also perplexed by TCCC’s statement that the “parties are . . . close to resolution” of the supplementation issues. Opp. Br. at 10. The history of the parties’ communications on supplementation, as laid out in Royal Crown’s moving brief and supporting declaration, belie such a statement. If Royal Crown believed that it could work with TCCC directly to resolve TCCC’s supplementation deficiencies, it would not have brought this motion. Moreover, Royal Crown filed its Motion to Compel when its deadline for making pre-trial disclosures was just over three weeks away. Considering that TCCC had not by that time made any effort to supplement its discovery responses despite having months – if not years – to do so, how long was Royal Crown supposed to wait?

TCCC finally attempts to escape the Board’s scrutiny of its discovery failures by asserting that Royal Crown also needs to supplement its discovery responses. While Royal Crown does not deny that supplementation is appropriate, Royal Crown – unlike TCCC – has already taken substantial steps to do so. Among other things, Royal Crown has served over 700 additional pages of documents since proceedings resumed last summer, bringing its production to date to more than 5,000 pages. (Supp. Popp-Rosenberg Decl. at ¶ 3.) TCCC, in contrast, has

not produced a single document since 2009. (*Id.* at ¶ 4.) In any event, it is TCCC’s discovery failures that are before the Board, not any purported discovery deficiencies by Royal Crown.³

In sum, TCCC has admitted that it owes Royal Crown documents in response to the Third and Fourth Document Requests, and that it owes Royal Crown supplemental (updated or corrected) discovery responses. None of TCCC’s arguments affects this basic truth, nor should the Board be swayed by TCCC’s various attempts to confuse the issue or direct attention away from TCCC’s failures. Accordingly, the Board should grant Royal Crown’s Motion to Compel insofar as it requests TCCC to produce documents in response to the Third and Fourth Document Requests and insofar as it requests TCCC to supplement its responses to Requests for Admission Nos. 50-51, 68, 70-98, 101, 106-113, 124-125 and 132-137; Document Requests Nos. 7-9, 12-19, 21-22, 24-27, 30-33, 35-36 and 38; and Interrogatories Nos. 8-14.

II. TCCC’s Arguments as the August 17, 2012 Discovery Close Date Have No Merit

The remainder of Royal Crown’s Motion to Compel is addressed to TCCC’s refusal to respond to the Fifth Document Requests and Fourth Requests for Admission, which were duly served on TCCC on August 17, 2012, the discovery close date under the then-operable scheduling order. TCCC contends that it does not have to respond to these August 17 Discovery Requests on the theory that discovery had closed, for once and for evermore, on April 24, 2010. *See Opp. Br.* at 3-9.

In attempting to rationalize this theory, TCCC does not attempt to deny that the Board’s July 19 and July 23 Orders reopened discovery and set a new discovery close date of August 17,

³ Therefore, the Board should ignore TCCC’s request that the Board order “that *each* party must supplement its prior discovery responses to the extent required by Rule 26(e).” *Opp. Br.* At 10; *see also id.* at 11. If TCCC believes it has a basis to move to compel Royal Crown to supplement its discovery responses – which it does not – TCCC should make a properly supported motion, not an improper request in its opposition to Royal Crown’s motion.

2012. Nor does TCCC attempt to deny that the Board has the power to reopen discovery. Instead, TCCC weakly argues only that the parties did not request discovery to be reopened (Opp. Br. at 4-5), and that the Board normally does not reopen discovery following suspension (Opp. Br. at 5-6). Neither of these arguments, however, changes the reality that the Board had the ability to reopen discovery and did, in fact, do so.

TCCC's argument that the Board should, more than six months later, retract its decision to reopen discovery because the parties did not ask for any additional discovery period misses the point. Once the Board reopened the discovery period, whether the parties requested an additional discovery period or not is irrelevant. Moreover, although the parties may not have requested an additional discovery period, the parties had nonetheless repeatedly signaled to the Board that additional discovery time was needed – having requested, on four successive occasions prior to the Board's July 2012 scheduling orders, an additional 195 days to complete discovery. (*See* Moving Br. at 10.) In fact, despite the Board giving the parties 30 days to complete discovery after the nearly two-year suspension had ended, the parties requested *yet another* extension, of approximately two and half months, in the hope that discovery could be completed if given additional time (a hope that was not realized). (*See* Dkt. No. 73.)

TCCC's argument that the Board does not normally reopen discovery after proceedings have been suspended also misses the point. In support of this argument, TCCC seems to lay great stock in a portion of the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") relating to suspension for settlement, which states that "[w]hen resuming proceedings, . . . the Board will generally issue a new trial order beginning with whatever period was running when the consented motion or stipulation to suspend was filed." Opp. Br. at 5 (quoting TBMP § 510.03(b)). However, the critical word in this passage is "generally"; clearly,

the Board is free to retain or alter the remaining period as appropriate to the circumstances and as it sees fit. Here, where the proceedings had been suspended for nearly two years, and where the parties had repeatedly asked for more time to conduct discovery, the Board clearly saw that the circumstances suggested additional discovery time was appropriate, and so ordered it.

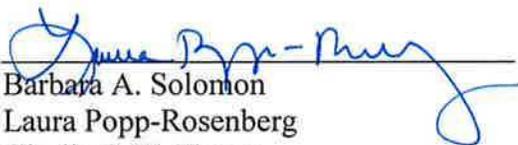
Therefore, Royal Crown respectfully requests that the Board issue an order compelling TCCC to respond in full to Royal Crown's Fifth Document Requests and Fourth Requests for Admission, without objection, and including by producing all responsive documents.

CONCLUSION

For the reasons stated herein and in Royal Crown's moving brief, Royal Crown respectfully requests that the Board enter an order compelling TCCC within thirty days of the Board's decision to (i) produce documents in response to Royal Crown's Third Document Requests dated January 14, 2010; (ii) produce documents in response to Royal Crown's Fourth Document Requests dated February 23, 2010; (iii) respond in full and without objection, including by producing responsive documents, in response to Royal Crown's Fifth Document Requests dated August 17, 2012; (iv) respond in full and without objection to Royal Crown's Fourth Requests for Admission dated August 17, 2012; and (v) supplement its written responses and document production to Requests for Admission Nos. 50-51, 68, 70-98, 101, 106-113, 124-125 and 132-137, Document Requests Nos. 7-9, 12-19, 21-22, 24-27, 30-33, 35-36 and 38, and Interrogatories Nos. 8-14 by updating its responses thereto.

Dated: New York, New York
January 9, 2013

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

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Attorneys for Royal Crown Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing Reply Brief in Further Support of Royal Crown Company, Inc.'s Motion to Compel and to Test Sufficiency of Objection 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 9th day of January, 2013.


Laura Popp-Rosenberg

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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THE COCA-COLA COMPANY,	:	Opposition No. 91186579
	:	Opposition No. 91189847
Applicant.	:	Opposition No. 91190658
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—and—

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THE COCA-COLA COMPANY,	:	
	:	
Opposer,	:	
	:	
- against -	:	Opposition No. 91184434
	:	
ROYAL CROWN COMPANY, INC.,	:	
	:	
Applicant.	:	
-----X		

**SUPPLEMENTAL DECLARATION OF LAURA POPP-ROSENBERG
IN FURTHER SUPPORT OF ROYAL CROWN COMPANY, INC.'S
MOTION TO COMPEL AND TO TEST SUFFICIENCY OF OBJECTION**

I, Laura Popp-Rosenberg, hereby declare under penalty of perjury:

1. I am a member of Fross Zelnick Lehrman & Zissu, P.C., attorneys for opposer and applicant Royal Crown Company, Inc. (“Royal Crown”) in the above-captioned consolidated proceedings. I submit this declaration in support of Royal Crown Company, Inc.’s Reply Brief in further support of its Motion to Compel and to Test Sufficiency of Objection, dated January 9, 2013. I make this declaration based on personal knowledge of the facts and circumstances set forth herein and upon review of my firm’s records in this matter.

2. In its brief in opposition to Royal Crown's motion, The Coca-Cola Company ("TCCC") has asserted that "TCCC has not yet produced to RC portions of the supplementation and other outstanding documentation that has been agreed to for one reason, which TCCC has made clear to RC. TCCC wishes to complete all of the remaining discovery (including by needed searching for and production of additional documents) once, rather than drag the process out piecemeal." Opp. Br. at 9. The first time I, my firm or Royal Crown *ever* recalls hearing such a rationale from TCCC was upon reading it in TCCC's brief. In point of fact, TCCC has never expressed such a rationale in any of the voluminous correspondence exchanged between the parties on the issues (all of which correspondence is attached to my initial declaration).

3. Since the instant proceedings recommenced in July 2012, Royal Crown has made two supplemental document productions to update its discovery responses: on August 28, 2012, Royal Crown produced documents bearing numbers RC 0004336 – RC 0004872, and on October 17, 2012, produced documents bearing numbers RC 0004873 – RC 0005055.

4. My recollection, confirmed by a search of my firm's records in this case, is that TCCC has not produced any documents in response to Royal Crown's document requests since 2009.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, declares that all statements made of his own knowledge are true, and all statements made on information and belief are believed to be true.

Declared under penalty of perjury this 9th day of January, 2013, at New York, New York.


Laura Popp-Rosenberg

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the **Supplemental Declaration of Laura Popp-Rosenberg in Further Support of Royal Crown Company, Inc.'s Motion to Compel and to Test Sufficiency of Objection** to be deposited with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed to counsel for The Coca-Cola Company, Bruce Baber, Esq., King & Spalding LLP, 1185 Avenue of the Americas, New York, NY 10036-4003, this 9th day of January, 2013.


Laura Popp-Rosenberg