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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.
Correspondence Address	Barbara A. Solomon Fross Zelnick Lehrman & Zissu, P.C. 866 United Nations Plaza New York, NY 10017 UNITED STATES bsolomon@frosszelnick.com
Submission	Other Motions/Papers
Filer's Name	Laura Popp-Rosenberg
Filer's e-mail	lpopp-rosenberg@fzlz.com,bsolomon@fzlz.com
Signature	/Laura Popp-Rosenberg/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ROYAL CROWN COMPANY, INC.,	:	
Opposer,	:	
- against -	:	Opposition No. 91178927 Opposition No. 91180771 Opposition No. 91180772
THE COCA-COLA COMPANY,	:	
Applicant.	:	

OPPOSER'S MOTION TO CONSOLIDATE OPPOSITION PROCEEDINGS

Royal Crown Company, Inc. ("Opposer"), by its attorneys, hereby moves the Trademark Trial and Appeal Board (the "Board") for an order consolidating the above-identified opposition proceedings concerning The Coca-Cola Company's Application Serial No. 78/580,598 for the mark COCA-COLA ZERO (Opposition No. 91178927), Application No. 78/316,078 for the mark SPRITE ZERO (Opposition No. 91180771), and Application Serial No. 78/664,176 for the mark COKE ZERO (Opposition No. 91180772). A full statement of the grounds for the motions and the memorandum in support of the motions, as required by 37 C.F.R. § 2.127(a), are set forth below.

BACKGROUND

In 1958, Opposer's predecessor launched Diet Rite as the first reduced-calorie soft drink. With this introduction, calorie-conscious soft drink lovers were given a product that fit their lifestyle. Since at least as early as 2003, Opposer has been continuously using the term "zero" in connection with its diet beverages to describe characteristics of those products, namely that the products have zero carbohydrates and zero calories. Others in the beverage industry also use the

term "zero" to describe the zero calorie, zero carbohydrate and/or zero sugar nature of their products.

In connection with its applications to register the marks DIET RITE PURE ZERO (Application Serial No. 78/576,257) and PURE ZERO (Application Serial No. 78/581,917) for soft drinks and related products in International Class 32, Opposer was required to disclaim and did disclaim the "zero" portion of its marks on the basis that the term is descriptive of one or more features of Opposer's products.

Beginning in October 2003, The Coca-Cola Company ("Applicant") began applying to register various marks combining the term "zero" with other marks owned by Applicant for soft drinks and related goods in International Class 32. Applicant currently has 16 pending applications for such marks, including Application Serial No. 78/316,078 (SPRITE ZERO), Application Serial No. 78/580,598 (COCA-COLA ZERO), and Application Serial No. 78/664,176 (COKE ZERO).

In connection with each of these applications (except for one application that was only filed in October 2007), the United States Patent and Trademark Office ("PTO") has required Applicant to disclaim the term "zero" on the basis that the term is descriptive of one or more features of Applicant's products. Applicant has refused to disclaim the "zero" portion of its marks, instead submitting to the PTO arguments and evidence purporting to demonstrate that its so-called "family of ZERO marks" has acquired distinctiveness under Section 2(f) of the Lanham Act. The PTO has accepted such arguments and evidence and has approved certain of Applicant's applications for registration without the "zero" disclaimer. So far, Application Serial No. 78/580,598 for COCA-COLA ZERO, Application Serial No. 78/316,078 for SPRITE

ZERO, and Application Serial No. 78/664,176 for COKE ZERO have been published for opposition as a precursor to registration.

Application Serial No. 78/580,598 for COCA-COLA ZERO was published for opposition on April 17, 2007, and Opposer filed its Notice of Opposition against registration of that mark on August 14, 2007.[1] Application Serial No. 78/664,176 for COKE ZERO was published for opposition on July 24, 2007, and Opposer filed its Notice of Opposition against registration of that mark on November 15, 2007.[2] Also on November 15, 2007, Opposer filed a Notice of Opposition against Application Serial No. 78/316,078 for SPRITE ZERO, which had been published for opposition on October 23, 2007.[3] Each of Opposer's three oppositions against Applicant's marks involves the same claims: 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 applications because Applicant claimed that the applied-for mark had acquired distinctiveness under Section 2(f) of the Lanham Act by virtue of Applicant's "substantially exclusive" use when Opposer (and others) were at the same time using "zero" in connection with identical products.

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[1] The COCA-COLA ZERO mark is the subject of two other pending opposition proceedings: Opposition No. 91177358 filed by Mayim Tovin a/k/a Erhlich, Matt and Fried, Shlomo on May 17, 2007; and Opposition No. 91178953, filed by Companhia de Bebidas das Américas – AMBEV on August 15, 2007. Currently pending before the Board and fully-briefed is Opposer's Motion to Suspend Opposer's Opposition No. 91178927 until resolution of Opposition No. 91177358, the first-filed of the three opposition proceedings. Opposer still endorses that Motion. Also currently pending before the Board is the Motion of The Coca-Cola Company to Consolidate Proceedings, which seeks to join this proceeding with the Mayim Tovin and AMBEV proceedings. For the reasons set forth in Opposer's Opposition to the Motion of The Coca-Cola Company to Consolidate Proceedings, filed concurrently with this motion, Opposer opposes Applicant's motion to consolidate Opposer's proceeding with those of unrelated third parties.

[2] Companhia de Bebidas das Américas filed Opposition No. 91180439 against the COKE ZERO application on October 31, 2007.

[3] Companhia de Bebidas das Américas filed Opposition No. 91180442 against the SPRITE ZERO application on October 31, 2007.

This Motion seeks to consolidate all three of Opposer's oppositions pending against Applicant into a single proceeding based on the identical discovery and trial schedules set by the Board in connection with Opposition Nos. 91180771 and 91180772.

ARGUMENT

Opposer seeks consolidation of Opposer's three opposition proceedings now pending against Applicant and its "zero"-inclusive applications because the proceedings all involve common questions of law and fact. The Board may, in its discretion, consolidate pending cases in such circumstances. *See* Fed. R. Civ. P. 42(a); *see also Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 U.S.P.Q.2d 1154 (T.T.A.B. 1991). "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.

Here, consolidating the three opposition proceedings filed by Opposer against Applicant's marks will save time, effort and expense and will not prejudice or inconvenience either the parties or the Board. First, each proceeding involves the identical parties and identical issues of law. In each opposition, Opposer has opposed an application filed by Applicant 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 applications. Due to the identity of the parties and the underlying legal questions, consolidation will save time, effort and expense because it will obviate the need for either party to duplicate discovery, testimony or arguments in three separate proceedings. It also will obviate the need for the Board to consider the identical evidence,

testimony and arguments in three separate proceedings. Thus, consolidation will save time, effort and expense.

Second, the first-filed proceeding, Opposition No. 91178927, is still in the earliest stages. Although Applicant has filed an answer, neither party has yet taken discovery, and discovery is not set to close for several months. Therefore, resetting the dates in the first-filed opposition proceeding to match those in the newly-filed proceedings will not unduly delay the first proceeding or prejudice either party.[4]

The fact that the proceedings involve different marks is not a basis for denying consolidation. All of the proceedings focus on the inclusion of the same term, namely "zero," and whether that term is descriptive of Applicant's beverages regardless of whether those beverages are sold under the COCA-COLA, COKE or SPRITE marks. Moreover, Applicant has claimed to own a "family of zero marks"; thus, all of the opposed marks are related.

CONCLUSION

For the reasons stated above, Opposer respectfully requests that the Board grant its motion to consolidate Opposer's three opposition proceedings currently pending against Applicant and its ZERO-inclusive marks: Opposition Nos. 91168097, 91180771, and 91180772. Opposer also respectfully requests that the Board set the schedule for the consolidated proceedings to match that of the last-filed proceeding.

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[4] Opposer expects that upon consolidation, all three oppositions would be subject to the new TTAB rules that went into effect November 1, 2007, even though the first-filed opposition proceedings was filed before this effective date. Application of the new rules would not prejudice either party. The parties would have been required to comply with the new rules in regard to the two later-filed proceedings in any event; compliance to the rules with regard to all three proceedings does not increase the burden since initial disclosures should be identical for all proceedings. Moreover, application of the new rules to all three proceedings should only increase the efficiency and transparency of the proceedings.

Dated: New York, New York
November 16, 2007

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: _____
Barbara A. Solomon
Laura Popp-Rosenberg
866 United Nations Plaza
New York, New York 10017
(212) 813-5900

Attorneys for Opposer Royal Crown Co., Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Opposer's Motion to Consolidate Proceedings** is being deposited with the United States Postal Service as first class mail, postage prepaid, this 16th day of November, 2007, in an envelope addressed to counsel for Applicant as follows:

in connection with Opposition No. 91178927, to

Bruce Baber, Esq.
King & Spalding LLP
1180 Peachtree Street
Atlanta, GA 30309,

and in connection with Opposition Nos. 91180771 and 91180772, to

Caroline K. Pearlstein
The Coca-Cola Company
One Coca-Cola Plaza NW.

Laura Popp-Rosenberg