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

Proceeding	91178927
Party	Defendant The Coca-Cola Company
Correspondence Address	Bruce W. Baber King & Spaulding, LLP 1180 Peachtree Street Atlanta, GA 30305 UNITED STATES cpearlstein@na.ko.com
Submission	Other Motions/Papers
Filer's Name	Bruce W. Baber
Filer's e-mail	BBaber@KSLAW.com, CPearlstein@na.ko.com, lysims@na.ko.com
Signature	/Bruce W. Baber/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

MATT EHRLICH and SHLOMO)	
FRIED, and/or MAYIM TOVIM,)	
)	
Opposers,)	OPPOSITION
)	
v.)	NO. 91177358
)	
THE COCA-COLA COMPANY,)	
)	
Applicant.)	
)	
ROYAL CROWN COMPANY, INC.,)	
)	
Opposer,)	OPPOSITION
)	
v.)	NO. 91178927
)	
THE COCA-COLA COMPANY,)	
)	
Applicant.)	
)	
COMPANHIA DE BEBIDAS DAS)	
AMÉRICAS - AMBEV,)	
)	
Opposer,)	OPPOSITION
)	
v.)	NO. 91178953
)	
THE COCA-COLA COMPANY,)	
)	
Applicant.)	

REPLY MEMORANDUM IN SUPPORT OF
APPLICANT’S MOTION TO CONSOLIDATE PROCEEDINGS

NOW COMES THE COCA-COLA COMPANY (“TCCC” or “Applicant”), applicant in each of the above-captioned matters, and, by and through its undersigned counsel and in accordance with Rule 2.127(a) of the Trademark Rules of Practice, files this reply memorandum

in support of its Motion To Consolidate the above-captioned proceedings (“TCCC’s Motion”), filed on October 31, 2007.

INTRODUCTION

In response to TCCC’s Motion, the opposers in only two of these three related proceedings have objected to TCCC’s Motion; notably, the opposers in the first-filed proceeding, Opposition No. 91177358 (the “Ehrlich/Fried Opposition”), have not responded to TCCC’s Motion and therefore do not oppose the consolidation requested by TCCC. The two opposers who have filed memoranda in opposition to TCCC’s Motion, Royal Crown Company, Inc. (“Royal Crown”) and Companhia de Bebidas das Americas AMBEV (“AmBev”)¹, have not presented any arguments sufficient to deny consolidation and, indeed, make arguments that are contrary to the reasons why consolidation is both contemplated by the rules and appropriate in cases such as these. Both of these opposers, moreover, apparently do favor at least a partial consolidation of these proceedings with other similar proceedings pending before the Board.

In view of the clear common issues presented in these cases and in view of opposers’ own expressed desire for at least some consolidation, it is apparent that the interests of justice and the goals of Rules 1 and 42 of the Federal Rules of Civil Procedure are best served by the consolidations requested by all parties, namely the consolidations requested in TCCC’s Motion as well as those favored by Royal Crown and AmBev. To that end, TCCC asks the Board to consolidate not only the three proceedings referenced above but also the four additional proceedings recently commenced by Royal Crown and AmBev against related applications filed

¹ Royal Crown served its “Opposer’s Opposition To Motion Of The Coca-Cola Company To Consolidate Proceedings” (the “Royal Crown Brief”) on November 16, 2007, and AmBev served its “Opposer’s Opposition To Applicant’s Motion To Consolidate Proceedings” (the “AmBev Brief”) on November 20, 2007. TCCC is submitting this single reply brief in response to both the Royal Crown Brief and the AmBev Brief.

by TCCC, thereby consolidating into a single proceeding the seven oppositions that are now pending and that involve the same or related marks and issues.

ARGUMENT AND CITATION OF AUTHORITIES

As a preliminary matter, it is important to note that there are now a total of *seven* – not three – pending opposition proceedings that are ripe for consolidation. Those oppositions are the three proceedings identified in the above caption, namely oppositions numbers 91177358, 91178927 and 91178953, all of which relate to TCCC’s application to register the mark COCA-COLA ZERO, as well as four additional proceedings, two of which were recently filed by Royal Crown and two of which were recently filed by AmBev. Those four additional proceedings are oppositions numbers 91180439, 91180442, 91180771 and 91180772, in which AmBev and Royal Crown oppose TCCC’s applications to register the marks SPRITE ZERO (serial number 78/316078) and COKE ZERO (serial number 78/664176). As noted above, TCCC requests that these four additional proceedings be consolidated with the three that were the subject of TCCC’s original motion.

In addition, it is also noteworthy that both Royal Crown and AmBev – the parties who opposed TCCC’s Motion – have themselves either requested or indicated that they plan to request the Board to consolidate at least some (but not all) of these related proceedings. Royal Crown has filed its own motion to consolidate, asking the Board to consolidate the three proceedings commenced by Royal Crown. See Opposer’s Motion To Consolidate Opposition Proceedings, filed November 16, 2007 by Royal Crown in Oppositions 91178927, 91180771 and 91180772.² And AmBev has indicated in its memorandum in opposition to TCCC’s Motion that

² TCCC does not oppose the consolidation of the three Royal Crown cases and therefore has not filed any opposition to the Royal Crown motion to consolidate. For the reasons stated

it “is planning to move for consolidation” of the three proceedings that it has commenced, namely Oppositions 91178953, 91180439 and 91180442. (AmBev Brief at 2).

Thus, all parties recognize and agree that at least some consolidation of these seven proceedings is appropriate. The only question remaining for decision by the Board is whether there should be just one consolidated proceeding that includes all seven of the related pending cases (as requested by TCCC) or three semi-consolidated proceedings, namely one consisting of the three Royal Crown cases, a separate one consisting of the three AmBev cases that raise an identical issue that plainly overlaps with the Royal Crown oppositions, and a third one consisting of just the Ehrlich/Fried case, which will require discovery on many of the same issues as the other six proceedings.

I. The Opposers In Opposition No. 91177358 Do Not Oppose Consolidation.

Matt Ehrlich and Shlomo Fried, the opposers in the first of these proceedings to be filed, opposition number 91177358, have not filed any opposition in response to TCCC’s Motion. Under Rule 2.127(a), therefore, those parties are deemed to have consented to the relief sought by TCCC, namely the consolidation of opposition number 91177358 with the first oppositions filed by Royal Crown and AmBev, numbers 91178927 and 91178953.

This acknowledgement by Ehrlich and Fried that consolidation is appropriate is significant in several respects. First, Royal Crown and AmBev both assert that the issues in the Ehrlich/Fried Opposition are not sufficiently related to those in their own oppositions to justify consolidation. Yet Ehrlich and Fried’s failure to oppose TCCC’s motion belies that assertion and shows that Ehrlich and Fried apparently concur in TCCC’s belief that the cases are

herein, however, TCCC believes that the consolidated Royal Crown oppositions should also be consolidated with the three AmBev oppositions and the Ehrlich/Fried Opposition.

sufficiently related to be consolidated. Second, Royal Crown has filed a motion to stay the first of its three oppositions pending resolution of the Ehrlich/Fried Opposition. *See* Royal Crown's Motion To Suspend Proceedings, filed October 11, 2007 in Opposition 91178927. Ehrlich and Fried's failure to oppose TCCC's Motion suggests that those opposers have no interest in proceeding first, in advance of the other oppositions to the same application.

II. Royal Crown's and AmBev's Arguments
Do Not Justify Denial of TCCC's Motion.

In opposition to TCCC's Motion, Royal Crown and AmBev assert positions that are contrary to the policies of the Federal Rules that permit and support consolidation in cases such as this. Both Royal Crown and AmBev complain that consolidation of these cases would require them and their counsel to coordinate with each other regarding discovery and other issues, and Royal Crown and AmBev both argue that they should have the right to require TCCC and its witnesses to participate in duplicative and overlapping discovery on the same issues. (Royal Crown Brief at 3-4; AmBev Brief at 2). AmBev even goes so far as to assert that its payment of the modest administrative filing fee for its opposition somehow gives it a right to burden TCCC's witnesses with multiple depositions! (AmBev Brief at 2).

Neither the Federal Rules nor common sense supports the Royal Crown and AmBev arguments. Indeed, one of the specific, recognized benefits of and reasons for consolidation of related cases such as these is to save time, effort and expense, and to avoid duplicative and overlapping discovery on the same issues in multiple proceedings. *See, e.g., Magnavox Co. v. APF Electronics, Inc.*, 496 F. Supp. 29, 33 (N.D. Ill. 1980) (consolidating cases and noting that same documentary evidence and depositions of same witnesses will likely be required); *see generally Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-85 (2d Cir. 1990); *S. Industries Inc. v.*

Lamb-Weston Inc., 45 U.S.P.Q.2d 1293, 1297 (TTAB 1997); *Ritchie v. Simpson*, 41 U.S.P.Q.2d 1859 (TTAB 1996), *rev'd on other grounds*, 170 F.3d 1092 (Fed. Cir. 1999) (cases consolidated where oppositions virtually identical and presented common questions of law and fact). Royal Crown and AmBev would turn these authorities on their heads in favor of multiple, parallel ongoing proceedings relating to the same issues. The discovery in all of these cases will plainly be overlapping. Many of the same documents, much of the same testimony from TCCC's witnesses regarding TCCC's use of its ZERO marks, and much of the same evidence regarding the use, if any, of "zero" by others will likely be sought in all of these proceedings.

While consolidation will require all of the opposers' counsel to coordinate with each other and will preclude each opposer from having a second or third bite at the same discovery apples, that is precisely what consolidation is designed to accomplish. Royal Crown and AmBev also both argue that their cases should not be consolidated with the Ehrlich/Fried opposition, asserting that the issues are different. Regardless of the merits of this position with respect to the Ehrlich/Fried opposition, it strongly supports and demonstrates the propriety of consolidation of the Royal Crown proceedings with the AmBev proceedings.

As both AmBev and Royal Crown acknowledge in their briefs, all three of the Royal Crown oppositions and all three of the AmBev oppositions raise identical issues – whether ZERO is merely descriptive and, if so, whether TCCC's showing of acquired distinctiveness before the Trademark Office was sufficient to demonstrate acquired distinctiveness of ZERO. While Royal Crown raises an additional, unsupported and legally insufficient claim of fraud, it is undisputed that all six of the Royal Crown and AmBev oppositions raise a number of identical issues and that identical discovery and evidence will be needed on those common issues in all six proceedings. It is therefore clear that the three Royal Crown cases should not only be

consolidated with each other, but that they should also all be consolidated with all three of the AmBev cases. The very same arguments that justify the consolidation that Royal Crown believes is appropriate as to its three cases (and that AmBev presumably believes is appropriate for its three cases) fully support the consolidation of all six cases.

The only remaining issue is whether the Ehrlich/Fried Opposition should be consolidated with the six Royal Crown and AmBev oppositions. As noted above and in TCCC's opening brief, the same application is at issue in the Ehrlich/Fried Opposition and in the first AmBev and the first Royal Crown oppositions. Even though the ultimate legal issues raised by the opposers may be different, the factual issues that will be the subject of both discovery and evidence overlap significantly. The most obvious areas of overlap relate to: (1) TCCC's use of its ZERO marks; and (2) the use, if any, by third parties of ZERO as a mark or element of a mark. It defies logic to assert that the parties collectively and the Board will not save significant "time, effort and expense" if these common issues are litigated in a single proceeding rather than in two, three or seven separate proceedings. *See* TBMP § 511. TCCC is entitled to prompt disposition of these oppositions collectively, and that goal will best be served by a single proceeding in which all of the factual issues are addressed in a uniform and efficient fashion.

Royal Crown also asserts in its brief that TCCC's position is somehow inconsistent, in that TCCC has opposed Royal Crown's motion to stay its opposition (and now, presumably, all three of its oppositions) pending the outcome of the Ehrlich/Fried Opposition. Royal Crown is misstating TCCC's position. TCCC recognizes that the legal claims raised by Ehrlich and Fried differ from those asserted by Royal Crown and AmBev. What TCCC also recognizes, however, is that there are common fact issues that will be the subject of discovery and testimony in all of these cases. Those common fact issues – coupled with TCCC's desire to have all of these

oppositions resolved as expeditiously as possible – weigh strongly in favor of consolidating all of the proceedings and moving forward with all of the claims asserted by all parties, rather than staying one or more of the cases and litigating the issues (including conducting duplicative discovery) seriatim.

III. Consolidation Will Achieve Substantial Benefits
Contemplated By the Rules Without Prejudice to Opposers.

In view of the above, consolidation of these seven cases is not only proper under the applicable rules, it is fully appropriate. Rule 42(a) of the Federal Rules permits consolidation when actions involve common questions “of law or fact,” and these cases involve both. The express purpose of Rule 42 is to “avoid unnecessary costs or delay,” and those goals will be well-served by consolidation of these seven proceedings. From the perspective of both TCCC and the Board, there are very substantial savings to be realized from the consolidation requested by TCCC.

In addition, none of the opposers will be prejudiced by the consolidation requested by TCCC. All of the opposers in the consolidated proceedings will continue to have the right to initiate written discovery of their choosing, to participate in depositions, to file such motions as they deem necessary, to present such testimony and documentary evidence as they deem appropriate, to brief the issues as they see fit, to present argument to the Board with respect to the issues they have chosen to assert, and, at the conclusion of the proceedings, to appeal if they choose to do so. The only change from the present circumstances will be that they will not be able to duplicate discovery or other activities conducted by the one or more of the other opposers.

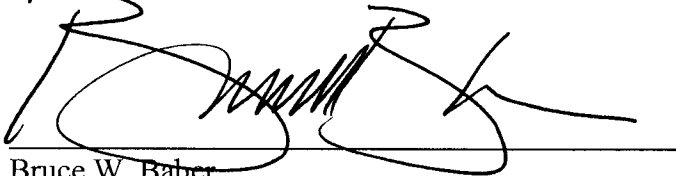
Thus, no cognizable prejudice to opposers will result from the consolidation of these cases. As noted above, none of opposers' substantive rights will be impaired in any way if the cases are consolidated; the only difference will be that discovery and testimony will have to be coordinated with other parties taking similar positions and duplicative, overlapping discovery avoided. That is precisely what typically happens, however, in consolidated proceedings and is one of the principal benefits of and reasons for consolidation under the rules. While each opposer or its counsel may prefer to litigate its asserted claims separately and pursue its own "agenda" in connection with these oppositions (*see* Royal Crown Brief at 3-4), an inability to do so as a result of proper consolidation of similar cases is not legally cognizable prejudice within the meaning of the rules as long as opposers' substantive rights are not adversely affected.

CONCLUSION

For the reasons stated above, and those stated in TCCC's opening memorandum in support of TCCC's Motion, TCCC respectfully requests that the Board enter an Order granting TCCC's Motion, consolidating all seven of the oppositions identified herein, and setting a discovery and testimony schedule for the consolidated proceedings.

Respectfully submitted, this 10th day of December, 2007.

KING & SPALDING LLP

A large, stylized handwritten signature in black ink, appearing to be "Bruce W. Baber", written over a horizontal line.

Bruce W. Baber
Emily Bienko Brown

1180 Peachtree Street
Atlanta, Georgia 30305
Telephone: (404) 572-4600
Facsimile: (404) 572-5134

Attorneys for Applicant
THE COCA-COLA COMPANY

CERTIFICATE OF SERVICE

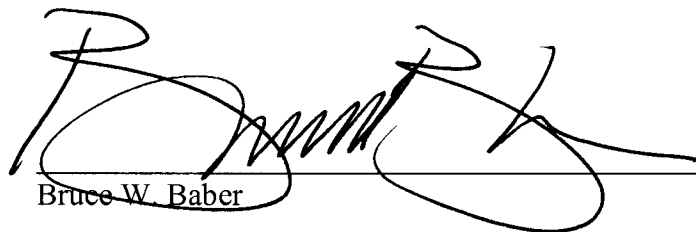
This is to certify that I have this day served the foregoing Reply Memorandum In Support Of Applicant's Motion To Consolidate Proceedings upon Opposers in each of the above-captioned matters, by causing true and correct copies thereof to be deposited in the United States mail, postage prepaid, addressed to Opposers' counsel of record as follows:

Mr. Simon Klein
Suslovich & Klein LLP
1507 Avenue M
Brooklyn, New York 11230

Ms. Barbara Solomon
Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza
New York, New York 10017

Mr. W. Mack Webner
Sughrue Mion, PLLC
2100 Pennsylvania Avenue, N.W.
Washington, DC 20037-3213

This 10th day of December, 2007.


Bruce W. Baber