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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 & SPALDING LLP 1180 PEACHTREE STREET ATLANTA, GA 30309 UNITED STATES bbaber@kslaw.com, ebrown@kslaw.com
Submission	Other Motions/Papers
Filer's Name	Bruce W. Baber
Filer's e-mail	bbaber@kslaw.com
Signature	/Bruce W. Baber/
Date	06/16/2014
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ROYAL CROWN COMPANY, INC.	)	<u>Consolidated Proceedings:</u>
and DR. PEPPER/SEVEN UP, INC.,)	
)	
Opposers,	)	OPPOSITION NO. 91178927
	)	OPPOSITION NO. 91180771
	)	OPPOSITION NO. 91180772
v.	)	OPPOSITION NO. 91183482
	)	OPPOSITION NO. 91185755
THE COCA-COLA COMPANY,	)	OPPOSITION NO. 91186579
	)	OPPOSITION NO. 91189847
Applicant.	)	OPPOSITION NO. 91190658

– and –

THE COCA-COLA COMPANY,)	
)	
Opposer,)	
)	
v.	)	OPPOSITION NO. 91184434
)	
ROYAL CROWN COMPANY, INC.)	
and DR. PEPPER/SEVEN UP, INC.,)	
)	
Applicants.)	

THE COCA-COLA COMPANY'S STATEMENT OF
OBJECTIONS TO ROYAL CROWN COMPANY, INC.
AND DR. PEPPER/SEVEN UP, INC.'S EVIDENCE

The Coca-Cola Company ("TCCC") states herein its objections to certain evidence of record introduced by Royal Crown Company, Inc. and Dr. Pepper/Seven Up, Inc. (collectively, "RC") in the above-captioned proceedings.

I. Objections To Testimony Depositions And Exhibits

For the reasons stated below, TCCC requests that the Board exclude the following deposition excerpts and exhibits from the record in these proceedings:

Witness: Robert Marciano, Beverage Marketing USA, Inc.

Objectionable Testimony / Exhibit	Basis of Objection
32:19 – 34:14	Lack of foundation -- No foundation was laid for Mr. Marciano's testimony regarding whether or not certain entities offer the Arnold Palmer Half & Half Zero product online. (TCCC stated its objection on the record at 33:13:14; 34:16-17)
48:17-23	Lack of foundation -- No foundation was laid for Mr. Marciano's testimony regarding the basis of his understanding of the meaning of the term "zero" in the names of beverage products; this is improper opinion testimony. (TCCC stated its objection on the record at 48:20-21). See Fed.R.Evid. 701.
RC 132	Lack of foundation -- No foundation was laid for Mr. Marciano to testify regarding these Internet printouts. (TCCC stated its objections on the record at 33:13-14; 34:16-17).

Witness: Christopher John Reed, Reed's Inc.

Objectionable Testimony / Exhibits	Basis of Objection
31:7-12	Lack of foundation -- No foundation was laid for Mr. Reed's testimony regarding his understanding of the meaning of the term "zero" in name of TCCC's ZERO products; this is improper opinion testimony. (TCCC stated its objection on the record at 31:10). See Fed.R.Evid. 701.
31:13-19	Lack of foundation -- No foundation laid for Mr. Reed's testimony regarding whether the use of ZERO by TCCC in their product name has any different meanings than the use of ZERO in the VIRGIL'S ZERO name; this is improper opinion testimony. (TCCC stated its objection on the record at 31: 17-18). See Fed.R.Evid. 701.

Witness: Chris Barnes, Dr. Pepper Snapple Group

Objectionable Testimony / Exhibits	Basis of Objection
Trial Declaration of Chris Barnes at Exhibit RC 18	Lack of foundation – Mr. Barnes does not know if these were the final ads used on the subway cars, if any of the other companies participating in the review of the campaign materials provided any feedback on the version of the ads shown in RC 18, and he has never seen the full set of final advertising cards. (Deposition of Chris Barnes ("Barnes Test.") at 21:5-7; 25:10-26:6; 45:12-14; 19-21).
Trial Declaration of Chris Barnes at 8	Hearsay – The portions of Mr. Barnes' testimony regarding the "Delivering Choices NYC" campaign and the goal of the campaign that are based on communications with the ABA are hearsay not falling within any exception, and improper opinion testimony. See Fed.R.Evid. 802, 701.

Objectionable Testimony / Exhibits	Basis of Objection
Trial Declaration of Chris Barnes at 10	Hearsay – Mr. Barnes’ testimony regarding the time frame that the “Delivering Choices NYC” subway advertisements ran and the scope of use of these advertisements is hearsay not falling within any exception. (Barnes Test. at 36:25–37:3; 41:18-22; 43:25–44:12). See Fed.R.Evid. 802.
13:25 – 14:17	Hearsay -- Mr. Barnes testimony regarding the time frame that the “Delivering Choices NYC” subway advertisements ran and the scope of use of these advertisements is hearsay not falling within any exception. See Fed.R.Evid. 802.

Witness: Mario Ortiz, Fross Zelnick Lehrman & Zissu, P.C.

Objectionable Exhibits	Basis of Objection
Declaration of Mario Ortiz at Exhibits RC 20 – RC 52	Lack of foundation – The photographs submitted were taken in either 2008 or 2010. Prior to signing the Trial Declaration of Mario Ortiz on July 12, 2013, Mr. Ortiz did nothing to determine whether any of the products shown in the photographs were still on the market or whether the product packaging was still the same as shown in the photographs. Further, Mr. Ortiz does not know how long the packaging that is shown in these photographs were used by the companies that made the products. (Deposition of Mario Ortiz (“Ortiz Deposition at 34:21 – 35:12)

Objectionable Exhibits	Basis of Objection
<p>Declaration of Mario Ortiz at Exhibit RC 53</p>	<p>Lack of foundation – Mr. Ortiz does not know whether the product shown in this documents, THE BEAST ZERO, is currently for sale anywhere or if a product that looks like what is shown in this documents was ever sold in the United States. (Ortiz Deposition at 27:1-4; 8-13)</p> <p>Hearsay – The document is inadmissible hearsay as it was submitted to show that the product is in use. See Fed.R.Evid. 802</p>
<p>Declaration of Mario Ortiz at Exhibit RC 54</p>	<p>Lack of foundation – Although Mr. Ortiz claims to have seen the product that is shown in this document on the website www.victoryenergize.com, he has never actually seen the product in stores. (Ortiz Deposition at 27:24 – 28:3)</p> <p>Hearsay – The document is inadmissible hearsay as it was submitted to show that the product is in use. See Fed.R.Evid. 802</p>
<p>Declaration of Mario Ortiz at Exhibit RC 55</p>	<p>Lack of foundation – Mr. Ortiz has not seen the products shown in the document in stores. Further, Mr. Ortiz did not verify whether the products shown in the document were in fact for sale in the stores listed on the manufacturer’s website.</p> <p>Hearsay – The document is inadmissible hearsay as it was submitted to show that the product is in use. See Fed.R.Evid. 802</p>

Witness: Esperanza Teasdale, PepsiCo

Objectionable Testimony	Basis of Objection
26:2-7	Lack of foundation – No foundation was provided for Ms. Teasdale to testify about what “zero” means in connection with Vitamin Water Zero; this is improper opinion testimony. (TCCC stated its objection on the record at 26:5-6). See Fed.R.Evid. 701.
32:17-25	Relevance – Ms. Teasdale’s testimony is beyond the scope of RC’s pretrial disclosures and the deposition notice. (TCCC stated its objection on the record at 32:21-23). See Fed.R.Evid. 402.
48:4-11	Lack of foundation – No foundation was provided for Ms. Teasdale to testify about what “zero” means when used in the name Coke Zero; this is improper opinion testimony. (TCCC stated its objection on the record at 48:8-9). See Fed.R.Evid. 701.
48:24 – 49:5	Lack of foundation – No foundation was provided for Ms. Teasdale to testify about what “zero” means when used in a beverage name; this is improper opinion testimony. (TCCC stated its objection on the record at 49:3-4). See Fed.R.Evid. 701. Relevance – See Fed.R.Evid. 402. (TCCC stated its objection on the record at 49:3-4).
49:8 – 50:4	Relevance – Ms. Teasdale’s testimony is beyond the scope of RC’s pretrial disclosures. See Fed.R.Evid. 402 (TCCC stated its objection on the record at 49:12-25).
51:4-17	Relevance – Ms. Teasdale’s testimony is beyond the scope of RC’s pretrial disclosures. See Fed.R.Evid. 402 (TCCC stated its objection on the record at 51:12).

Objectionable Testimony	Basis of Objection
56:12-24	Lack of foundation – No foundation was provided for Ms. Teasdale to testify about what “zero calorie proposition” means; this is improper opinion testimony. (TCCC stated its objection on the record at 56:16-17). See Fed.R.Evid. 701.

Witness: Harold Miller, Southern Group Enterprises, Inc.

Objectionable Testimony	Basis of Objection
27:6-9	Lack of foundation – No foundation was provided for Mr. Miller to testify about whether BevNET is a source relied on by the beverage industry. (TCCC stated its objection on the record at 27:10-11).
39:6-11	Lack of foundation – No foundation was provided for Mr. Miller to testify about assumptions made about characteristics of a product with “zero” in the beverage name; this is improper opinion testimony. (TCCC stated its objection on the record at 39:9-10). See Fed.R.Evid. 701.
39:22 – 40:25	Lack of foundation – No foundation was provided for Mr. Miller to testify about any differences in the meaning of “zero” in how TCCC uses it in products names and how South Group Enterprises, Inc. uses it; this is improper opinion testimony. (TCCC stated its objection on the record at 40:2-3). See Fed.R.Evid. 701.

Witness: Andrew Springate, Dr. Pepper Snapple Group

Objectionable Testimony and Exhibits	Basis of Objection
July 3, 2013 Declaration of Andrew Springate at ¶ 10	Hearsay – Mr. Springate’s testimony about when the DIET RITE product launched is hearsay not falling within any exception. (July 9, 2013 Deposition of Andrew Springate (“Springate Deposition”) at 36:4 – 37:18). See Fed.R.Evid. 802.
July 3, 2013 Declaration of Andrew Springate at Exhibit RC 2	Lack of foundation – Mr. Springate does not know if all of the documents were in fact final print ad copy and believes, based on some having a legend on them and others not, that at least some of the documents included in Exhibit RC2 were not final copy. (Springate Deposition at 50:5-23)
July 3, 2013 Declaration of Andrew Springate at ¶ 13	Hearsay – Mr. Springate’s testimony about what “zero” standing alone communicated to consumers and the desire to deemphasize the word “diet” is hearsay not falling within any exception and improper opinion testimony. (Springate Deposition at 52:13-22; 53:15-23). See Fed.R.Evid. 802, 701.
July 3, 2013 Declaration of Andrew Springate at Exhibit RC 5	Lack of foundation / lack of personal knowledge – No foundation was provided for Mr. Springate’s testimony regarding Exhibit RC 5. (Springate Deposition at 59:11 – 60:10; 62:25 – 63:10)
July 3, 2013 Declaration of Andrew Springate at Exhibits RC 10 and 11	Lack of foundation / Lack of personal knowledge / Hearsay – Mr. Springate did not verify the authenticity and completeness of the documents and declares they are copies of records based on what he was told about them. Mr. Springate’s testimony is hearsay not falling within any exception. (Springate Deposition at 98:16 – 99:19)

Objectionable Testimony and Exhibits	Basis of Objection
November 25, 2013 Declaration of Andrew Springate at ¶ 4	Lack of foundation / Lack of personal knowledge – Mr. Springate did not take any steps to confirm the information included in paragraph 4 and does not have personal knowledge of whether or not there has been any confusion between any products of RC and TCCC. (December 4, 2013 Deposition of Andrew Springate (“December 2013 Springate Deposition”) at 14:18 – 17:9)
November 25, 2013 Declaration of Andrew Springate at ¶ 6	Lack of foundation – Mr. Springate did not provide any foundation for his testimony regarding the letter referenced in paragraph 6 of his November 25, 2013 Declaration. (December 2013 Springate Deposition at 6:23 - 11:12). Hearsay – Mr. Springate’s testimony about the letter referenced in paragraph 6 is hearsay not falling within any exception. See Fed. R Evid. 802

II. Objections To Portions of Opposers’ Notice of Reliance On Printed Publications

For the reasons stated below, TCCC requests that the Board exclude the following exhibits submitted by RC from the record in these proceedings:

Objectionable Exhibits	Basis of Objection
RC 129 – 169	Hearsay -- RC submitted these exhibits to show the existence of third parties who use the term or numeral zero in connection with their beverage products and to show that zero is generic and/or descriptive. (Notice of Reliance at ¶ 1(a)-(oo). The submission of these documents for the above reasons constitutes inadmissible hearsay under Fed.R.Evid. 802.

Objectionable Exhibits	Basis of Objection
RC 187-188	Hearsay -- RC submitted these exhibits to demonstrate how consumers view the "0 cal carb sug" tagline on DIET PEPSI and PEPSI MAX products. (Notice of Reliance at ¶ 3(a)-(b). The submission of these documents for the above purpose constitutes inadmissible hearsay under Fed.R.Evid. 802.
RC 190	The printouts from the website www.dietrite.com showing RC's marketing of the DIET RITE PURE ZERO product on the Internet (Notice of Reliance at ¶ 4) were not produced during discovery despite the fact that they were requested in document requests. RC is prohibited from relying on these printouts. Fed. R. Civ. P. 37(c)(1).

III. Objections to Portions of Opposers' Notice of Reliance on Official Records

For the reasons stated below, TCCC requests that the Board exclude the following exhibits submitted by RC from the record in these proceedings:

Objectionable Exhibits	Basis of Objection
RC 192 - 235	<p>RC submitted these applications and registrations to show that companies and individuals have sought to use the term or numeral "zero" in connection with beverage products. (Notice of Reliance ¶ 1 (a)-(rr); 2 (a)-(w)). Third party applications and registrations are only probative to show that the application has been filed or the registration issued. They are not probative of use of the mark. <i>Nike, Inc. v. WNBA Enterprises, LLC</i>, 85 USPQ2d 1187, 1200 (TTAB 2007) (not evidence of use); <i>Nike Inc. v. Maher</i>, 100 USPQ2d 1018, 1028 (TTAB 2011) (little probative value because they tell nothing about whether the marks are being used or the manner of such use); <i>St. Louis Janitor Supply Co. v. Abso-Clean Chemical Co.</i>, 196 USPQ 778, 780 n.4 (TTAB 1977); <i>Freedom Federal Savings & Loan Ass'n v. Heritage Federal Savings & Loan Ass'n</i>, 210 USPQ 227, 231 (TTAB 1981) (third-party use of marks without more is not probative of the impact that such marks have on consumer perceptions).</p>
RC 282-283	<p>Relevance -- RC submitted United Kingdom decisions regarding ZERO. (Notice of Reliance ¶ 8 (a)-(b)). These foreign decisions are irrelevant and should be excluded under Fed.R.Evid. 402.</p>

IV. Objections to Opposers' Second Notice of Reliance on Printed Publications

For the reasons stated below, TCCC requests that the Board exclude the following exhibits submitted by RC from the record in these proceedings:

Objectionable Exhibits	Basis of Objection
RC 309-313	RC submitted these exhibits to show the existence of third parties who use the term or numeral zero in connection with their beverage products and to show that zero is generic and/or descriptive. ((Notice of Reliance ¶ 1 (a)-(e)). The submission of these documents for the above purposes constitutes inadmissible hearsay under Fed.R.Evid. 802.

V. Objections To Portions of Opposers' Notice of Reliance on Additional Portions Of Deposition Testimony Of Opposers' Witnesses

RC identified in its Notice of Reliance additional portions of the discovery depositions of its witnesses on the basis that these additional portions are necessary so that the designations submitted by TCCC are not misleading. However, RC's counter designations listed below are not responsive to TCCC's designations and therefore do not serve to make TCCC's designations not misleading.

For the reasons stated above, TCCC requests that the Board not consider the following counter designations made by RC that are not responsive to TCCC's designations:

Exhibit No.	Deponent	Challenged Counter-Designations
RC 314	Springate	98:13-16 146:6-11 164:16-25 165:2-13, 19-25 166:2-3, 8-13
RC 315	Schleiden	66:18 – 67:8 71:24 – 72:16
RC 316	Jacobs	6:19 – 8:12 28:2 – 29:8 32:7 – 33:2 39:20 – 42:25 53:25 – 55:18 72:5-17 73:19 – 75:1 110:8-12 144:22-25

Respectfully submitted,

KING & SPALDING LLP

/Bruce W. Baber/

Bruce W. Baber
 Kathleen E. McCarthy
 Emily B. Brown

1180 Peachtree Street
 Atlanta, Georgia 30309
 404-572-4600

Attorneys for Applicant and Opposer
 THE COCA-COLA COMPANY

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing The Coca-Cola Company 's Statement of Objections to Royal Crown Company, Inc. and Dr. Pepper/Seven Up, Inc.'s Evidence by causing a true and correct copy thereof to be deposited in the United States mail, addressed to counsel of record for opposers and applicants Royal Crown Company, Inc. and Dr. Pepper/Seven Up, Inc. as follows:

Ms. Barbara Solomon
Ms. Laura Popp-Rosenberg
Ms. Emily Weiss
Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza
New York, New York 10017

This 16th day of June, 2014.

/Bruce W. Baber/

Bruce W. Baber