

ESTTA Tracking number: **ESTTA620712**

Filing date: **08/11/2014**

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

Proceeding	91178927
Party	Defendant The Coca-Cola Company
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Date	08/11/2014
Attachments	Brief Public Version.pdf(101126 bytes)

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.,)	
	)	OPPOSITION NO. 91178927
Opposers,	)	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 REPLY BRIEF ON THE MERITS

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In accordance with Trademark Rule 2.128, The Coca-Cola Company files this reply brief in support of its oppositions to the applications of Royal Crown Company, Inc. to register the marks PURE ZERO and DIET RITE PURE ZERO, and in response to the “Second Trial Brief For Royal Crown Company, Inc. And Dr Pepper/Seven Up, Inc.” filed herein by Royal Crown and Dr Pepper/Seven Up, Inc. (collectively, “RC”) on July 14, 2014 (Dkt. No. 157) (the “Second Trial Brief” or “RC Second Br.”).

INTRODUCTION

In the portion of its Second Trial Brief directed to TCCC’s opposition to its applications to register the marks PURE ZERO and DIET RITE PURE ZERO, RC relies on many of the same arguments it makes in support of its opposition to TCCC’s ZERO Marks, including its challenges to TCCC’s substantial proof of acquired distinctiveness and its arguments that “zero” is a generic term. RC also makes additional arguments relating to priority and certain of the likelihood of confusion factors.

RC’s arguments miss the mark. RC asks the Board to ignore commercial reality and the substantial proof that supports TCCC’s oppositions on both the issue of priority and the issue of likelihood of confusion. The evidence of record shows that the alleged third party use of ZERO as part of a mark – on which RC relies most heavily – is either not sufficiently documented; is for products other than carbonated soft drink products, as to which TCCC and RC are the only parties that have made any significant use of “ZERO” as part of the name of a product; or is for products that could not have had any meaningful market impact. The evidence of record establishes that ZERO, when used as part of the name of a soft drink, is unlike “diet” or “light” and, as a result of TCCC’s

extensive advertising, promotion and sales of its ZERO products, is exclusively associated with TCCC and its products.

On the issue of priority, RC would have the Board to ignore Board precedent holding that the relevant priority issue in this proceeding is not determined with reference to the date on which RC filed its intent-to-use based applications. The relevant priority issue is which party has proven that its use of the descriptive term at issue – ZERO – acquired secondary meaning first. There is no evidence that RC has ever claimed or attempted to prove that its ZERO marks (or its use of ZERO as a part of those marks) have acquired distinctiveness, let alone that RC can show it acquired secondary meaning prior to TCCC. Based on the evidence of record, including the survey conducted by Dr. Simonson, the priority issue can only be resolved in TCCC's favor.

With respect to the likelihood of confusion factors, RC acknowledges that the parties' marks are used for precisely the same types of products and that those products are marketed and advertised through the same channels of trade and media channels to the same customers. RC overlooks, however, that – as RC's own witness conceded – no other party of any commercial significance has used ZERO as part of the name for carbonated soft drinks. RC's continued heavy reliance on its alleged proof of third party use is therefore misplaced; for purposes of TCCC's oppositions, there is little if any relevant evidence of third party use. These factors, coupled with the evidence that consumers associate ZERO in soft drink product names with TCCC, fully support TCCC's oppositions.

RC also makes much of the fact that there is no evidence of record regarding instances of actual confusion. This argument overlooks two key facts. First, RC's DIET RITE PURE ZERO products have [REDACTED], have had [REDACTED] sales during that period, and have at best [REDACTED]. Second, RC's primary witness testified that, notwithstanding the pendency of these proceedings and discovery requests that sought all documents in RC's possession regarding instances of confusion, [REDACTED].

Under these circumstances, it is not surprising that there is no evidence of actual confusion, as RC – the party most likely to receive such communications – has been willfully blind to whether such instances have occurred.

When all of the evidence of record is considered as a whole and in its proper perspective, the record shows that TCCC has established that ZERO, as used in TCCC's ZERO Marks, has acquired distinctiveness and is associated with TCCC, and that RC's use of ZERO in its DIET RITE PURE ZERO and PURE ZERO marks is similar to TCCC's use and is likely to cause confusion. The evidence also shows that – unlike “diet” – ZERO is not a generic term for soft drinks; that TCCC's ZERO Marks have acquired distinctiveness through extensive sales, advertising and promotion; that no other user of any marks including “zero” for soft drinks has made the substantial investments needed to have any market impact or weaken TCCC's acquired distinctiveness; and that TCCC's ZERO Marks are strong marks. The conclusion that

should be drawn from all the evidence, fairly considered, is that TCCC's oppositions to RC's applications should be sustained.

ARGUMENT AND CITATION OF AUTHORITIES

I. RC Has Presented No Relevant Evidence of Significant Third Party Use of ZERO For Soft Drinks.

Several of RC's primary arguments in defense of TCCC's oppositions are re-hashes of RC's arguments regarding alleged third-party uses of "zero." RC refers numerous times to the alleged "32 ZERO-inclusive beverage marks" upon which it relies, and argues that, for purposes of TCCC's oppositions, TCCC's ZERO Marks must be considered weak as a result of such use. See, e.g., RC Second Br. 46-48.

RC's evidence of third party use is not persuasive. Twenty-eight of its thirty-two alleged third party uses are not sufficiently documented to have any probative value; RC has introduced no competent evidence of the sales of any of the twenty-eight products, whether the products have in fact been sold or in what areas, or whether any significant amounts have been spent to advertise or promote the products. Particularly in light of the evidence of TCCC's very substantial sales and advertising expenditures, this alleged evidence is entitled to little, if any, weight. See, e.g., *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée*, 396 F.3d 1369, 1374, 73 USPQ2d 1689 (Fed. Cir. 2005); see also *Valentino U.S.A., Inc. v. Florence Fashions (Jersey) Ltd.*, 2010 TTAB LEXIS 266, 50-52 (TTAB June 25, 2010).

RC's own evidence, moreover, disproves the relevance of many of the alleged third party uses that RC repeatedly touts. RC introduced into evidence through its witness Andrew Springate an exhibit purporting to show the sales in grocery stores of

beverage products with ZERO in their names, as tracked by Nielsen. (Ex. RC17). Even putting aside the witness' lack of familiarity with the document or what exactly it purported to show (Springate Tr. 125-31)¹, the document reports [REDACTED] [REDACTED] during the 52-week period covered by the document.² And the only soft drinks listed that had more than very modest sales reported were TCCC's COCA-COLA ZERO, SPRITE ZERO, COCA-COLA CHERRY ZERO, COCA-COLA VANILLA ZERO, FANTA ZERO, MELLO YELLO ZERO and PIBB ZERO products and RC's DIET RITE PURE ZERO products.³

The last four third party uses, as to which RC introduced evidence in the form of testimony, are also not sufficient to support a finding that TCCC's ZERO Marks for soft drinks are "weak." The most significant of the four – PepsiCo's short-lived and since-discontinued use of the name PROPEL ZERO – was not for a soft drink; it was for a sports water product. The other three were for a niche market energy drink named IMPULSE ZERO, an "Arnold Palmer Zero Half & Half" tea product that is not advertised or promoted through traditional channels, and VIRGIL'S, a specialty-market soft drink

¹ References herein to "Springate Tr." are to the July 9, 2013 testimony of Andrew Springate of RC. References to Mr. Springate's second testimony session are in the form "Springate 12/4/2013 Tr."

² Springate Trial Declaration paragraph 34 lists 23 "zero-named beverages." Only three of the 23 – identified as [REDACTED] [REDACTED] [REDACTED] – show any sales in Exhibit RC17, and the sales shown for each of the three are less than [REDACTED] in the prior year. Three others (identified as [REDACTED] [REDACTED] [REDACTED]) are listed in RC17, but the exhibit shows no sales for those products.

³ Paragraph 33 of the Springate Trial Declaration references several other products that have "zero" in the name, including two [REDACTED] products. The [REDACTED] [REDACTED] products identified therein are not soft drinks, and Exhibit RC17 shows no sales for the [REDACTED] products. The final product listed ([REDACTED]) had, according to Mr. Springate, only a [REDACTED] [REDACTED] market share. Springate Tr. 109-10.

that did not use ZERO as part of the product name. None of these uses was similar to TCCC's uses of ZERO as part of the names of soft drinks or RC's use of the same term in the same way. See TCCC Opening Brief at 28-30.

As RC's Andrew Springate acknowledged, TCCC's and RC's uses stand alone and are more like each other than any other uses of ZERO of which he was aware. Mr. Springate's testimony was that [REDACTED]

[REDACTED]. (TCCC Ex. 200 at 173).

II. The Record Shows That TCCC Has Priority of Secondary Meaning.

RC argues that TCCC's oppositions must fail because RC's intent to use applications for PURE ZERO and DIET RITE PURE ZERO – as to which RC did not file amendments to allege use prior to publication – were filed in early 2005, and that TCCC has not proven that its ZERO marks had acquired distinctiveness prior to RC's filing dates. RC Second Br. 41-44.

In a proceeding such as this, involving use by both parties of descriptive terms, priority is not determined based on constructive use as of the filing date of a party's intent to use application. Priority in such a case is determined instead by the priority as to secondary meaning.

As Professor McCarthy explains in his treatise, the rule applied by the Board in such cases is different from the priority rules that may be applied in a civil action; the Board does not apply the rule that "the senior user must prove secondary meaning existed prior to the junior user's first use." *McCarthy on Trademarks and Unfair*

Competition § 16.34 (4th ed. 2013). Citing several Board decisions, Professor McCarthy concludes that the Board follows the rule that “a plaintiff in an inter partes proceeding in the PTO with a non-inherently distinctive mark must establish **priority of secondary meaning** in order to prevail.” *Id.* (emphasis added); see *Bass Pro Trademarks, L.L.C. v. Sportsmans Warehouse, Inc.*, 89 U.S.P.Q.2d 1844, 1852, 2008 WL 927726 (TTAB 2008); see also *Larami Corp. v. Talk to Me Programs, Inc.*, 36 U.S.P.Q.2d 1840, n.9 (TTAB 1995); *Perma Ceram Enterprises, Inc. v. Preco Industries, Ltd.*, 23 U.S.P.Q.2d 1134 (TTAB 1992).

There is no evidence in the record from which the Board could conclude that RC has ever established secondary meaning for its PURE ZERO or DIET RITE PURE ZERO marks or as to its use of ZERO as an element of those marks. The evidence regarding RC’s use of its marks shows that RC’s DIET RITE PURE ZERO products

[REDACTED]

[REDACTED] and that – not surprisingly – sales of the products have been

[REDACTED] during that same period. (Springgate Tr. 17-18 ([REDACTED]

[REDACTED]); 68 ([REDACTED]); 69-70 ([REDACTED]

[REDACTED]); 72 ([REDACTED]

[REDACTED]); 88 ([REDACTED]); 95-98 ([REDACTED]

[REDACTED]

[REDACTED]); 161 (amount spent for marketing “[REDACTED]”). RC does not argue

that its use of ZERO has acquired distinctiveness, and the evidence would plainly not support such an argument.⁴

In contrast to the evidence regarding RC's use, the record contains extensive evidence regarding TCCC's use of its ZERO marks. That evidence consists of proof of more than [REDACTED] billion dollars in sales, proof of more than [REDACTED] million dollars in advertising and promotion expenditures, and a survey demonstrating that consumers associate ZERO, when used as part of a soft drink name, with one source, namely TCCC.⁵ As the Board has previously concluded, that evidence is more than sufficient to support a finding of acquired distinctiveness in favor of TCCC.⁶

Ambev at 17-21.

⁴ RC's Andrew Springate testified that he believed that the DIET RITE PURE ZERO product ranked "[REDACTED]" in the carbonated soft drink category (Springate Tr. 162) and had a "[REDACTED]" market share. (Springate Tr. 132).

⁵ RC continues to make unfounded challenges to Dr. Simonson's survey, without the benefit of any expert opinion or analysis from anyone knowledgeable about survey design and based only on RC's attorneys' arguments. See RC Second Br. at 16-20; see also RC's "Reply In Further Support Of Its Statement Of Objections," filed July 14, 2014 (Dkt. No. 155) at 2-6. The only testimony or other evidence of record regarding the design, conduct and conclusions to be drawn from the Simonson study, however, is Dr. Simonson's testimony, in which he addressed many of the issues raised by RC. Without adequate support for its challenges to Dr. Simonson's findings and having not previously made a motion to exclude Dr. Simonson's testimony, RC's arguments regarding the survey can at most go only to the weight to be given to the survey results and not its admissibility.

⁶ RC argues in its Second Trial Brief that the *Ambev* decision is "not res judicata." See RC Second Br. 10. TCCC has not suggested that the *Ambev* decision is res judicata as to RC; it clearly is not, as RC was not a party to that proceeding. But the *Ambev* decision addressed many of the same issues that the Board will need to resolve in these proceedings. The Board's analysis of those issues in *Ambev* – including the Board's careful analysis of the relevance of different types of uses of "zero" in different contexts, *Ambev* at 13-15, 21 – was correct and is persuasive.

For purposes of these proceedings, moreover, application of the Board priority rule described above is especially appropriate. RC has submitted no statement of use in support of its applications, and it would therefore make little sense to require proof by TCCC of secondary meaning prior to the filing date of the RC applications. A contrary rule would allow competitors to assert claims of “constructive use” to avoid the effect of substantial proof of secondary meaning when the facts and market realities confirm in spades that the prior user has established secondary meaning in a descriptive term prior to the establishment of any distinctiveness on the part of the junior user. See *Henry Siegel Co. v. M & R International Mfg. Co.*, 4 U.S.P.Q.2d 1154, 1987 WL 123838 at *6 (TTAB 1987).

III. The Actual Confusion Factor is Neutral.

RC also makes much in its Second Trial Brief of the fact that there is no evidence of record of any instances of actual confusion, and argues that this “weighs decidedly” against a finding of likelihood of confusion. RC Second Br. 52-53.

The testimony taken in this proceeding demonstrates that RC has not taken steps to ensure that any confusion reported to RC would be identified or made available as evidence in these proceedings – despite TCCC’s discovery requests seeking information regarding any such instances.⁷ In these circumstances, the absence of evidence is not only not surprising, it cannot be used to the detriment of TCCC.

As the source of the DIET RITE PURE ZERO products, RC is the most likely entity that a consumer would contact if he or she was confused about whether the RC products come from TCCC or are associated with the TCCC ZERO products. Like most

⁷ See TCCC Ex. 280 at 10 (Document Request 14).

companies, RC maintains consumer communications channels of several types, including customer service call centers. Yet RC's witness Andrew Springate testified

[REDACTED]. Indeed, Mr. Springate's testimony regarding this issue demonstrated that Mr. Springate's "direct testimony" drafted by RC's counsel included overstatements that were significantly clarified by and revised by the witness after cross-examination.

Mr. Springate's "direct testimony" was submitted by way of a written statement prepared by counsel for RC. See Springate Tr. 32. In his second testimony statement, Mr. Springate stated as follows:

[REDACTED]

(Springate Second Trial Declaration (Dkt. No. 140) ¶ 5).

When cross-examined by TCCC's counsel regarding this statement, however, Mr. Springate testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].” (Springate 12/4/2013 Tr. 13, 15-16, 17-20).

In addition, as noted above, the RC DIET RITE PURE ZERO products have been in steady decline during the past several years.

In view of the above, the absence of documented instances of actual confusion is at best a neutral factor based on all the evidence of record.

IV. The Parties' Respective Uses on Their Products Are Similar.

RC contends that confusion is not likely because its DIET RITE product has been sold for many years and that the DIET RITE portion of the mark DIET RITE PURE ZERO is well-known and has coexisted with TCCC's products for years without confusion. These arguments are misguided.

First, even if RC's arguments about its and its predecessors' use of the DIET RITE mark was supported by substantial evidence, those arguments would have no relevance to RC's application to register the mark PURE ZERO or TCCC's opposition to that application. For purposes of TCCC's opposition to that mark, the mark must be treated as a standalone mark having nothing to do with the DIET RITE mark.

The record evidence demonstrates that RC's use and presentation of its PURE ZERO and DIET RITE PURE ZERO marks is far more similar to TCCC's use of its ZERO Marks than any of the third party uses relied on by RC. Compare, e.g., Exx. RC3, RC4 and Ex. TCCC100-105, TCCC118-19. As these exhibits demonstrate, both TCCC and RC use their marks on carbonated soft drink products sold in both cans and bottles, whereas the other parties do not. As [REDACTED] testified, RC's use is the only use similar to TCCC's use in the carbonated (or "sparkling") beverage field. See [REDACTED] Tr. 106-08; Baker Tr. 155. The RC PURE ZERO and

DIET RITE PURE ZERO marks are likely to cause confusion with the TCCC ZERO marks.

CONCLUSION

The evidence of record in these consolidated opposition proceedings demonstrates:

(1) there is no evidence of widespread use of the term “zero” to identify a category or type of soft drink, and ZERO is therefore not a generic term for soft drinks;

(2) as a result of TCCC’s extensive and widespread use and extensive sales of its products bearing its ZERO Marks, TCCC’s ZERO Marks have acquired secondary meaning and, as Dr. Simonson’s survey confirms, consumers associate soft drinks having ZERO in their name with TCCC; and

(3) RC’s use of its PURE ZERO and DIET RITE PURE ZERO marks is likely to cause confusion in view of the TCCC ZERO Marks.

For the foregoing reasons, and those previously argued in TCCC’s opening brief, TCCC respectfully prays that the Board dismiss RC’s oppositions to the TCCC ZERO Marks and sustain TCCC’s oppositions to the RC PURE ZERO and DIET RITE PURE ZERO marks.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing The Coca-Cola Company 's Reply Brief On The Merits 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:

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This 11th day of August, 2014.

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Bruce W. Baber