This Decision is Not a Precedent of the TTAB

Hearing: December 8, 2015

Mailed: September 27, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc.
v.
The Coca-Cola Company

Opposition Nos. 91178927 (Parent Case); 91180771; 91180772; 91183482; 91185755; 91186579; and 91190658

Barbara A. Solomon, Laura Popp-Rosenberg, and Emily Weiss of Fross Zelnick Lehrman & Zissu, P.C., for Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc.

Bruce W. Baber, Kathleen E. McCarthy, and Emily B. Brown of King & Spalding LLP for The Coca-Cola Company.

Before Zervas, Hightower, and Lynch,
Administrative Trademark Judges.

Hightower, Administrative Trademark Judge:

On May 23, 2016, the Board issued its decision in these consolidated opposition proceedings sustaining in part and dismissing in part. In that decision, the Board:

1. dismissed Opposers Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc. (collectively, "RC") claim that ZERO is generic for soft drinks, sports drinks, or energy drinks, including such drinks that contain no, or fewer than five, calories;

2. dismissed The Coca-Cola Company's ("TCCC") opposition against two of RC's applications to register marks incorporating the term ZERO on the ground that they are likely to cause confusion with its ZERO-formative marks (Serial No. 78576257 and 78581917);

3. found that TCCC established that it has acquired distinctiveness in the descriptive term ZERO when used as part of a mark for soft drinks and, thereby, for syrups, concentrates, and powders for making soft drinks, and so dismissed RC's opposition to 13 of TCCC's applications (Serial Nos. 78316078, 78580598, 78620677, 78664176, 77097644, 77175066, 77175127, 77176099, 77176108, 77176127, 77176279, 77257653, and 77309752); and

4. sustained RC's opposition to four of TCCC's applications for energy drinks and syrups and concentrates for making energy drinks (Serial Nos. 77413618, 76674382, 76674383, and 78698990) in the absence of disclaimers of the term ZERO.

On July 19, 2016, Energy Beverages LLC moved to be substituted as Applicant in application Serial No. 77413618 and to disclaim ZERO apart from the mark in that application. On July 22, 2016, TCCC timely submitted disclaimers to applications Serial Nos. 76674382, 76674383, and 78698990. On August 26, 2016, the Board issued an order substituting Energy Beverages LLC as Applicant in Opposition No. 91189847 and deferred consideration of the motions to amend the applications.

TCCC did not appeal the dismissal of its Opposition No. 91184434 against RC's applications Serial Nos. 78576257 and 78581917. Nor did Energy Beverages appeal the Board's decision sustaining RC's Opposition No. 91189847 against application Serial No. 77413618, which Energy Beverages now owns, without disclaimer of the word ZERO.

RC appealed the Board's decision as to its other seven oppositions to the U.S. Court of Appeals for the Federal Circuit, and on June 20, 2018, the court issued a decision that vacated the Board's decision and remanded the case for further

proceedings. *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041 (Fed. Cir. 2018). As stated in the court's "Conclusion":

> Because the Board applied the incorrect legal standard in assessing whether TCCC's ZERO marks are generic, and did not adequately consider Royal Crown's evidence with respect thereto, we vacate the Board's dismissal of Royal Crown's oppositions on that ground. We also vacate the Board's acquired distinctiveness determination to allow it, in the first instance, to assess the nature of TCCC's burden on that point and to explain how the evidence presented meets that precise burden.

Id. at 1049.

In order to correctly assess this case on remand, as ordered by the court, we find it necessary to require rebriefing by the parties to discuss the critical evidence of record relevant to the legal standards set forth by the court in its decision on appeal.[1] In particular, the parties must:

1. Address "whether the term ZERO, when appended to a beverage mark, refers to a key aspect . . . of at least a sub-group or type of the claimed beverage goods." *Id.* at 1047.

2. Address the degree of descriptiveness of the term ZERO, how "the evidentiary record reflects" the degree of descriptiveness, and how the evidence meets TCCC's "precise burden" to establish acquired distinctiveness. *Id.* at 1048-49.

Much of the evidence was designated confidential. Trial ended more than four years ago, and some evidence filed under seal was several years old even at the time of trial. Therefore, the Board will assume that the confidentiality designations no

[1] The new briefs should abide by the applicable page limits as set forth in Trademark Rule 2.128(b), 37 C.F.R. § 2.128(b).

longer apply and all relevant evidence may be discussed in the Board's opinion on remand unless the parties move within 150 days from the date of this order to retain particular confidential designations for specific evidence.

When referring to evidence in the new briefs, the parties are ordered to refer to the record using the entry and page number in TTABVUE, the Board's electronic viewing system. *See RxD Media, LLC v. IP Application Dev. LLC*, 125 USPQ2d 1801, 1804 (TTAB 2018); *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014); TBMP § 801.03 (2018).

Proceedings are resumed and briefing dates are reset as follows:

RC's Brief Due:	60 days from date of this order
TCCC's Brief Due:	120 days from date of this order
RC's Rebuttal Brief Due:	150 days from date of this order