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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
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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,	)	OPPOSITIONS NOS. 91178927,
	)	91180771, 91180772, 91183482,
	)	91185755, 91186579 AND 91190658
)	
v.	)	APPLICATION SERIAL NOS. 78580598,
	)	78316078, 78664176, 77176279,
	)	77176127, 77176108, 77175127,
THE COCA-COLA COMPANY,	)	77175066, 77097644, 77176099,
	)	76674382, 76674383, 77257653,
Applicant.	)	78620677, 77309752 AND 78698990

REPLY BRIEF IN SUPPORT OF
MOTION TO AMEND APPLICATIONS

NOW COMES THE COCA-COLA COMPANY (“TCCC”), Applicant in the above-captioned proceedings, and, by and through its undersigned counsel and in accordance with Trademark Rule 2.127(a), 37 C.F.R. § 2.127(a), and section 502.02(b) of the Trademark Board Manual of Procedure, TBMP § 502.02(b), files this reply brief in support of its Motion To Amend Applications, filed February 15, 2019 (183 TTABVUE (Opposition 91178927)).

ARGUMENT AND CITATION OF AUTHORITIES

Opposers Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc. (“Opposers”) have filed a two and one-half page “opposition” to TCCC’s motion to amend the sixteen applications at issue in these proceedings to add the disclaimers that are the only relief Opposers have ever sought in these proceedings. 184 TTABVUE

91178927 (the “Opposition”).¹ Opposers tacitly acknowledge that the disclaimers are in fact the relief that they have sought in these proceedings and that TCCC’s willingness to disclaim “zero” in the applications at issue make further proceedings herein unnecessary, as Opposers will obtain precisely the relief they have requested. Opposers argue that Opposers nonetheless “deserve” a ruling by the Board regarding one or both of the alternative issues raised by Opposers. Opposition at 3. That argument is unsupported by any relevant case law and is contrary to the limits on the Board’s jurisdiction.

Opposers first take issue with TCCC’s assertion that the entry of the disclaimers is the only relief sought by Opposers in these proceedings. Opposition at 2. The pleadings of record in all seven of these consolidated proceedings confirm that TCCC’s assertion is correct. On June 22, 2009, Opposers filed an “Amended Consolidated Notice Of Opposition” in all seven of these proceedings (and in an eighth proceeding, Opposition No. 91189847, that is no longer at issue). 39 TTABVUE (Opposition 91178927). That amended consolidated opposition is the operative pleading of record filed by Opposers and supersedes Opposers’ earlier pleadings under Rule 15 of the Federal Rules of Civil Procedure. In that pleading, Opposers’ prayer for relief requested one thing, namely that Opposers’ oppositions be sustained and “that the registrations sought by Applicant . . . all be denied absent the entry of a disclaimer of the term ‘zero.’” 39 TTABVUE (Opposition 91178927) at 8-9.

¹ References herein to documents in the TTABVUE dockets will be in the form “[Dkt. No.] TTABVUE (Opposition 91xxxxxx),” to indicate the proceeding in which the document was filed.

This limited request for one and only one form of relief is consistent with all of Opposers' prior pleadings in all seven proceedings. See 1 TTABVUE (Opposition 91178927) at 6 ("that the registration sought by Applicant . . . be denied absent the entry of a disclaimer of the descriptive term ZERO."); 1 TTABVUE (Opposition 91180771) at 7 ("that the registration sought by Applicant . . . be denied absent the entry of a disclaimer of the descriptive term 'zero.'"); 1 TTABVUE (Opposition 91180772) at 6 ("that the registration sought by Applicant . . . be denied absent the entry of a disclaimer of the descriptive term 'zero.'"); 1 TTABVUE (Opposition 91183482) at 6-7 ("that the registrations sought by Applicant . . . all be denied absent the entry of a disclaimer of the descriptive term 'zero.'"); 1 TTABVUE (Opposition 91185755) at 5-6 ("that the registrations sought by Applicant . . . all be denied absent the entry of a disclaimer of the descriptive term 'zero.'"); 1 TTABVUE (Opposition 91186579) at 5 ("that the registrations sought by Applicant . . . all be denied absent the entry of a disclaimer of the descriptive term 'zero.'"); TTABVUE (Opposition 91190658) at 6 ("that the registration sought by Applicant . . . be denied absent the entry of a disclaimer of the term 'zero.'").²

Opposers assert that their request for relief "has always been a **determination** that 'zero' is generic or merely descriptive," Opposition at 2 (emphasis added), and that Opposers "in fact seek a **ruling** that Applicant's marks are not entitled to registration

² Opposers recently confirmed, in their brief on remand, that the disclaimers are the only relief they seek. See 182 TTABVUE (Opposition 91178927), Brief on Remand for Opposers, filed December 17, 2018, at 54 (requesting Board to hold in Opposers' favor on one of two "alternative" grounds and "refuse registration of the Challenged Marks to TCCC without disclaimer of the term [ZERO]" whether it finds for Opposers on Opposers' genericness claim or on Opposers' alternative lack of acquired distinctiveness claim).

without a disclaimer of the term ‘zero.’” *Id.* (emphasis added). But Opposers’ pleadings contain no prayer for such relief as to either of the alternative grounds asserted by Opposers, and the Board could not entertain such a request for declaratory relief in any event. The Board’s jurisdiction is limited and extends only to issues relating to the propriety of registrations on the federal trademark registers. The Board may not issue declaratory judgments. *See, e.g., Precious Marketing Group, LLC v. Dennie*, 2012 WL 1267964, Opposition No. 91195989 (T.T.A.B. 2012); *Kelly Services, Inc. v. Greene’s Temporaries Inc.*, 25 U.S.P.Q.2d 1460, 1464 (T.T.A.B. 1992) (“The Board is not empowered to render such a [declaratory] judgment”). And the Board does not issue advisory opinions. *E.g., In re Whatley*, 2013 WL 6355605, Serial No. 85299521 at n.3 (T.T.A.B. 2013).

TCCC is willing to allow its registrations to issue with disclaimers of “zero,” as Opposers have requested. Issuance of those registrations is therefore proper, and there are no further issues for the Board to decide. In other proceedings at other future times, some tribunal may be called upon to determine, based on the current facts and record then before it, whether “zero” is merely descriptive, has acquired distinctiveness or not, and/or is generic – but those issues need not be determined in these proceedings and may never need to be determined. It is true that these proceedings have been pending for many years and that the Federal Circuit remanded these proceedings. Neither of those facts entitles Opposers to a “determination” of or a “ruling” on issues that, in light of TCCC’s agreement to enter the disclaimers, need not be decided and are moot. It is telling that Opposers cite no law for the proposition that they “deserve” such a determination or ruling. Opposition at 3.

Opposers are also incorrect that, if the disclaimers are added, “the parties will be back where they started over a decade ago.” Opposition at 2. Absent these proceedings being filed and pursued by Opposers, TCCC’s registrations would have issued many years ago and would likely be incontestable by now. Instead of that state of affairs, the registrations will issue with disclaimers of “zero,” precisely as Opposers have requested.

Finally, Opposers’ suggestion that the Board defer consideration of TCCC’s motion to amend “until final decision” (Opposition at 2, 3) is unsupported. Granting the motion now will result in the termination of these proceedings without any further unnecessary expenditure of time or resources by the Board or by the parties; no “final decision” is necessary for Opposers to obtain the relief they seek. The fallacy of Opposers’ logic is most apparent from Opposers’ acknowledgement that the relief of a disclaimer would be appropriate whether the Board were to rule for Opposers on either of their proffered alternative grounds and arguments. Since the disclaimers would be consistent with either of the results sought by Opposers, there is no need to further prolong these proceedings when TCCC has voluntarily agreed to the disclaimers. In view of TCCC’s motion to amend, no “full decision” is appropriate. See Opposition at 3.

In these circumstances, Board practice is in fact the opposite of what Opposers assert. When, for example, a disclaimer resolves a claim of acquired distinctiveness and the disclaimer is the only relief sought in the proceeding, the issue before the Board becomes moot and an opposition requesting such a disclaimer should be dismissed upon acceptance of the disclaimer. *E.g., Igloo Products Corp. v. Kool Pak, Inc.*, 2008 WL 5078737, Opposition No. 91095892 (T.T.A.B. 2008). But when, for example, a

disclaimer does not resolve a separate issue such as a Section 2(d) claim or a claim that a mark in its entirety is merely descriptive and should be refused registration altogether, the entry of a disclaimer does not moot further proceedings relating to that broader relief. *E.g., DT Fashion, LLC v. Joshu*, 2018 WL 1558118, Opposition No. 91234482 (T.T.A.B. 2018); *In re I.T.C. Limited*, 2001 WL 561341, Serial No. 75/615,020 (T.T.A.B. 2001).

There are no such separate issues and no such potential broader relief sought in these proceedings. The only issue that has ever been raised in these proceedings is whether disclaimers of “zero” are warranted. TCCC’s agreement that the disclaimers may be entered leaves no separate or unresolved issues for the Board to decide – or any other or different relief requested by Opposers to be considered.

CONCLUSION

WHEREFORE, Applicant The Coca-Cola Company respectfully prays that the Board approve TCCC’s request to enter disclaimers, in standard form, of the term “zero” in each of the applications at issue and, upon such approval, terminate these proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Reply Brief In Support Of Motion To Amend Applications upon Opposers Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc., by causing a true and correct copy thereof to be forwarded by electronic mail to Opposers' counsel of record as follows:

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This 27th day of March, 2019.

/Bruce W. Baber/

Bruce W. Baber