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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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Attachments	TCCC Brief in Response to RC Motion for Leave to Amend.pdf (7 pages) (128561 bytes)

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

ROYAL CROWN COMPANY, INC.,)	
)	<u>Consolidated Proceedings:</u>
Opposer,)	
)	OPPOSITION NO. 91178927
v.)	OPPOSITION NO. 91180771
)	OPPOSITION NO. 91180772
THE COCA-COLA COMPANY,)	OPPOSITION NO. 91183482
)	OPPOSITION NO. 91185755
Applicant.)	OPPOSITION NO. 91186579

– and –

THE COCA-COLA COMPANY,)	
)	
Opposer,)	
)	
v.)	OPPOSITION NO. 91184434
)	
ROYAL CROWN COMPANY, INC.,)	
)	
Applicant.)	

THE COCA-COLA COMPANY'S BRIEF IN RESPONSE TO
ROYAL CROWN COMPANY, INC.'S MOTIONS FOR LEAVE
TO AMEND ITS NOTICES OF OPPOSITION AND TO SUSPEND

NOW COMES THE COCA-COLA COMPANY ("TCCC"), the applicant and/or opposer in the above-referenced matters, and, in accordance with Rule 2.127 of the Trademark Rules of Practice and by and through its undersigned counsel, hereby files this brief in response to "Royal Crown Company, Inc.'s Motions For Leave To Amend Its Notices Of Opposition And To Suspend, And Memorandum In Support Thereof" ("RC's Motions"), served by Royal Crown Company, Inc. ("RC") in connection with the above-captioned matters on March 25, 2009.

INTRODUCTION

TCCC does not agree with the grounds upon which RC has moved for leave to amend its six Notices of Opposition in the above-referenced consolidated proceedings (collectively, the “Oppositions”), namely to assert a claim that “zero” is a generic term for beverages. TCCC also does not agree with many of the incorrect statements made in RC’s Motions. TCCC believes that RC’s proposed amendment borders on futile and that its motion to suspend is yet another attempt by RC to prolong unnecessarily the resolution of these proceedings. However, TCCC acknowledges that Rule 15 of the Federal Rules of Civil Procedure provides a liberal standard for allowing amendments to pleadings and that the Board liberally grants leave to amend a pleading in the same manner and to the same extent as provided in Rule 15.

In view of the liberal standard of Rule 15 and given the current status of the above-referenced proceedings, TCCC does not oppose RC’s request that it be permitted to amend its pleadings. TCCC does, however, oppose the form in which RC proposes to do so, namely by filing six amended pleadings and thereby requiring six separate amended answers to be filed by TCCC – in addition to two other answers that TCCC will be required to file during the next several weeks. TCCC believes that, if the Board is inclined to grant RC leave to amend, it would make far more sense and would be far more efficient for the Board and for the parties if RC was required to file a single, consolidated Amended Notice of Opposition. TCCC further believes that the single, consolidated Amended Notice of Opposition should include both RC’s opposition to

TCCC's application to register the mark FULL THROTTLE ZERO and its opposition to TCCC's application to register the mark VAULT ZERO.¹

ARGUMENT AND CITATION OF AUTHORITIES

TCCC acknowledges that Rule 15 of the Federal Rules of Civil Procedure provides a liberal standard with respect to amendment of pleadings. TCCC also acknowledges that, pursuant to Rule 2.107 of the Trademark Rules of Practice, the Board allows for the amendment of pleadings "in the same manner and to the same extent as in a civil action in a United States district court." 37 C.F.R. § 2.107. Despite this liberal standard, TCCC believes that RC's proposed amendment to its six Notices of Opposition in the above-referenced proceedings borders on futile.²

RC, for example, cites two cases involving Miller Brewing Co. to support its argument that the category of "generic" and unregistrable terms can apply to an adjective that denotes fundamental characteristics of a class of goods. (RC's Motions at 8). However, the cases cited by RC are inapposite, and do not apply to TCCC's use of "zero" in its marks. See Miller Brewing Co. v. G. Heileman Brewing Co., 561 F.2d 75

¹ On April 22, 2009, after the filing of RC's Motions, RC filed its Notice of Opposition to TCCC's application to register the mark FULL THROTTLE ZERO, Serial No. 77-413,618, and asserted therein a claim that "zero" is generic. (Opposition No. 91189847). The extended deadline by which RC must oppose TCCC's application to register the mark VAULT ZERO, Serial No. 78-698,990, is June 17, 2009, and RC stated in RC's Motions that it will oppose this additional application and that it will assert as a ground in the opposition that "zero" is generic. See RC's Motions at 7, n 4.

² TCCC notes that RC could have asserted its claim that "zero" is generic when it initially filed each of its six Notices of Opposition. Instead, RC waited until after it had opposed fifteen of TCCC's seventeen marks that include "zero," and seven months after it first raised a genericness issue in any of these consolidated cases, to seek leave to amend its pleadings to assert the genericness claim and, at the same time, move to suspend the proceedings. This is an example of RC's continuing efforts to prolong the resolution of these proceedings.

(7th Cir. 1977); Miller Brewing Co. v. Joseph Schiltz Brewing Co., 605 F.2d 990, 023 U.S.P.Q. 642 (7th Cir. 1979). None of TCCC's ZERO Marks are generic terms; the word "zero," as used in TCCC's ZERO Marks, is not used as a generic term; and there is no recognized generic meaning of the term "zero beverage."³

TCCC further notes, however, that – as noted in RC's Motions – RC has raised the alleged genericness of "zero" as an affirmative defense in its answer, filed on August 27, 2008, to TCCC's opposition against RC's applications to register the marks PURE ZERO and DIET RITE PURE ZERO, which are a part of these consolidated proceedings, and that RC has also asserted that "zero" is generic in its recently-filed opposition to TCCC's application for the mark FULL THROTTLE ZERO. In view of these facts, TCCC does not oppose in principle RC's request that it be permitted to amend its other previously-filed pleadings to assert this same ground.⁴

In RC's Motions, however, RC requests that RC be permitted to serve six different amended answers. TCCC believes that this request should be denied in the interest of efficiency and economy for all parties. There is no need for the parties to be required to prepare multiple, extremely similar pleadings when only one will suffice.

³ TCCC also believes that RC's fraud claims, which are asserted only in RC's oppositions against the marks COCA-COLA ZERO, SPRITE ZERO and COKE ZERO, fail to state a claim, are disproven as a matter of law by the Trademark Office records relating to the applications at issue, and are futile. There is no basis for allowing RC to be allowed to re-plead them as part of the amended oppositions, and even RC seeks to include those claims as to only three of the fifteen applications.

⁴ TCCC does, however, take issue with many of the incorrect statements made in RC's Motions. TCCC's position as expressed herein should not be viewed as acquiescence in the statements or mischaracterizations made throughout RC's Motions, including, for example, RC's statements regarding the alleged "question" at issue in these proceedings (RC's Motions at 2), the allegations made by third parties in other proceedings (RC's Motions at 3 n. 2), any alleged potential damage to third parties (RC's Motions at 5), TCCC's alleged "enforcement" actions (RC's Motions at 5), or the alleged viability of RC's genericness claim. (RC's Motions at 9).

Thus, if the Board decides to grant RC's request to amend its pleadings, TCCC believes that it would be far more efficient for the parties and for the Board for RC to be required to file a single, consolidated Amended Notice of Opposition that includes RC's grounds for opposing the fifteen marks that are the subject of the six consolidated oppositions filed by RC, as well as its grounds for opposing TCCC's applications to register the mark FULL THROTTLE ZERO, which RC opposed on April 22, 2009, and the mark VAULT ZERO, which RC has until June 17, 2009 to oppose. The filing of a single, consolidated Amended Notice of Opposition would be more efficient than RC serving and TCCC being required to answer six separate amended notices of opposition, TCCC being required to answer separately the recently-filed opposition against the mark FULL THROTTLE ZERO, and RC being required to file (and TCCC to be required to answer) yet another separate opposition against the mark VAULT ZERO.

RC's oppositions to all seventeen of the marks already at issue in these consolidated proceedings or to be at issue herein include or, according to RC, will include the grounds that "zero" is merely descriptive and/or generic. Indeed, RC relies on the similarity of the various oppositions in support of its request for leave to amend. (RC Motions at 5-6). Requiring that RC file a single, consolidated Amended Notice of Opposition will save significant time, effort and expense by obviating the need for either party to duplicate unnecessarily its pleadings and/or arguments. Each of the consolidated proceedings can continue to retain its separate character and case number, as is customary with consolidated proceedings, and the parties will be able to move forward with these oppositions efficiently, with a minimum of additional, unnecessary paperwork.


In closing, TCCC notes that RC's motion to suspend, made as a part of RC's Motions, is yet another attempt by RC to prolong indefinitely the resolution of these proceedings. RC has repeatedly pursued delaying tactics since these proceedings began in an effort to drag out the instant oppositions and hold off the issuance of the registrations to which TCCC is entitled for its seventeen marks that include the term "zero" for beverage products. It is time for the parties to complete discovery and proceed to their testimony periods without further delay.

CONCLUSION

For the reasons stated above, TCCC respectfully requests that the Board deny RC's Motions or, in the alternative, enter an Order requiring RC to serve a single, consolidated Amended Notice of Opposition that includes its grounds for opposition to all seventeen of the TCCC applications that will ultimately be at issue in these proceedings, including TCCC's application to register the mark VAULT ZERO.

Respectfully submitted, this 28th day of April, 2009.

KING & SPALDING LLP

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

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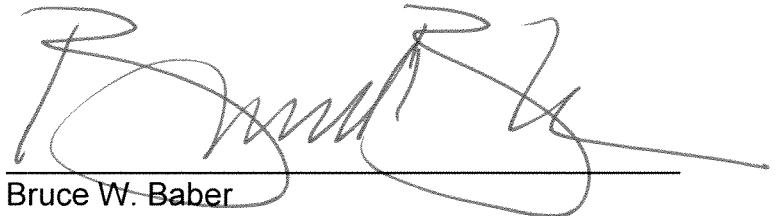
Attorneys for Applicant and Opposer
THE COCA-COLA COMPANY

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing The Coca-Cola Company's Brief In Response To Royal Crown Company, Inc.'s Motions For Leave To Amend Its Notices Of Opposition And To Suspend in the above-captioned matter upon Royal Crown Company, Inc., by causing a true and correct copy thereof to be deposited in the United States Mail, postage prepaid, addressed to counsel of record for Royal Crown as follows:

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

This 28th day of April, 2009.


Bruce W. Baber