

ESTTA Tracking number: **ESTTA447486**

Filing date: **12/21/2011**

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

Proceeding	92052950
Party	Defendant King Par, LLC
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Date	12/21/2011
Attachments	ReplyTrialBrief.pdf (5 pages)(404410 bytes)

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

KING PAR, LLC,)	
)	CANCELLATION NO. 92052163
v)	
)	
JOHN S. FRANKLIN)	
)	
AND)	
)	
JOHN S. FRANKLIN,)	
)	CANCELLATION NO. 92052950
v)	
)	
KING PAR, LLC)	
)	

**PLAINTIFF/COUNTERCLAIM DEFENDANT’S REPLY TO
DEFENDANT/COUNTERCLAIM PLAINTIFF’S TRIAL BRIEF IN COUNTERCLAIM**

The above-named Plaintiff/Counterclaim Defendant, for its reply to Defendant/Counterclaim Plaintiff’s Trial Brief in Counterclaim, states as follows:

I. DEFENDANT/COUNTERCLAIM PLAINTIFF’S EVIDENCE IS NOT APPROPRIATELY OF RECORD

In its trial brief, Defendant/Counterclaim Plaintiff offers in evidence several documentary exhibits, and a CD of a voice message left on an answering machine.

Plaintiff/Counterclaim Defendant submits that none of the evidence so submitted is admissible.

First, it is worthy of note that the Defendant/Counterclaim Plaintiff did not undertake any trial testimony. Defendant/Counterclaim Plaintiff’s representatives were not present at Plaintiff/Counterclaim Defendant’s trial depositions of Mark Schlosser or Ryan Coffell, although

Defendant/Counterclaim Plaintiff was represented at Defendant/Counterclaim Plaintiff's own trial deposition.

Defendant/Counterclaim Plaintiff did not seek to offer into evidence any documents at any time. In its trial brief, however, Defendant/Counterclaim Plaintiff does submit a number of proposed exhibits, which Plaintiff/Counterclaim Defendant contends are not entitled to consideration.

Exhibits and other evidentiary materials attached to a party's brief in a case can be given no consideration unless they were properly made of record during the time of taking testimony. *37 C.F.R. § 2.122(c)*. Further, factual statements made in a party's brief in the case cannot be given consideration unless they are supported by evidence properly introduced. *Electronic Data Systems Corp. v EDSA Micro Corp.*, 23 USPQ 2d 1460 (TTAB 1992) On this basis, with the exception of documents identified as exhibits in the Plaintiff/Counterclaim Defendant's trial testimony (King Par's 2010 catalog), none of the exhibits proposed by Defendant/Counterclaim Plaintiff are properly before the Board and should be disregarded.

II. LIKELIHOOD OF CONFUSION

The Plaintiff/Counterclaim Defendant does not contest the fact that it has not offered evidence of actual confusion, for the reason that the Plaintiff/Counterclaim Defendant has not investigated this issue. The costs associated with conducting an investigation and consumer survey associated with actual confusion is beyond the resources of the Plaintiff/Counterclaim Defendant.

Plaintiff/Counterclaim Defendant is justified in relying, however, on an admission against interest made by counsel for the Defendant/Counterclaim Plaintiff, during the Franklin deposition, wherein the following exchange took place:

“Mr. MacFarlane: For the record, I am referring to a letter provided to me by the witness in response to my request for production of documents. And it was submitted, I believe, by Mr. Franklin on November 5, 2010. It purports to be a letter dated May 31, 2006, and it begins...its directed to Mr. Finklestein...at Sports Source, Inc. and it says, ‘while ‘DIAMOND’ by itself as used for golf equipment would present a likelihood of confusion with Diamond Golf, this did not turn up in our search for some reason we cannot explain.”

“Q Do you remember asking or having someone in your organization ask that some research be done into the availability of the trademark “DIAMOND GOLF” for use by Sports Source?

A I didn’t remember at the time, but...but looking at these documents refresh my memory...” (Franklin Dep., pg. 37-38)

The fact that Defendant/Counterclaim Plaintiff’s attorney believed that a likelihood of confusion exists in the marketplace between the Plaintiff/Counterclaim Defendant’s registered mark “DIAMOND” and the Defendant/Counterclaim Plaintiff’s mark “DIAMOND GOLF” is powerful evidence in support of a finding of the likelihood of confusion.

III. ABANDONMENT

Plaintiff/Counterclaim Defendant contends that a telephone call made by a person identified only as “Sylvia” from King Par on or about August 30, 2010, constitutes evidence of Plaintiff/Counterclaim Defendant’s intention to abandon the “DIAMOND” trademark.

As explained in the introduction to this reply brief, this voice recording is not properly in evidence. Assuming, however, *arguendo* that the voice recording was to be considered, its content is unreliable and insufficient to establish abandonment. First, nothing in evidence identifies who “Sylvia” is. Defendant/Counterclaim Plaintiff did not seek to conduct any

discovery regarding the identity, position or qualification of the person identified as “Sylvia” on the voice recording. Secondly, the recording itself recites that Sylvia is reporting information that she obtained from “Brad”, another individual whose identity, position and responsibilities are unknown. Further, the statement contains only the assertion that King Par did not have, at the time of the call, any golf clubs bearing the name “DIAMOND”, and contains a statement that King Par did not actually purchase any golf clubs from some unspecified vendor. Finally, the phone conversation concludes with a statement that the speaker concluded “we do not have any”, presumably meaning golf clubs bearing the “DIAMOND” mark.

Defendant somehow concludes from this statement that this is an admission that King Par had not used the mark “DIAMOND” on golf clubs for at least six years. Of course, this telephone message says nothing of the sort. More importantly, the testimony is inconsistent with the testimony of Ryan Coffell, whose trial testimony details exactly how and when King Par was using the “DIAMOND” mark.

IV. CONCLUSION

Since the Defendant/Counterclaim Plaintiff’s trial brief includes no admissible evidence, and since its arguments on likelihood of confusion and abandonment are without merit, Plaintiff/Counterclaim Defendant respectfully submits that its request for cancellation should be granted, and Defendant and Counterclaim Plaintiff’s request for cancellation should be denied.

Respectfully submitted,

/Marshall G. MacFarlane/
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DATED: December 21, 2011

CERTIFICATE OF MAILING

I hereby certify that this correspondence: **PLAINTIFF/COUNTERCLAIM DEFENDANT'S
REPLY TO DEFENDANT/COUNTERCLAIM PLAINTIFF'S TRIAL BRIEF IN
COUNTERCLAIM**, is being filed with the TTAB electronically, on December 21, 2011.

/Marshall G. MacFarlane/
Marshall G. MacFarlane

CERTIFICATE OF SERVICE

I hereby certify that this correspondence: **PLAINTIFF/COUNTERCLAIM DEFENDANT'S
REPLY TO DEFENDANT/COUNTERCLAIM PLAINTIFF'S TRIAL BRIEF IN
COUNTERCLAIM**, is being deposited with the United States Postal Service, 1st Class Mail, postage prepaid, in an envelope addressed to Douglas M. Kautzky, 3868 Carson Street, Suite 105, Torrance, California 90503, on December 21, 2011.

/Marshall G. MacFarlane/
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