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

Proceeding	92057941
Party	Plaintiff Clockwork IP, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

CLOCKWORK IP, LLC)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92057941
)	Reg. No. 3,618,331
BARNABY HEATING & AIR, and)	
McAFEE HEATING AND AIR)	
CONDITIONING CO., INC.)	
)	
Respondents.)	

PETITIONER’S OPPOSITION TO RESPONDENT’S
CROSS MOTION FOR SUMMARY JUDGMENT

Petitioner Clockwork IP, LLC (“Clockwork”), by counsel, states the following as its Opposition to Respondent’s Cross-Motion for Summary Judgment:

INTRODUCTION

Faced with the fact that Clockwork is entitled to judgment as a matter of law on its fraud claim, Respondent Barnaby Heating and Air (“Barnaby”) attempts to avoid the inevitable by muddying the water and cross-moving for judgment on seven of the affirmative defenses listed in its Answer to the Petition to Cancel. (*See* [Dkt. # 30] Resp’t’s Cross-Mot. for Summ. J. (“Cross-Mot.”) at 2; [Dkt. # 30] Resp’t’s Mem. in Supp. of Cross-Mot. (“Resp’t Mem.”).) But although it moves for judgment based on all seven, Barnaby submits no authority, argument, or facts in support of over half of those defenses, and the facts and authority it does provide for the others, demonstrate that those defenses either fail as a matter of law or are meritless. As a result, the Board should not only deny Barnaby’s cross-motion for summary judgment, but it should preclude Barnaby from raising those defenses again if the proceeding is not otherwise resolved on Clockwork’s pending motions.

BACKGROUND

Clockwork is an intellectual property holding company that owns the COMFORTCLUB Mark. ([Dkt. # 22] Yohn Decl. ¶ 5.) Since at least as early as 2003, and possibly as early as 2001, Clockwork has licensed the COMFORTCLUB Mark to the franchisees of Clockwork's sister entity, One Hour Air Conditioning Franchising, LLC (the "OHAC franchisees") for use in connection with electrical, plumbing, and heating and air conditioning services. (*Id.* ¶¶ 6–7.) Between 2003 and 2008, Clockwork licensed the COMFORTCLUB Mark to at least 100 OHAC franchisees, and from 2007 to 2008, it licensed that mark to up to seven (7) Texas OHAC franchisees. (*Id.* ¶¶ 7–8; *see also* [Dkt. # 22] Ex. 1–2 to Yohn Decl.)

Barnaby is a Texas-based heating and air conditioning business that became a member of the affinity group AirTime500, which is affiliated with Clockwork, in August 2007. ([Dkt. # 22] Nighthawk Agreement, Ex. 2 to DeFord Decl.; [Dkt. # 30] Barnaby Decl. ("Barnaby Decl.") ¶ 12; [Dkt. # 30] Ex. 7 to Barnaby Decl.; [Dkt. # 30] Resp't Mem. at 6.) Through its membership in AirTime500, Barnaby had access to Clockwork's intellectual property, and from 2008 to 2014, Barnaby was a non-exclusive licensee of Clockwork's COMFORTCLUB Mark. ([Dkt. # 22] Faust Decl. ¶ 3.)

As part of its membership in AirTime500, Barnaby executed the Nighthawk AirTime Member Agreement (the "Agreement"), through which Barnaby agreed and acknowledged, among other things, that it possessed (and possesses) no rights or ownership interest in Clockwork's intellectual property. ([Dkt. # 22] Nighthawk Agreement, Ex. 2 to DeFord Decl.; *see also* [Dkt. # 30] Barnaby Decl. ¶ 12; [Dkt. # 30] Ex. 7 to Barnaby Decl.; [Dkt. # 30] Resp't Mem. at 6.) The Agreement also provides under number 7 in the "Miscellaneous Provisions" that "[t]his Agreement will be governed by and construed in accordance with the laws of the

State of Missouri, without regard to conflict of laws principles” and that “[a]ny action arising out of or relating to *this Agreement* will be brought by the parties only in a Missouri state court or federal court sitting within Missouri, which will be the exclusive venue of any such action” (“Section 7”) (emphases added). ([Dkt. # 22] Nighthawk Agreement, Ex. 2 to DeFord Decl.; [Dkt. # 30] Resp’t Mem. at 7.)

Yet, less than seven months after signing the Agreement, Barnaby filed an application to register Clockwork’s COMFORTCLUB Mark, stating a first use date of January 22, 2008. (*See* [Dkt. # 30] Resp’t Mem. at 8; [Dkt. # 30] Barnaby Decl. ¶ 14; [Dkt. # 30] Ex. 3 to Barnaby Decl.) Barnaby then lied to the USPTO with the intent to deceive the Board into issuing Barnaby a registration to which Barnaby knew it was not entitled, claiming ownership of the COMFORTCLUB Mark and a lack of knowledge of any other entity, firm, person, or association with rights to use an identical or confusingly similar mark, despite possessing full knowledge of Clockwork’s well-established, superior rights and ownership of COMFORTCLUB. (*See* [Dkt. # 22] Ex. 3 to DeFord Decl.) Barnaby lied again five months later in an August 2008 response to an office action when it knowingly made the same false statements to the Board, again with the intent to deceive the Board into issuing Barnaby a registration to which it was not entitled. (*See* [Dkt. # 22] Ex. 4 to DeFord Decl.) Barnaby’s deceit worked, and the Board issued Barnaby U.S. Reg. No. 3,618,331 for the COMFORTCLUB Mark (the “Barnaby registration”).

Given its superior rights in COMFORTCLUB and Barnaby’s commission of fraud on the USPTO to obtain the Barnaby registration, Clockwork filed the above-captioned cancellation proceeding, seeking cancellation of the Barnaby registration based on claims of fraud and Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d) (the “section 2(d) likelihood of confusion claim”). (*See generally* [Dkt. # 1] Petition to Cancel (“Pet.”).) Almost two years later, with

Clockwork's motion for discovery sanctions and entry of judgment as well as its motion for summary judgment pending, and approximately a year after discovery closed with Barnaby asking for no discovery whatsoever in this matter, Barnaby has now filed a cross-motion for summary judgment, contending that both claims in the Petition must be dismissed in light of seven of Barnaby's affirmative defenses. ([Dkt. # 30] Cross-Mot. at 2; [Dkt. # 30] Resp't Mem. at 15–17.) But as demonstrated below, Barnaby is not entitled to judgment as a matter of law on any of its defenses.

ANALYSIS

Barnaby cross moves for summary judgment on seven of its affirmative defenses: (1) failure to state a claim; (2) priority, (3) statute of limitations, (4) contract estoppel, (5) acquiescence, (6) laches, and (7) no liability for fraud. ([Dkt. # 30] Cross-Mot. at 2.) Yet, Barnaby cites virtually no legal authority or facts in support of its claimed defenses, ignores that many of its defenses are inapplicable to the types of claims asserted in this case, and even if they are applicable, fails to establish why Barnaby is entitled to judgment on those defenses based on the record before the Board. (*See* [Dkt. # 30] Resp't Mem. at 15–17.) The cross-motion for summary judgment must therefore be denied.

I. Barnaby is not entitled to summary judgment on its failure to state a claim and contract estoppel defenses because those defenses are either inapplicable or devoid of merit.

Two of Barnaby's affirmative defenses – failure to state a claim and contract estoppel – are predicated on Section 7 of the Agreement.¹ Specifically, Barnaby contends that, because the

¹ It is not clear from Barnaby's motion whether it also intends to rely on its pleading deficiency theory that it espouses in opposition to Clockwork's motion for summary judgment. (*See* [Dkt. # 30] Resp't Mem. at 15–17.) But to the extent that Barnaby does intend to incorporate that argument here, it fails for the same reasons stated in Clockwork's reply: namely, after recognizing that fraud claims may be pleaded upon information and belief as long as they are

undisputed facts show that Barnaby and Clockwork are both parties to the Agreement and that the Agreement contains a mandatory forum-selection clause, it is entitled to judgment as a matter of law because Clockwork failed to state a claim upon which relief may be granted and/or is barred from bring its claims under the doctrine of contract estoppel. ([Dkt. # 30] Resp't Mem. at 7, 15–16.) But other than making those conclusory statements and acknowledging generally that the Board may construe a contract, Barnaby provides no support for its position that a forum-selection clause demonstrates a pleading deficiency or that, even accepting all of the facts in the Petition as true, Clockwork cannot state a claim for fraud or a likelihood of confusion. (*See id.*) Barnaby also fails to explain why a forum-selection clause would estop Clockwork from bringing a proceeding to reveal Barnaby's fraud on the USPTO and/or to seek redress for the risk of confusion created by Barnaby's use of a junior identical mark on identical or virtually identical services.² (*See id.*) As a result, Barnaby failed to establish that it is entitled to summary judgment on these defenses, let alone that they are the proper procedural vehicle through which to address Section 7.

accompanied by some facts underlying that belief, Barnaby **deliberately misrepresented the Petition** by quoting only the “upon information and belief” language and **excising the facts** in support of that belief with ellipses. ([Dkt. # 32] Pet.'s SJ Reply at 4–5.) Viewing the Petition as actually drafted – and not Barnaby's willful recreation – it satisfies the heightened pleading standard of Rule 9(b) with respect to the fraud claim, and the standard pleading requirement with respect to the section 2(d) likelihood of confusion claim. (*See generally* [Dkt. # 1] Pet.)

² The sole case cited by Barnaby provides no support for its forum-selection based defenses. In *Selva & Sons, Inc. v. Nina Footwear, Inc.* 705 F.2d 1316 (Fed. Cir. 1983), the Board dismissed a proceeding, declining to interpret or otherwise construe a settlement agreement to determine if it barred the claims brought. The Federal Circuit reversed, finding that the Board should construe and interpret contracts in circumstances where the contract may give rise to contract estoppel, i.e., demonstrate that a party is barred from making certain claims because of, for example, a settlement agreement to which it is a party. *Id.* at 1324. Although the general principle that the Board should consider the terms of a contract when determining whether a proceeding should go forward may apply here, *Selva & Sons* does not support Barnaby's contention that the forum-selection clause requires Clockwork to seek relief in Missouri federal court. Barnaby cites no authority for that meritless position.

Giving Barnaby the benefit of the doubt and assuming that, rather relying on Rule 12(b)(6) or contract estoppel, it meant to invoke the forum-selection clause to defeat venue and require Clockwork to pursue its claims in Missouri federal court does not change that conclusion. As Barnaby notes, Section 7 provides in pertinent part that “[a]ny action arising out of or relating to this Agreement will be brought by the parties only in Missouri state court or a federal court sitting within Missouri, which will be the exclusive venue of such action.” ([Dkt. # 22] Nighthawk Agreement, Ex. 2 to DeFord Decl.; *see also* [Dkt. # 30] Resp’t Mem. at 9; [Dkt. # 30] Ex. 7 to Barnaby Decl.) Neither of Clockwork’s claims “aris[e] out of or relat[e] to [the] Agreement.” It is absurd to say that they do.³

To start, the section 2(d) likelihood of confusion claim and the fraud claim predicated on Barnaby’s intentional withholding of its knowledge about Clockwork’s superior rights in no way implicate the Agreement. Moreover, even though Clockwork’s fraud claim based on Barnaby’s intentional false representation regarding its ownership of the COMFORTCLUB Mark is further **demonstrated** by the existence of the Agreement (in which Barnaby acknowledged it possessed no ownership rights or interests in Clockwork’s intellectual property), the fraud claim still does not “aris[e] out of or relat[e] to” the Agreement. In this matter, the Agreement is merely *evidence*. Barnaby’s fraud exists because it could not have had a good faith belief regarding its ownership of COMFORTCLUB; that fraud exists independent from the Agreement, such that it is not even necessary for the Agreement to ultimately be enforceable (although it is) for Barnaby’s fraud to exist. (*See, e.g.*, [Dkt. # 32] Pet.’s SJ Reply at 3–10 (demonstrating Barnaby’s fraud based on the record currently before the Board)); *see also Qualcomm Inc. v.*

³ In fact, taking Barnaby’s claim to its logical conclusion, given the choice of law provision, Barnaby’s position would mean that Clockwork has no remedy as the Lanham Act cannot apply at all and Clockwork can only find relief where Missouri state law provides it. In fact, as discussed in Section III, *infra*, that is essentially the approach Barnaby takes.

FLO Corp., 93 U.S.P.Q.2d (BNA) 1768, 1770 (T.T.A.B. 2010); *Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 U.S.P.Q. 2d (BNA) 1203, 1205–06 (T.T.A.B. 1997). Thus, the Board should deny the cross-motion for summary judgment on its Rule 12(b)(6) and contract estoppel defenses and should prohibit Barnaby from asserting any defense predicated on the forum-selection clause in the future because that clause does not apply to the claims in this case.

II. Barnaby’s acquiescence and laches defenses are legally unsupportable and meritless.

Barnaby next attempts to dismiss the Petition based on a theory that Clockwork is estopped, pursuant to the doctrine of acquiescence or laches, from asserting its fraud and section 2(d) likelihood of confusion claims. ([Dkt. # 30] Resp’t Mem. at 16–17.) But it is well-settled that the doctrine of laches and acquiescence do not apply in cases of fraud. *See Saint-Gobain Abrasives, Inc. v. Unova Indus. Automation Sys. Inc.*, 66 U.S.P.Q.2d (BNA) 1355, 1359 (T.T.A.B. 2003). Barnaby therefore cannot obtain judgment on Clockwork’s fraud claim based on these defenses.

Barnaby has also failed to meet its burden to establish acquiescence or laches with respect to Clockwork’s section 2(d) likelihood of confusion claim. To start, Barnaby’s attempts to establish acquiescence in this case by pointing to the declaration of Robin Faust and its accompanying exhibits, which Clockwork submitted in support of its motion for summary judgment.⁴ ([Dkt. # 30] Resp’t Mem. at 8–9, 16–17; [Dkt. # 30] Ex. 9 to Barnaby Decl.; *see also* [Dkt. # 22] Ex. A–C to Faust Decl.) Specifically, Barnaby contends that, based on these emails,

⁴ It is worth pointing out the irony that Barnaby moved to strike the declaration of Ms. Faust while simultaneously trying to rely on it in support of its own cross motion. As noted in Clockwork’s response in opposition to Barnaby’s motion to strike, Ms. Faust’s declaration is proper and therefore should not be struck. ([Dkt. # 32] Pet.’s SJ Reply at 1–3.) However, should the Board determine otherwise, Clockwork respectfully requests that the Board decline to allow Barnaby to rely on that declaration.

Clockwork had knowledge of Barnaby's use of the COMFORTCLUB Mark as of February 2008 and that it therefore cannot now complain that Barnaby used and registered that mark. ([Dkt. # 30] Resp't Mem. at 16–17.) But Barnaby's 'consent to use *equals* consent to register' argument misses the mark. Unlike the case that Barnaby relies on for that principle, this case does not present a situation where two competing parties agree to some type of coexistence in the marketplace. *See Richdel, Inc. v. Mathews Cnty.*, 190 U.S.P.Q. (BNA) 37, 38–40 (T.T.A.B. 1976). Instead, Ms. Faust's approval of Barnaby's ad using the COMFORTCLUB Mark was Clockwork giving permission to an AirTime500 member – and therefore a Clockwork licensee, (*see* Faust Decl. ¶ 3) – to use that mark as a licensee of Clockwork, subject to the terms of the Agreement. Thus, Barnaby has failed to show establish that Clockwork acquiesced to its *registration* of the COMFORTCLUB Mark.⁵

Similarly, Barnaby cannot meet its burden to prove its laches defense. In order to state a defense based on laches in a cancellation proceeding, the respondent must show (1) that the petitioner possessed actual or constructive knowledge of the *registration* sought to be cancelled, yet waited an unreasonable amount of time before seeking to cancel that registration, and (2) that the respondent was prejudiced as a result of that delay. *Ava Ruha Corp. v. Mother's Nutritional Ctr., Inc.*, 113 U.S.P.Q.2d (BNA) 1575, 1580 (T.T.A.B. 2015); *Turner v. Hops Grill & Bar, Inc.*,

⁵ In fact, it is curious that Barnaby even tries to establish acquiescence based on those emails in this case. Assuming *arguendo* that Barnaby was not a licensee of Clockwork's when Ms. Faust approved of Barnaby's ad, Barnaby would still be unable to support an acquiescence defense without conceding (which it already has, (*see generally* [Dkt. # 30] Resp't Mem.; [Dkt. # 32] Pet.'s SJ Reply)) **that it knew of Clockwork's superior rights to COMFORTCLUB in February 2008**, such that it could rely on Clockwork's approval of its use of the mark to now assert an acquiescence defense. If that is Barnaby's position, then Clockwork is entitled to judgment as a matter of law on its fraud claim based on at least the fraudulent statements it made to the USPTO in March 2008 and August 2008, regarding its belief that no other firm, entity, person, or association exists with rights to use an identical or confusingly similar mark to the one Barnaby sought to register.

52 U.S.P.Q.2d (BNA) 1310, 1312 (T.T.A.B. 1999). Barnaby again relies solely on the emails exchanged between Ms. Faust and Mr. Barnaby to assert delay, and it relies entirely on Mr. Barnaby's declaration that Barnaby allegedly invested \$225,000 in the COMFORTCLUB Mark since February 2008 to demonstrate prejudice. (*See* [Dkt. # 30] Resp't Mem. at 16–17.) But Barnaby cannot rely on the Faust-Barnaby emails to establish an unreasonable delay because the laches period begins to run from the date of knowledge of registration, not the date of first use. *Turner*, 52 U.S.P.Q.2d (BNA) at 1312. Moreover, even assuming *arguendo* that Barnaby has in fact spent \$225,000 on the COMFORTCLUB Mark since 2008, it fails to explain how that expenditure demonstrates prejudice. As noted above, this is not the typical cancellation proceeding where competitors are fighting for exclusive rights to use a trademark; up until 2014 when Barnaby terminated its membership in AirTime500, Barnaby had a non-exclusive license that permitted it to use COMFORTCLUB in connection with its heating and air conditioning services. Thus, unlike another entity that would lose the right to use a mark unless it entered into a license arrangement with an entity after its mark was cancelled, Barnaby cannot establish prejudice based on its investment in COMFORTCLUB when, at the time the cancellation proceeding was filed, it would have been able to continue using that mark as Clockwork's pre-existing licensee. Barnaby therefore has failed to establish that laches apply in this case.

Finally, even if Barnaby could prove laches or acquiescence in this case, it still would not be entitled to judgment as a matter of law on those defenses. Beyond clearly not being applicable to Clockwork's fraud claim, even regarding the section 2(d) likelihood of confusion claim, it is well-settled that, "even though proven, laches [and acquiescence] will not prevent cancellation" of a mark where "the marks and goods or services of the parties are substantially similar and it is determined that confusion is inevitable." *Turner*, 52 U.S.P.Q.2d (BNA) at 1313;

see also Richdel, 190 U.S.P.Q. (BNA) at 41. In other words, in cases such as this one where the parties both claim rights to identical marks for use on identical or substantially similar goods and the respondent has failed to demonstrate that it is entitled to summary judgment on the likelihood of confusion, the Board will not grant summary judgment even if the respondent proves its laches or acquiescence defense. The Board should therefore deny Barnaby's cross-motion on those defenses here.

III. Barnaby's statute of limitations claim fails as a matter of law.

Barnaby next moves for judgment as a matter of law based on its statute of limitations defense. ([Dkt. # 30] Cross-Mot. at 2.) But other than saying that it is entitled to judgment on that defense under Missouri law, Barnaby provides no argument or facts in support of that conclusion, let alone an explanation of why Missouri law would apply. ([Dkt. # 30] Resp't Mem. at 15–17.)

Presumably, Barnaby intends to rely again on Section 7 of the Agreement, which states that “[t]his Agreement will be governed by and construed in accordance with the laws of the State of Missouri, without regard to conflict of laws principles.” ([Dkt. # 22] Nighthawk Agreement, Ex. 2 to DeFord Decl. (emphasis added).) That reliance is misplaced. Although the Board would be required to apply Missouri law if it needed to construe, interpret, or evaluate the Agreement (which it does not), Section 7 does not (and cannot) provide the substantive law governing the claims in this cancellation proceeding, which are governed by the Lanham Act, 15 U.S.C. § 1051 *et seq.*

Moreover, even giving Barnaby the benefit of the doubt and assuming that it meant to assert a statute of limitations defense based on the Lanham Act and any Board precedent related to that Act, the defense would still fail. The Lanham Act specifies several claims that may be

brought to cancel a trademark registration. *See* 15 U.S.C. § 1064. Among those listed are both of the claims Clockwork asserts in this case: fraud on the USTPO, which is not subject to a time limitation, and a section 2(d) likelihood of confusion claim, which must be brought within five years of the subject mark's registration. *Id.* § 1064(1), (3). As Clockwork's fraud claim is not subject to a time limitation and it brought the section 2(d) likelihood of confusion claim within five years of the registration's issuance, the Board should deny summary judgment on Barnaby's statute of limitations defense and prohibit Barnaby from asserting that defense in this case.

IV. Barnaby cannot establish that it has priority over Clockwork.

Barnaby next moves for judgment based on its claim that it has priority over Clockwork with respect to COMFORTCLUB. ([Dkt. # 30] Cross-Mot. at 2). Again, however, Barnaby provides no facts in support of that claim, other than facts mentioned in its opposition to Clockwork's motion for summary judgment. (*See generally* [Dkt. # 30] Resp't Mem.) But even considering those facts, Barnaby has not established priority.

Barnaby maintains that its first use of COMFORTCLUB in commerce was on January 22, 2008, which is the date specified in Barnaby's registration. (*See* [Dkt. # 30] Resp't Mem. at 8; [Dkt. # 30] Barnaby Decl. ¶ 14; [Dkt. # 30] Ex. 3 to Barnaby Decl.) Thus, as long as Clockwork can establish that it was using that mark prior to Barnaby's first use date, Barnaby's priority claim must fail. The record is replete with that evidence.

To start, Barnaby has already conceded that at least seven (7) One Hour Air and Heat franchisees (and licensees of Clockwork) were using the COMFORTCLUB Mark in Barnaby's geographic area at least as early as 2007. (*See generally* [Dkt. # 30] Resp't Mem.; [Dkt. # 30] Barnaby Decl. (addressing Mr. Yohn's declaration but not contesting use by the seven (7) Texas OHAC franchisees).) Additionally, Clockwork submitted the sworn declaration of Rick Yohn,

who explained that Clockwork has used the COMFORTCLUB Mark in commerce through its OHAC franchisees since at least as early as 2003, and likely earlier, in support of its motion for summary judgment. ([Dkt. # 22] Yohn Decl. ¶ 7.) As evidence of that use, Mr. Yohn submitted the 2006 copyrighted StraightForward Pricing Guide, which is purchased by OHAC franchisees for use during home visits to explain and sell COMFORTCLUB memberships.⁶ ([Dkt. # 22] Ex. 1 to Yohn Decl.; [Dkt. # 32] Supp. Yohn Decl. ¶¶ 3–5; [Dkt. # 32] Ex. A to Supp. Yohn Decl. (containing invoices for sales of COMFORTCLUB memberships by an OHAC franchisee at least as early as 2007).) No matter which date is considered, Clockwork predates Barnaby’s claimed first use in January 2008, and Barnaby’s priority defense is unworkable. The Board should therefore deny summary judgment on Barnaby’s priority defense and prohibit Barnaby from reasserting that defense in this case.

IV. Barnaby’s “no liability” defense is refuted by the evidence before the Board.

Finally, Barnaby moves for judgment on its defense that it did not commit fraud on the USPTO when procuring the Barnaby registration (the “no liability defense”). ([Dkt. # 30] Cross-Mot. at 2.) For at least the reasons stated in Clockwork’s briefs in support of its motion for summary judgment (including but not limited to the fact that Barnaby admitted through RFA No. 36 that this defense is meritless) and regardless of whether the Board finds that Clockwork is entitled to judgment on the fraud claim or that there is a genuine issue of material fact that precludes summary judgment, Barnaby is not entitled to judgment on this defense. (*See*

⁶ In its opposition to Clockwork’s motion for summary judgment, Barnaby attempts to call into question the evidence of use submitted by Clockwork in support of its superior rights to the COMFORTCLUB Mark through the declaration of Mr. Barnaby. But as discussed in more detail in Clockwork’s reply in support of its motion for summary judgment, the Board should not credit Mr. Barnaby’s “analysis” because it lacks foundation and is improper as either a lay or expert opinion, and therefore cannot contradict – or even call into doubt – the declarations of Rick Yohn. ([Dkt. # 32] Pet.’s SJ Reply at 9–10.)

generally [Dkt. # 22] (Petitioner’s opening brief); [Dkt. # 32] Pet.’s SJ Reply.) The Board should therefore deny summary judgment on the “no liability” defense.

CONCLUSION

For the reasons stated above, Petitioner Clockwork IP, LLC respectfully requests that the Board deny Barnaby’s cross-motion for summary judgment.

Respectfully submitted,

CLOCKWORK IP, LLC

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CERTIFICATE OF SERVICE

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