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

Proceeding	91207440
Party	Plaintiff Champion Window Manufacturing and Supply Company, LLC
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Submission	Motion to Dismiss - Rule 12(b)
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of the Application Serial No. 85429267
Filed on the 22nd day of September, 2011
For the mark: COMFORT QUADSHIELD GLASS.
Published in the Official Gazette on October 09, 2012

In the matter of the Application Serial No. 85429563
Filed on the 22nd day of September, 2011
For the mark COMFORT QUAD SHIELD GLASS and design
Published in the Official Gazette on August 21, 2012

Champion Window Manufacturing
and Supply Co., LLC,

Opposer,

v.

Comfort Window Co., Inc.,

Applicant.

OPPOSITION NO. 91207440

**MOTION TO DISMISS COUNTERCLAIM
FOR FAILURE TO STATE A CLAIM UPON
WHICH RELIEF MAY BE GRANTED**

AND/OR

**MOTION FOR SUMMARY JUDGMENT AS
TO APPLICANT'S COUNTERCLAIM**

**MOTION TO DISMISS AND/OR
MOTION FOR SUMMARY JUDGMENT
AS TO APPLICANT'S COUNTERCLAIM**

Opposer, Champion Window Manufacturing and Supply Co., LLC ("Champion"), hereby moves that the Trademark Trial and Appeal Board ("TTAB") dismiss the Counterclaim of Applicant Comfort Window Co., Inc. ("CWI") for the reason that, even if all of the allegations set forth in the Counterclaim are taken as true, Applicant's Counterclaim still fails or, in the alternative, Opposer moves that it be granted summary judgment for the reason that, when the facts are viewed in a light most favorable to CWI, there is no genuine issue as to any material fact and that Champion is entitled to judgment as a matter of law, all as set forth more detail in

the brief attached hereto and made part hereof. Also filed herewith is an Affidavit, with attached Exhibits, that is made part of this Motion. In compliance with TBMP 528.05, this Affidavit and the attached Exhibits are not submitted with a notice of reliance.

Wherefore, Opposer moves that Applicant's Counterclaim be dismissed or, in the alternative, that Opposer be granted Summary Judgment as to the Counterclaim at Applicant's costs and that the TTAB grant Opposer such other relief as it may determine is appropriate.

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION

I. INTRODUCTION

CWI filed applications to register two marks: the word mark COMFORT QUADSHIELD GLASS (Serial No. 85429267) and the composite mark COMFORT QUAD SHIELD GLASS (Serial No. 85429563) (jointly the "QUADSHIELD Marks"). "QUADSHIELD" is a single word when used in the word mark, and two words, "QUAD" and

“SHIELD,” in CWI’s composite mark. Applications for registration of both marks were filed in September 2011.

Upon receiving notice of the publication of the composite QUADSHIELD mark, Champion sought an extension of time, after which it filed this Opposition to both QUADSHIELD Marks. Despite telephone and email discussions between counsel for the parties, no agreement has been reached.

CWI counterclaimed for cancellation of Champion’s COMFORT 365 WINDOWS and COMFORT 365 DOORS marks (“Champion COMFORT Marks”). However, the counterclaim is not based on a claim relating to the QUADSHIELD marks. Rather, CWI bases its cancellation counterclaim on the mark  (“CWI COMFORT Mark”), a mark for which an application is presently pending in the USPTO.

II. BACKGROUND

CWI and Champion have had prior contact over trademark issues, several years before CWI filed the QUADSHIELD applications. Approximately four years ago, CWI sent Champion a cease and desist letter, advising Champion to stop using its COMFORT 365 WINDOWS mark in central and upstate New York. CWI alleged that it had obtained New York state trademark registration that predated Champion’s first use of the Champion COMFORT marks in New York. It claimed that area as its market area, predating Champion’s use of the COMFORT 365 marks. (See affidavit, paragraphs 13-14). The goods and services represented by the CWI and Champion marks appeared very similar, as did the channels of trade. (Affidavit, paragraph 15).

The parties quickly reached an amicable oral agreement. CWI agreed that Champion could use the mark “COMFORT 365” glass in place of COMFORT 365 WINDOWS or COMFORT 365 DOORS. CWI also insisted that the mark COMFORT 365 glass would only be

used in association with the name Champion (as in “Champion’s COMFORT 365 glass”) in all of its advertising in CWI’s New York sales area. In return, CWI would not take legal action against Champion. (Affidavit, paragraphs 16-18). Champion agreed and undertook to make the necessary changes to its marketing in CWI’s sales area. (Affidavit, paragraphs 19-20). The changes required by the oral agreement required a substantial effort by Champion. (Affidavit, paragraphs 21-23).

However, the parties never reduced the agreement to writing. The difficulty was not the terms of the oral agreement itself, but additional terms that CWI insisted be added to the written version of the agreement. Champion sent CWI a written draft of the terms of the oral settlement agreement. CWI returned the draft agreement with an additional term stating that Champion would not oppose any CWI application for the CWI COMFORT Marks in the USPTO. (Affidavit, paragraphs 24-27). Champion would not agree to add these additional requirements that had no relevance to the issues raised in CWI’s cease and desist letter.

CWI was insistent, through several drafts of a proposed written settlement agreement, that any written version of the agreement must include such a provision, even though it had never been raised, discussed or agreed. (Affidavit, paragraph 27). Finally, on October 26, 2011, after making no progress on reducing the oral agreement to writing because of these additional terms, Champion’s counsel sent CWI counsel an email in which Champion agreed to uphold the oral agreement. (Affidavit, paragraphs 28). The email further stated that a written agreement did not appear either necessary or possible. CWI never replied to the email. There was no further contact on any trademark matter between Champion and CWI, until the commencement of these proceedings. (Affidavit, paragraphs 28-29).

Since that time, Champion has fulfilled its obligations under the terms of the oral agreement.

III. FACTS

Champion's registered marks

Champion has opposed CWI's COMFORT QUADSHIELD applications due to a likelihood of confusion in the minds of consumers between CWI's pending marks and Champion's registered marks COMFORT 365 (Reg. No. 3039140); COMFORT 365 WINDOWS (Reg. No. 3373431) and COMFORT 365 DOORS (Reg. No. 3373432). That issue is not presently before the TTAB in these motions.

COMFORT 365 is incontestable.

The COMFORT 365 mark was registered on January 10, 2006. On July 7, 2011 Champion filed its Section 8 and 15 Statements of Continued Use. On August 18, 2011, the PTO accepted Champion's Section 8 and 15 filings for COMFORT 365, making the mark incontestable. (Affidavit, paragraphs 4, 7).

COMFORT 365 WINDOWS was registered on January 22, 2008. The generic word WINDOWS was disclaimed in the registration. (Affidavit, paragraph 5). COMFORT 365 DOORS was also registered on January 22, 2008. The generic word DOORS was disclaimed on the registration. (Affidavit, paragraph 5). The one year window for filing the section 8 and 15 Statements of Continued Use began four days after CWI filed its Counterclaim. (Affidavit, paragraph 8).

CWI's counterclaim seeks cancellation of COMFORT 365 WINDOWS and COMFORT 365 DOORS.

CWI 's counterclaim for cancelation is based on CWI's COMFORT Mark, for which an application is pending in the USPTO (Serial No. 85402235). (Affidavit, paragraph 5). That application for a composite mark in which the word COMFORT is inside a red oval, is presently pending but on suspension due to this Opposition. However, prior to the suspension an Office Action was issued refusing to register the mark. The mark was refused registration because the examiner found a likelihood of confusion with eleven different marks, eight of which were registered, including Champion's registered marks COMFORT 365, COMFORT 365 WINDOWS and COMFORT 365 DOORS. (Affidavit, paragraph 33 – 34).

CWI responded to the refusal. It argued that the cited marks, which included the three Champion COMFORT Marks, do not cause a likelihood of confusion. CWI argued that, under the DuPont standards, no likelihood of confusion exists. (Affidavit, paragraph 35). Before the examiner could make a determination, the application was placed on suspension. (Affidavit, paragraphs 36). If CWI's claim is based on likelihood of confusion, it has taken the opposite stance than that taken in an ongoing application rejection involving the same marks.

CWI's Counterclaim actually fails to state how it will be damaged by the Champion COMFORT marks. There is no allegation that Champions COMFORT Marks create a likelihood of confusion, that they are deceptive, misdescriptive, generic, merely descriptive or any other cognizable claim. A claim in the TTAB must set forth the basis for the claim.

There is also no allegation that the mark is in use in commerce over which the United States may exert control. CWI merely alleges that it "...has been using the following COMFORT & design mark since at least 1985 in conjunction with the following goods:..." (Counterclaim ¶¶25, 26). It does not say in what manner it has been using the mark or whether it has been used in commerce as that term is defined for the purpose of jurisdiction of the TTAB.

IV. LAW AND ARGUMENT

This Motion is made up of several arguments. The first, that CWI failed to allege necessary elements in the Counterclaim, is based solely upon the inadequacy of the pleadings, and is the basis of the Motion to Dismiss.

The second argument, that CWI is attempting to engage in a futile action that it cannot win, since Champion's COMFORT 365 mark is already incontestable; the third argument, that CWI is barred by contractual estoppel; and the fourth argument, that CWI is barred by promissory estoppel, are based on the pleadings and matters outside the pleadings, and are the basis of the Motion for Summary Judgment.

To win a motion to dismiss, all of the allegations in the Complaint or Counterclaim must be taken as true and nonetheless be insufficient to warrant a finding against the movant. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1027 (Fed. Cir. 1999). Dismissal for insufficiency is appropriate only if it appears certain that the plaintiff is entitled to no relief under any set of facts that could be proved in support of its claim. *Cineplex Odeon Corp. v. Fred Wehrenberg Circuit of Theaters*, 56 USPQ2d 1538 (TTAB 2000); TBMP 503.02

In a motion for summary judgment, for the movant to win, there must be no question of material fact and those facts, when viewed in a light most favorable toward the party defending against the motion, must nonetheless warrant judgment in favor of the movant. FRCP 56; TBMP 528.0; *1 T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879, 1881 (Fed. Cir. 1996).

A. CWI's counterclaim fails to state a cause of action.

Allegations of Use, Date of First Use and Nature of Claim. CWI failed to allege in its counterclaim that its COMFORT oval mark was 1) used in commerce or 2) the date of first such

use in commerce, as required by the trademark Act. CWI's only references to dates of use are in paragraphs 25 and 26 of its counterclaim. In paragraph 25 it alleges that CWI has been using the mark "...since at least 1985 in conjunction with the following goods: ...," whereupon CWI lists its uses from its registration application. In paragraph 26, CWI alleges "widespread and continuous use of the mark in conjunction with the above-referenced goods since at least 1985."

15 USC §1064 states in part, "A petition to cancel a registration of a mark, stating the grounds relied upon, ..." (emphasis added). CWI fails to allege the grounds relied upon to justify cancellation of Champion's marks. CWI's counterclaim (or CWI's answer for that matter) never makes any allegation that the COMFORT oval mark was "in use" in interstate, territorial, or foreign commerce. If the mark has not been used in a manner over which Congress may regulate, the USPTO and the TTAB specifically, would have no jurisdiction to hear this matter. Therefore, CWI has failed to properly allege facts giving rise to jurisdiction by the TTAB.

Nor does CWI allege a date for first use of its mark in interstate, territorial, or foreign commerce. If there is no date of first use in a manner over which Congress may exercise control, there is no claim CWI could win, since it cannot claim earlier date of first use than the Champion Comfort marks.

The power of the federal government to register marks comes from the commerce clause of the Constitution. Section 1 of the Trademark Act, 15 U.S.C. §1051, TMEP 901.01. "Commerce," means all commerce which may lawfully be regulated by Congress. 15 USC §1127. The term "Trademark" means any word, symbol, ... or any combination ... used by any person ... in commerce and applies to register on the principal register established by this chapter" 15 USC §1127. The scope of federal trademark jurisdiction is commerce that may be regulated by the United States Congress. TMEP 901.03. A plaintiff must plead ... priority of

use. In order to properly assert priority, a plaintiff must allege facts showing proprietary rights in its pleaded mark that are prior to defendant's rights in the challenged mark. Such rights may be shown by, ... prior trademark or service mark use... TBMP 309.03(c)(A).

CWI is alleging that its COMFORT oval mark, which is not a registered mark, as the basis for its counterclaim. CWI fails to allege prior use of the mark or a date that the mark was first in use in interstate, territorial or foreign commerce. Absent such a date, the counterclaim is fails to state essential elements necessary to prevail. Even if all of the allegations in CWI's Counterclaim were true, they would state sufficient allegations to be the basis for a cancellation for Champion's COMFORT marks.

Likewise, CWI has failed to allege the grounds for the claim. There are numerous grounds for seeking cancellation of a registered mark, including an allegation that a mark generic, that it creates a likelihood of confusion, that it is geographically deceptive or that it lacks inherent distinctiveness or is merely descriptive. The counterclaim states no such grounds. "... a plaintiff must also plead ... statutory ground or grounds for opposition or cancellation. TBMP 309.03(c). Such pleading such grounds is statutory and cannot be ignored.

As such, the counterclaim as plead is fatally defective. It fails to set forth 1) use in commerce, 2) priority or 3) grounds. Therefore it fails to set forth a claim upon which relief may be granted, even if all of the allegations in the counterclaim are taken as true.

B. The Champion Marks are essentially incontestable.

A petition to cancel a mark must plead a "real interest," which requires CWI to allege a "direct and personal stake' in the outcome of the proceeding," and "...allegations that support of plaintiff's belief of damage must have a reasonable basis 'in fact.'" TBMP 309.03(b). Tthe

belief of damage alleged by plaintiff must be more than a subjective belief.” *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); TBMP 309.03.

The Champion trademark COMFORT 365 is already an incontestable mark. (See Affidavit Exhibit 1). The two Champion marks for which CWI is attempting to cancel the registration are COMFORT 365 WINDOWS (with WINDOWS disclaimed) and COMFORT 365 DOORS (with DOORS disclaimed). (See Affidavit Exhibits 2 & 3).

The terms “WINDOWS” and “DOORS,” used in connection with windows and doors, are both generic. They are therefore not susceptible to registration by themselves and must be disclaimed when included as part of a trademark. Generic terms are terms that the relevant purchasing public understands primarily as the common or class name for the goods or services. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1811 (Fed. Cir. 2001); *In re Am. Fertility Soc'y*, 188 F.3d 1341, 1346, 51 USPQ2d 1832, 1836 (Fed. Cir. 1999). These terms are incapable of functioning as registerable trademarks denoting source, and are not registerable on the Principal Register under §2(f) or on the Supplemental Register. TMEP 1209.01(c).

CWI has chosen not to make a claim for cancellation of the COMFORT 365 mark, presumably because it can't, since COMFORT 365 is incontestable. Therefore, if COMFORT 365 is incontestable, and the disclaimed component is generic, there is no actual relief available to CWI.

What damages can CWI allege that may be remedied by a cancellation? What possible value can be had from this counterclaim seeking to cancel the COMFORT 365 WINDOWS and DOORS marks, when Champion may continue using COMFORT 365 windows or COMFORT 365 doors? In order to bring a claim for trademark cancellation, the party seeking cancellation

must establish standing. Standing is “a threshold inquiry directed solely to establishing interest of the party.” Sunrich Food Group, Inc. v Pacific Foods or Oregon, Inc. 233 F.Supp.2d 1273, 1277 (D.C. Oregon, 2002). In order to have standing to assert a cancellation claim against a trademark, a petitioner must show “a real and rational basis for its belief that it would be damaged by the registration sought to be cancelled, stemming from an actual commercial or pecuniary interest in [its] own mark.” Sunrich Food Group, Inc. v Pacific Foods or Oregon, Inc. 233 F.Supp.2d 1273, 1277-1278 (D.C. Oregon, 2002), citing Star–Kist Foods, Inc. v. P.J. Rhodes & Co., 735 F.2d 346, 349 (9th Cir.1984).

Ultimately, it is not the words DOORS or WINDOWS to which CWI objects, but the word COMFORT, as part of Champion’s mark. With no challenge available for the incontestable mark COMFORT 365, CWI’s counterclaim becomes limited to challenging disclaimed generic components. Cancellation of those marks will afford CWI neither relief nor damages nor any benefit. Champion will continue to have the registered mark COMFORT 365. Champion will continue to use COMFORT 365 Windows and COMFORT 365 Doors.

Clearly, CWI can not to demonstrate a “real interest” in the claim it makes. The allegations that support a belief of damage must have a reasonable basis “in fact.” TBMP 309.03(b). Given these facts, if CWI can show no real interest in the cancellation proceeding, the counterclaim fails to meet the minimum requirements for maintaining a cancellation proceeding.

The counterclaim should therefore be dismissed since no substantive relief is possible.

C. CWI’s counterclaim is barred by contractual estoppel.

CWI alleges in its Counterclaim that it has used the CWI COMFORT mark since at least 1985. For the purposes of this argument, Champion will take that allegation as true. Fifteen years later, in 2010, CWI wrote a cease and desist letter to Champion, claiming that it had

exclusive rights to use the mark COMFORT in its New York market area for windows and doors. (Affidavit, paragraphs 13-15).

Counsel for the parties discussed the matter and, in reasonably short order, reached an agreement. Champion agreed that it would: 1) not use the marks COMFORT 365 DOORS or COMFORT 365 WINDOWS within the CWI's New York market areas; and 2) it would always associate the COMFORT 365 mark with the name Champion. In return, CWI would take no action against Champion's trademarks. (Affidavit, paragraphs 16-18).

Champion immediately made the changes to which Champion and CWI had orally agreed. Undertaking to produce local ads and spots for a particular geographic area was a time consuming and laborious undertaking. (Affidavit, paragraphs 21-23). As of the date of this motion, Champion continues to live up to the terms of that agreement it made with CWI. (Affidavit, paragraphs 19, 20).

However, the parties were never able to place the agreement into a written agreement. Champion submitted several drafts of an agreement to CWI, setting out the terms to which the parties agreed. There was never a dispute on the issue of how Champion would use the marks in CWI's market area. However, each time CWI returned Champion's drafts with additions that were not part of the discussions between the parties. CWI added language that stated that Champion would not oppose registration of CWI's COMFORT marks in the USPTO, an issue that was never raised nor discussed until it was placed in the draft. (Affidavit, paragraphs 24-27).

The parties were never able get beyond that issue. CWI would put the language in and Champion would remove it. In the end, Champion concluded that no written version of the agreement could be reached. Champion finally sent the October 26, 2011 email to CWI (Affidavit, paragraph 28, 30). In the email, Champion reiterated that it appeared that no written

agreement could be reached, but that the verbal agreement was in place, and that Champion was abiding by it and would continue to do so. CWI never responded. (Affidavit, paragraph 31).

CWI agreed to the terms and that it would take no action against Champion if Champion made its requested changes with regard to the COMFORT 365 marks. Champion no longer uses COMFORT 365 WINDOWS or COMFORT 365 DOORS in CWI's New York market area, and always associate its name "Champion" with the COMFORT 365 mark.

The parties have an enforceable oral agreement. An oral agreement, even one that might otherwise violate the Statute of Frauds, is valid and enforceable if one party alters its position to its detriment in reliance on the contract. The Statute of Frauds affects only executory and not executed contracts. *Last Time Beverage Corp. v. F & V Distribution Co., LLC.*, 2010-30480 (Supreme Court, Nassau County February 25, 2010) (citing *Schenley Distillers Corp. v. RC Williams & Co.*, 64 N.Y.S.2d 561 (Supreme Court, New York County 1946)); *Green v. Le Beau*, 281 A.D. 836 (2d Dept. 1953) (statute of frauds did not vitiate oral partnership agreement that had been wholly or partially executed).

When Champion changed its method for advertising in CWI's market area, it fulfilled its agreement with CWI. Such a change is not a minor manner for a company advertising in 40 states. The change required Champion to create marketing material for CWI's market areas that were different from the marketing materials used by Champion elsewhere around the country.

Champion has executed its obligations under the agreement and continues to do so in reliance of CWI's promise not to take action against the Champion Marks. Now, CWI has now taken action against Champion by filing a counterclaim seeking to cancel the registration of the same marks that were the central to the prior agreement. By making the claim for cancellation,

CWI is breaching its oral agreement with Champion, after Champion has complied in full with its obligations under the same agreement.

Contractual estoppel applies where CWI is contractually estopped from making a counterclaim seeking cancellation of the COMFORT 365 WINDOWS mark or the COMFORT 365 DOORS mark. For these reasons, CWI's counterclaim is barred by contractual estoppel and should be dismissed.

D. CWI's counterclaim is barred by equitable estoppel.

CWI has filed its Counterclaim against the Champion marks, not based on the mark opposed in the Opposition, but based on the COMFORT oval mark. The mark is presently pending in the PTO (Serial No. 85402235). At present the mark is on suspension, due to this Opposition.

However, prior to the suspension, the attorney examiner refused registration for the reason that the mark would cause a likelihood of confusion with eight previously registered marks, including the three Champion COMFORT marks. (Affidavit, paragraphs 32-34). CWI responded to the Office Action refusal with a reply brief. In the reply brief, CWI argued that there was no likelihood of confusion between its COMFORT oval mark and the other marks cited by the examining attorney, including the Champion marks. (Affidavit, paragraph 35).

Before the examining attorney could make a determination the matter was placed on suspension due to this Opposition.

If CWI's counterclaim is one of likelihood of confusion, CWI has argued to the attorney examiner a position diametrically opposed to the allegations set forth in the counterclaim. As such, CWI is equitably estopped from asserting "likelihood of confusion," if that is to be CWI's claim.

‘There is a kind of evidential estoppel which, though it may not amount to a complete estoppel in pais, is raised when persons who have spoken or acted one way under one set of circumstances, and with one objective in mind, undertake under other circumstances and when their objective has changed, to testimonially give a different color to what they formerly said and did. We think that principle applies here.’ *Holly Hill Citrus Growers' Ass'n v. Holly Hill Fruit Products, Inc.*, 5 Cir. 1935, 75 F.2d 13 as cited in *Pacific Supply Co-op. v. Farmers Union Central Exchange Inc.* 318 F.2d 894, 137 U.S.P.Q. 835.

The Pacific Supply court went on to say that, “... Pacific must say now what in effect it said, and enabled National to say, then.” *Pacific Supply Co-op*, supra 318 F.2d at 907. The same is true in the instant matter. CWI cannot claim there is no “likelihood of confusion” between its COMFORT oval mark and Champion’s COMFORT marks before the trademark examining attorney and then argue, before the TTAB, that there is a “likelihood of confusion” pertaining to the same marks. CWI is equitably estopped from asserting the Counterclaim.

V. CONCLUSION

For all or the forgoing reasons, Opposer asks that its motion be granted and that CWI’s counterclaim be dismissed.

Respectfully submitted,

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Certificate of Service

The forgoing Motion and Brief in Support were duly served on CWI counsel:

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By regular US Mail and by electronic service at frankelp@bsk.com on the _____ day of
_____, 2013.

William S. Wyler
Hallie S. Borellis