IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FLEXI-MAT CORPORATION, an Illinois corporation,

Plaintiff,

v.

DALLAS MANUFACTURING COMPANY, INC., a Texas corporation, and **BJ'S WHOLESALE CLUB, INC.**, a Delaware corporation, and **DOSKOCIL MANUFACTURING COMPANY, INC.**, a Texas corporation,

Defendants.

AND RELATED COUNTERCLAIMS

Civil Action No. 04 10162 DPW

PLAINTIFF FLEXI-MAT CORPORATION'S REPLY TO THE COUNTERCLAIM OF DEFENDANT BJ'S WHOLESALE CLUB, INC.

Plaintiff Flexi-Mat Corporation ("Flexi-Mat") hereby replies to the Counterclaim of defendant BJ's Wholesale Club, Inc. ("BJ's Wholesale Club").

Parties

30. BJ's Wholesale Club is a corporation duly organized and existing under the laws of the State of Delaware, having a place of business in Natick, Massachusetts.

Reply:

Flexi-Mat admits, upon information and belief, that BJ's Wholesale Club is a corporation duly organized and existing under the laws of the state of Delaware, with a place of business in Natick, Massachusetts.

31. On information and belief, Flexi-Mat is a corporation organized under the laws of the State of Illinois, having a place of business in Chicago, Illinois.

Reply:

Admitted.

Jurisdiction

32. Contingent on the main claim, this Court has supplemental jurisdiction over this counterclaim pursuant to 28 U.S.C. §§ 1367, 2201 and 2202. This counterclaim asserts an action for declaratory judgment of invalidity of claims 1 through 11 of U.S. Patent No. 5,765,502 ("the '502 patent") and non-infringement of those claims by Counter-Claimant BJ's Wholesale Club.

Reply:

Flexi-Mat admits that this court has supplemental jurisdiction of this Counterclaim pursuant to 28 U.S.C. §§ 1367, 2201 and 2202. Flexi-Mat further admits that this Counterclaim purports to assert an action for declaratory judgment of invalidity of claims 1 through 11 of the '502 Patent and non-infringement of those claims by BJ's Wholesale Club, but denies that the Counterclaim has merit.

Facts

33. Counter-Defendant Flexi-Mat's First Amended Complaint alleges that Counter-Claimant BJ's Wholesale Club has infringed, has induced others to infringe, and/or has committed acts of contributory infringement of one or more claims of the '502 patent by offering for sale and selling pet beds under the name "Berkeley & Jensen Premium Quality Bolster Pet Bed" supplied to Counter-Claimant BJ's Wholesale Club by Dallas Manufacturing and Doskocil, as shown in Exhibits B and C of the First Amended Complaint.

Reply:

Admitted.

34. In its First Amended Complaint, Counter-Defendant Flexi-Mat alleges that it is the owner of the '502 patent.

Reply:

Admitted.

35. Counter-Claimant BJ's Wholesale Club denies that any of its activities involving any pet beds supplied by Defendants Dallas Manufacturing or Doskocil have infringed any valid claim of the '502 patent.

Reply:

Flexi-Mat admits that BJ's Wholesale Club denies that its activities have infringed any

claim of the ‘502 Patent, but Flexi-Mat continues to disagree.

Counterclaim for Declaration of Invalidity, Unenforceability and Non-Infringement of U.S. Patent No. 5,765,502

36. Counter-Claimant BJ’s Wholesale Club repeats and realleges each and every allegation contained in paragraphs 30 to 35 above as though fully set forth herein.

Reply:

Flexi-Mat repeats and realleges each and every reply to paragraphs 30 through 35 above as if fully set forth herein.

37. Upon information and belief, each and every claim of the ‘502 patent is invalid and/or unenforceable under one or more provisions of the Patent Laws, including, without limitation, 35 U.S.C. §§ 101, 102, 103 and 112.

Reply:

Denied.

38. Counter-Claimant BJ’s Wholesale Club alleges that none of its activities involving any pet beds supplied to Counter-Claimant BJ’s Wholesale Club by Dallas Manufacturing or Doskocil constitute direct infringement, contributory infringement, or inducement of infringement of any claims of the '502 patent, either literally or under the doctrine of equivalents.

Reply:

Flexi-Mat admits that BJ’s Wholesale Club alleges that its activities do not constitute direct infringement, contributory infringement or inducement of infringement of any claims of the ‘502 Patent, either literally or under the doctrine of equivalents, but Flexi-Mat continues to disagree.

DEFENSES

1. Each cause of action alleged in the Counterclaim fails to state a claim upon which relief may be granted.

2. Each and every claim of the ‘502 Patent is valid.

3. BJ’s Wholesale Club infringes one or more claims of the ‘502 Patent.

WHEREFORE, Plaintiff and Counter-Defendant Flexi-Mat prays that the Court enter judgment in its favor and against Defendant and Counter-Plaintiff BJ's Wholesale Club, granting the following relief:

A. Dismiss each Counterclaim with prejudice;

B. Award Flexi-Mat its relief sought in its original Complaint; and

C. Award Flexi-Mat its reasonable attorneys' fees, interest, costs and such other relief as the Court may deem just and equitable.

Dated: October 13, 2004

s/ Larry L. Saret
Larry L. Saret (*pro hac vice*)
Manotti L. Jenkins (*pro hac vice*)
MICHAEL BEST & FRIEDRICH LLP
401 N. Michigan Avenue, Suite 1900
Chicago, Illinois 60611-4274
Telephone: (312) 222-0800
Facsimile: (312) 222-0818

John J. Cotter (BBO # 554524)
William A. Meunier
TESTA, HURWITZ & THIBEAULT, LLP
125 High Street
Boston, Massachusetts 02110
Telephone: 617-248-7000
Facsimile: 617-248-7100

Attorneys for Plaintiff,
FLEXI-MAT CORPORATION