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

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U.S. Trademark Application No.: 77/329,997

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

PIONEER FAMILY BRANDS, INC.,

Opposer,

v.

TROPICAL SNOWBALL,

Applicant.

Opposition No. 91187879

MEMORANDUM OF POINTS AND AUTHORITIES
SUPPORTING OPPOSER'S MOTION FOR SUMMARY JUDGMENT

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MEMORANDUM OF POINTS AND AUTHORITIES
SUPPORTING OPPOSER'S MOTION FOR SUMMARY JUDGMENT

Opposer, Pioneer Family Brands, Inc. (hereinafter "Pioneer") shall demonstrate below that the available and indisputable facts of this case support a finding of likelihood of confusion between Pioneer's TROPICAL SNO mark and the TROPICAL SNOWBALL mark applied for by Applicant, Tropical Snowball. The Trademark Trial and Appeal Board (hereinafter "Board") should readily determine that summary judgment in favor of Pioneer is appropriate and, as such, registration of Applicant's application for the TROPICAL SNOWBALL mark must be denied.

I. FACTS

A. Pioneer Has a Strong Trademark

Pioneer is a leading seller of shaved ice, and flavorings and toppings for shaved ice in the United States and abroad. Pioneer offers an extensive line of authentic-tasting flavorings for its shaved ice. *See*, Exhibit A attached hereto, Declaration of Donald Griffiths (hereinafter "Griffiths Dec."), ¶¶ 3-4. The market leadership enjoyed by Pioneer is founded on the fact that since 1983, Pioneer has offered and continues to offer high quality, innovative, and great tasting shaved ice products. *See*, Exhibit A, Griffiths Dec. ¶ 4.

Pioneer uses the TROPICAL SNO trademark, along with other trademarks, to market and sell its shaved ice products. The specific trademark which is most relevant to the current proceeding is outlined in more detail below.

i) TROPICAL SNO Mark

Pioneer is the owner of U.S. Trademark Registration No. 1,359,508, for the mark TROPICAL SNO, for use in connection with "flavored shaved ice and flavorings for shaved ice" in International Class 30. Pioneer is currently using and has continuously used through its predecessor in

interest the mark TROPICAL SNO in Registration No. 1,359,508 in interstate commerce since at least as early as June of 1983. *See*, Exhibit A, Griffiths Dec. ¶ 5.

As a result of its efforts, Pioneer has built up substantial goodwill in its TROPICAL SNO mark, which is used in connection with products marketed and sold nationwide through brick and mortar retail outlets, and also through mobile retail outlets, including, without limitation, kiosks, trailers, carts, huts and the like. *See*, Exhibit A, Griffiths Dec. ¶ 7. Pioneer's mobile retail outlets are typically located in high foot traffic areas, including, but not limited to, stadiums featuring sporting and/or cultural events, city streets, parks, shopping centers, malls, schools, fairs, festivals, amusement parks, fundraising events and the like. *See*, Exhibit A, Griffiths Dec. ¶ 8. In addition, as part of its marketing efforts, Pioneer, together with its dealers, operates various websites, for example, at the URLs www.tropicalsno.com, www.pioneerfamilybrands.com, and www.tropicalsnotx.com where product and sales information is provided to potential customers.

Pioneer has literally expended hundreds of thousands of dollars and considerable time in the promotion and advertising of its TROPICAL SNO products. *See*, Exhibit A, Griffiths Dec. ¶ 6. Pioneer's marketing efforts have and are continuing to successfully develop a loyal customer following and valuable brand identity for Pioneer's products. *See*, Exhibit A, Griffiths Dec. ¶ 6.

B. Applicant Has Provided Sufficient Facts Establishing Confusion

On November 15, 2007, Applicant filed a U.S., intent-to-use trademark application (Application Serial No. 77/329,997) to register the mark TROPICAL SNOWBALL for "shaved ice and shaved ice based desserts combined with fruit nuts, cereal, candy, cookies, ice cream, and soy based products; frozen yogurt and frozen yogurt desserts combined with nuts, cereal,

fruit, candy and shaved ice; ice cream; beverages made of coffee; beverages made of tea; chocolate food beverages not being dairy-based or vegetable based; cocoa beverages with milk; coffee flavored syrup used in making food beverages; coffee-based beverages containing milk; flavorings for beverages; grain-based beverages; grain-based food beverages; herbal food beverages; mixes in the nature of concentrates, syrups or powders used in the preparation of tea based beverages; prepared cocoa and cocoa-based beverages; tea-based beverages with fruit flavoring; and candy” in International Class 30 (hereinafter the “’997 App.”). Subsequently, on November 11, 2008, the ’997 App. was published for opposition. *See*, Exhibit B attached hereto, copy the record of the ’997 App. from the U.S. Patent and Trademark Office TARR web server. Pioneer filed its Notice of Opposition on December 3, 2008.

As part of its responses to Opposer’s discovery requests, Applicant has stated that it intends to market its product “through word of mouth and foot traffic and the internet along with potential public relations blitz.” *See*, Exhibit C attached hereto, Applicant’s Responses to Interrogatories and Requests for Production of Documents (hereinafter “Responses to Interrogatories”), Responses to Interrogatories No. 3.

II. ARGUMENT

A. Summary Judgment Is Appropriate

The Federal Rules of Civil Procedure generally apply to proceedings before the Trademark Trial and Appeal Board. *See*, 37 C.F.R. §2.116(a). Therefore, on a motion for summary judgment, the Board may render judgment for the moving party if there is no genuine issue as to any material fact. *See*, Fed.R.Civ.P. 56(c). Further, a party may move for summary judgment in its favor regarding all asserted claims, or any part thereof. *See*, Fed.R.Civ.P. 56(a). In *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 222 U.S.P.Q. 741 (Fed. Cir. 1984),

the Federal Circuit affirmed the Board's grant of summary judgment in an opposition proceeding, explaining that the "basic purpose of summary judgment is one of judicial economy." *Id.* at 743 (citing *Exxon Corp. v. National Food Line Corp.*, 198 U.S.P.Q. 407, 408 (C.C.P.A. 1978)). It is against public interest to conduct unnecessary trials, and where the time and expense of a full trial can be avoided by the summary judgment procedure, such action is favored. *See, Pure Gold*, 222 U.S.P.Q. at 743. The court encouraged the disposition of matters before the Trademark Trial and Appeal Board by summary judgment:

The practice of the U.S. Claims Court and of the former U.S. Court of Claims in routinely disposing of numerous cases on the basis of cross-motions for summary judgment has much to commend it. The adoption of a similar practice is to be encouraged in inter partes cases before the Trademark Trial and Appeal Board, which seem particularly suitable to this type of disposition. Too often we see voluminous records which would be appropriate to an infringement or unfair competition suit but are wholly unnecessary to resolution of the issue of registrability of a mark.

Id. at 744, n.2. *See also, Sweats Fashions, Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 U.S.P.Q.2d 1793, 1795 (Fed. Cir. 1987) (lauding the use of summary judgment to resolve Board proceedings).

The burden of a party moving for summary judgment is met by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). When the moving party shows that there is no genuine issue of material fact, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleadings." Fed.R.Civ.P. 56(e). It must respond, setting "forth specific facts showing that there is a genuine factual issue for trial." *Id.* A factual dispute is genuine only if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the nonmoving party. *See, Lloyd's Food Products, Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 U.S.P.Q.2d 2027 (Fed. Cir. 1993).

The sole issue for the Board's determination is whether any disputed facts remain with regard to the likelihood of confusion between the parties' marks. "Whether a likelihood of confusion exists is a question of law, based on underlying factual determinations." *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351 (Fed. Cir. 2000); *Sweats Fashion*, 4 USPQ2d at 1797 (stating, "The uniform precedent of this court is that the issue of a likelihood of confusion is one of law.").

The determination of whether there is a likelihood of confusion between Pioneer's TROPICAL SNO trademark and Applicant's TROPICAL SNOWBALL mark is a question of law appropriate for disposition on summary judgment. In this case, it is clear that there can be no genuine issue of material fact concerning the similarity of the marks in question, the relatedness of the respective goods, and relatedness of the trade channels used by the parties. Accordingly, an analysis of the undisputed facts under the law strongly favors a finding of a likelihood of confusion between Pioneer's TROPICAL SNO trademark and Applicant's TROPICAL SNOWBALL mark.

B. Applicant's TROPICAL SNOWBALL Mark Is Likely to Cause Confusion with Pioneer's TROPICAL SNO Mark

Section 2(d) of the Lanham Act provides that registration of a trademark should be refused if the mark "so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, to cause mistake, or to deceive . . ." 15 U.S.C. §1052(d). The registration and use of Applicant's TROPICAL SNOWBALL mark is likely to cause confusion, to cause mistake, or to deceive consumers and potential consumers, particularly as to the source or origin of the goods with which Applicant intends to use its mark. Registration and/or use of Applicant's TROPICAL

SNOWBALL mark may induce purchasers to believe that Applicant's goods are those of Pioneer, or endorsed by Pioneer, or in some way affiliated or associated with Pioneer.

The court has listed a number of factors that may be considered when analyzing the likelihood of confusion under Section 2(d) of the Lanham Act. *See, In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973). These factors include:

1. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.
2. The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
3. The similarity or dissimilarity of established, likely-to-continue trade channels.
4. The conditions under which sales are made, *i.e.*, "impulse" versus careful, sophisticated purchasing.
5. The fame of the prior mark (sales, advertising, length of use).
6. The number and nature of similar marks in use on similar goods.
7. The nature and extent of any actual confusion.
8. The duration and circumstances of concurrent use without evidence of actual confusion.
9. The variety of goods on which a mark is or is not used (house mark, "family" mark, product mark).
10. The mark interface between applicant and the owner of a prior mark:
 - a) a mere "consent" to register or use;
 - b) agreement provisions designed to preclude confusion, *i.e.*, limitations on continued use of the marks by each party;
 - c) assignment of mark, application, registration and good will of the related business; and
 - d) laches and estoppel attributable to owner of prior mark and indicative of lack of confusion.
11. The extent to which applicant has a right to exclude others from use of its mark on its goods.
12. The extent of potential confusion, *i.e.*, whether *de minimis* or substantial.
13. Any other established fact probative of the effect of use.

Id. at 567. As outlined below, a review of the applicable *DuPont* factors reveals that there are no genuine disputes of material facts and that a likelihood of confusion exists between Opposer's TROPICAL SNO mark and Applicant's TROPICAL SNOWBALL mark.

Accordingly, Applicant's TROPICAL SNOWBALL mark should be denied registration.

1. Pioneer's Mark and Applicant's Mark Are Very Similar

The standard for determining the similarity of marks involves evaluating the similarities in sight, sound and meaning. Similarities in any one of these three components may suffice for the marks to be deemed confusingly similar. *In re Swan, Ltd.*, 8 U.S.P.Q.2d 1534, 1535 (T.T.A.B. 1988); *In re Lamson Oil Co.*, 6 U.S.P.Q.2d 1041, 1042 n.4 (T.T.A.B. 1987). While marks must be compared in their entireties, one feature may be more significant in creating a commercial impression. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 U.S.P.Q.2d 1531 (Fed. Cir. 1997).

Applicant's TROPICAL SNOWBALL mark and Pioneer's TROPICAL SNO mark are very similar in sight, sound, and commercial meaning. Specifically, both marks comprise two words, the first word in both marks being identical, and the second words both beginning with "sno," i.e., sno and snowball, both of which immediately bring to mind thoughts of some form of snow.

Essentially, the only substantive difference between the marks is that Applicant has added the word "ball" to the end of Pioneer's mark. Generally, a likelihood of confusion is not avoided between otherwise confusingly similar marks merely by the junior user adding a descriptive or weak element to the senior user's mark, and the dominant portion of both marks remains the same. *See, e.g., Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Chatam International Inc.*, 380 F.3d 1340, 1343, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) ("Viewed in their entireties with non-dominant features appropriately discounted, the marks [GASPAR'S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical").

Likewise, in the present case, Applicant's mark encompasses Pioneer's mark in its entirety. Although, Applicant adds the letter "w" to the word "sno," the general sight, sound and meaning of this term remains unchanged. Moreover, Applicant is merely adding the suggestive or descriptive term "ball" to end of Pioneer's mark. The term "ball" is suggestive, if not descriptive, of Applicant's intended goods, since Applicant's goods admittedly include "finely shaved ice in the form of [a] sphere" or in other words, in the form of a ball. *See*, Exhibit D attached hereto, Copy of Applicant's Sept. 8, 2008 Response to Office Action submitted during Discovery by Applicant; *See*, Exhibit E attached hereto, copies of online dictionary definitions wherein the word "ball" is defined as a *spherical* object (a declaration setting forth that these exhibits are true and correct copies is included with this Motion for Summary Judgment). When the descriptive word "ball" is discounted appropriately, the marks TROPICAL SNO and TROPICAL SNOWBALL become virtually identical.

In addition, when either the word "snowball" or "sno" is used in combination with the word "tropical," it creates an oxymoron since "tropical" denotes a hot and humid climate that never experiences weather featuring snow, and thus snowballs. The oxymoron resulting from the mark TROPICAL SNO is virtually identical to the oxymoron resulting from the mark TROPICAL SNOWBALL, and thus, each of the respective marks creates the exact same commercial impression. *See, e.g., In re Dr. Mitchell Swartz*, 2002 TTAB LEXIS 215 (TTAB 2002) (stating that the important question was whether the compared marks create the same commercial impression and that "[t]he test is not whether the marks can be distinguished in a side-by-side comparison, but whether they are sufficiently similar in their overall commercial impression so that confusion as to the source of goods marketed under the respective marks is likely to result").

Based on the above, no reasonable fact finder would disagree that the entireties of the respective marks are highly similar in sight and sound, and identical in commercial meaning. Accordingly, this factor weighs heavily in favor of Pioneer.

2. Applicant's Goods and Pioneer's Goods are Virtually Identical

It is well established that the more similar or closely related the goods or services, the greater the likelihood of confusion. *See, Exxon Corp. v. Texas Motor Exch. of Houston, Inc.*, 628 F.2d 500, 505, 208 U.S.P.Q. 384, 388 (5th Cir. 1980). Moreover, the more closely related the goods or services of respective marks, the more the showing needed under the remaining likelihood of confusion factors is reduced. *See, Banff, Ltd. v. Federated Dep't Stores, Inc.*, 6 U.S.P.Q.2d 1187, 1192 (2d Cir. 1988). The test for proximity of the goods or services is only that they be "similar in use and function." *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 204 U.S.P.Q. 808, 815 (9th Cir. 1979).

The goods associated with Applicant's TROPICAL SNOWBALL mark are closely related, if not identical, to Pioneer's goods. Applicant describes its goods as "*shaved ice and shaved ice based desserts* combined with fruit nuts, cereal, candy, cookies, ice cream, and soy based products; frozen yogurt and frozen yogurt desserts combined with nuts, cereal, fruit, candy and shaved ice; ice cream; beverages made of coffee; beverages made of tea; chocolate food beverages not being dairy-based or vegetable based; cocoa beverages with milk; coffee flavored syrup used in making food beverages; coffee-based beverages containing milk; flavorings for beverages; grain-based beverages; grain-based food beverages; herbal food beverages; mixes in the nature of concentrates, syrups or powders used in the preparation of tea based beverages; prepared cocoa and cocoa-based beverages; tea-based beverages with fruit flavoring; and candy" (emphasis added). *See, Exhibit B, copy of the record of the '997 App.*

obtain from the U.S. Patent and Trademark Office TARR web server. Pioneer describes its goods in similar terms, for example, “flavored shaved ice and flavorings for shaved ice.” *See*, Exhibit A, Griffiths Dec. ¶ 5. Both Applicant’s and Pioneer’s goods can be described as cold, frozen treats or shaved ice desserts containing shaved ice as a primary ingredient combined with flavorings.

Notably, many of the other types of ingredients proposed for use in Applicant’s goods and the ingredients in Pioneer’s goods are likely to be the same, a fact expressly admitted by Applicant. *See*, Exhibit F attached hereto, Copy of Applicant’s Response to Request for Admissions, Response Nos. 15 &16. Further, both Applicant’s intended product and Pioneer’s product may contain additional ingredients to give the product a more creamy texture and taste. Specifically, Pioneer’s shaved ice is commonly combined with a non-dairy cream topping while Applicant’s products may contain vanilla ice cream. *See*, Exhibits D and G attached hereto (Exhibit D containing copy of Applicant’s Sept. 8, 2008 Response to Office Action submitted during Discovery by Applicant, and wherein Applicant describes its product as containing vanilla ice cream); (Exhibit G containing document Bates numbered PF 0008, copy of page from Pioneer’s website describing Pioneer’s vanilla flavored cream topping for use with its shaved ice product).

Based on the similarities between Applicant’s proposed goods and Pioneer’s goods, and the respective descriptions of both, Pioneer has comfortably satisfied its burden with respect to this factor as Applicant’s goods are either identical or at least very “similar in use and function” to Pioneer’s goods. *See, AMF Inc.*, 204 U.S.P.Q. at 815. Accordingly, this factor weighs heavily in favor of Pioneer and a finding of likelihood of confusion.

3. Pioneer and Applicant Offer Their Respective Goods Through Similar Channels of Trade

It is well-established that overlapping or complimentary marketing channels increase the likelihood of confusion. *See, DuPont*, 177 USPQ at 468 (stating “The mere fact of diverse marketing emphasis alone may not in every case preclude confusion. Without more, it may well be that purchasers active in both markets and familiar with products sold under a particular mark could attribute to the same source closely related goods sold under the same mark.”).

In its Answer to the Notice of Opposition, Applicant asserts that it intends to have high end locations and to market and sell its goods associated with the TROPICAL SNOWBALL mark to “high end customer[s] accustomed to Starbucks and Pinkberry. To support this notion, Applicant further asserts that the average price of its shaved ice desserts will “be in the order of \$5.00 and as high as \$7.00.” *See*, Exhibit C, Copy of Applicant’s Answer to Notice of Opposition, Answer No. 17.

Likewise, Pioneer markets and sells its TROPICAL SNO products to about 1,000 dealers and distributors throughout the entire U.S. *See*, Exhibit A attached hereto, Griffiths Dec., ¶10. Pioneer currently has or has had dealers and/distributors in every state in the U.S. *See*, Exhibit A attached hereto, Griffiths Dec., ¶10. These dealers and distributors then proceed to sell the TROPICAL SNO shaved ice product to the general consuming public through a variety of retail outlets, including, without limitation, brick and mortar retail outlets, and also through mobile retail outlets. *See*, Exhibit A attached hereto, Griffiths Dec., ¶¶ 7, 11. At times, Pioneer’s TROPICAL SNO products are offered alongside or in the same vicinity of a variety of other frozen confections such as ice cream, frozen yogurt, popsicles, and/or sherbet. *See*, Exhibit A attached hereto, Griffiths Dec., ¶ 13.

Furthermore, the price range of Pioneer's product is similar to the anticipated price range of Applicant's product. A single serving of Pioneer's ready-to-eat shaved ice product typically costs from about \$1.50 to about \$5.00. *See*, Exhibit H, Copies of documents Bates numbered PF 0149- PF 0151 including examples of Pioneer's menus with pricing thereon, submitted by Pioneer's during Discovery. As indicated above, Applicant has indicated that the price range of its product is in the order of \$5.00 to \$7.00, which notably overlaps the price range of Pioneer's goods. Since the cost of Applicant's intended products and Pioneer's products is similar, Pioneer and Applicant likely target a similar class of consumers.

Moreover, both Pioneer and Applicant both express that their respective products either are or will be marketed via "foot traffic." *See*, Exhibits A, Griffiths Dec. ¶ 8; and Exhibit C Applicant's Responses to Interrogatories No. 3. In view of the foregoing, the channels of trade through which the parties currently do and/or intend to market and sell their respective products are highly similar, if not the same. Since Pioneer and Applicant market and sell their respective products through similar channels of trade, this factor strongly favors a finding of likelihood of confusion.

4. The Proposed Goods of Applicant and the Goods of Pioneer are Typically Purchased on Impulse

Consumers pay less attention when they purchase a product on impulse, or when purchasing inexpensive products. *E. & J. Gallo Winery v. Consorzio Del Gallo Nero*, 782 F.Supp. 457, 20 USPQ2d 1579, 1584 (N.D. Cal. 1991). When inexpensive products are purchased on impulse, the likelihood of confusion as to the source of the products increases. *Id.*; *see also*, *Helene Curtis Indus., Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). In the present case, both Pioneer's goods and Applicant's proposed goods are icy, cold, edible treats containing shaved ice marketed to average consumers. As indicated above, the available

evidence suggests that the pricing and marketing of Applicant's shaved ice dessert will be very similar to Pioneer's pricing and marketing for its TROPICAL SNO shaved ice products. Specifically, a single serving of Pioneer's ready-to-eat shaved ice product typically costs from about \$1.50 to about \$5.00. *See*, Exhibit H, Copies of documents Bates numbered PF 0149- PF 0151 including examples of Pioneer's menus with pricing thereon, submitted by Pioneer's during Discovery. Likewise, Applicant has asserted that its shaved ice desserts "will be in the order of \$5.00 and as high as \$7.00." *See*, Exhibit C, Copy of Applicant's Answer to Notice of Opposition, Answer No. 17.

In view of the foregoing, in many instances, the price range of both Applicant's product and Pioneer's product will be identical, or very similar, per serving. Importantly, the price of both parties' goods is relatively inexpensive, thus setting the stage for impulse purchasing. Given that both the goods of Pioneer and intended goods of Applicant are relatively inexpensive and purchased on impulse, this factor weighs in favor of a finding of likelihood of confusion.

5. Pioneer's TROPICAL SNO Trademark Is Entitled to Broad Protection

Pioneer has expended considerable amounts of time and expense in promoting its TROPICAL SNO trademark, and thus, Pioneer's TROPICAL SNO trademark is entitled to increased protection from other marks utilizing the term "tropical" together with a secondary term having a similar connotation to "sno." *See, J&J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991). Pioneer, through its predecessor in interest, adopted the TROPICAL SNO trademark in 1983 and has been using the mark continuously since that time on shaved ice and flavorings for shaved ice. *See*, Exhibit A, Griffiths Dec. ¶ 5.

In addition, during the past about 20 years, Pioneer has, at times, used its TROPICAL SNO mark on other related goods such as powdered water ice desserts, fruit drinks and syrups for making fruit drinks, and frozen yogurt. *See*, Exhibit A, Griffiths Dec. ¶ 12. As a result of Pioneer's use of TROPICAL SNO on various products, consumers will expect that goods in the nature of shaved ice, frozen treats and icy desserts bearing the TROPICAL SNO mark, or a confusingly similar mark such as TROPICAL SNOWBALL, are those of or are affiliated with Pioneer. Thus, Applicant's use of TROPICAL SNOWBALL on these types of products is likely to cause confusion to consumers as to the source of the goods. *See, e.g., Marion Laboratories, Inc. v. Biochemical/Diagnostics, Inc.*, 6 USPQ2d 1215 (TTAB 1988) (finding that the plaintiff's TOXI- trademarks were rightly considered a family of trademarks and that defendant's TOX-PREP mark was likely to cause confusion). Thus, this factor favors Pioneer and a finding of likelihood of confusion.

6. The Extent of Potential Confusion Is Substantial

The discussion of the previous *DuPont* factors establishes that the potential for confusion between Applicant's TROPICAL SNOWBALL mark and Pioneer's TROPICAL SNO mark is substantial. The adoption of a virtually identical, or confusingly similar mark by Applicant for use on goods that are identical to or closely related to Pioneer's goods presents at least the potential for substantial confusion. Further, the fact that goods in the nature of Applicant's goods and those of Pioneer, travel through similar channels of trade to the same class of purchasers, makes the potential for confusion substantial. Thus, this factor also favors Pioneer and denying registration of Applicant's TROPICAL SNOWBALL mark.

III. CONCLUSION

A complete analysis of the DuPont factors as applied to this opposition proceeding supports a finding by summary judgment that Applicant's TROPICAL SNOWBALL mark is likely to be confused with Pioneer's TROPICAL SNO mark. *See, e.g., Blansett Pharmacal Co. v. Carmrick Laboratories, Inc.*, 25 USPQ2d 1473 (TTAB 1992) (finding by summary judgment that NALEX was likely to be confused with NOLEX, both marks for nasal decongestants); *see also, Starbucks U.S. Brands, LLC and Starbucks Corporation d/b/a Starbucks Coffee Company v. Marshall S. Ruben*, 78 USPQ2d 1741 (TTAB 2006) (finding LESSBUCKS likely to be confused with STARBUCKS, both for retail coffee shops); *In re Chatam Intern. Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed.Cir. 2004) (finding applicant's JOSE GASPAR GOLD for tequila was likely to be confused with registration of GASPAR'S ALE for beer); *and, Mattel, Inc. v. Funline Merchandise Co., Inc.*, 81 USPQ2d 1372 (TTAB 2006) (finding RAD RIGS likely to be confused with RAD RODS, both for toy vehicles).

The admitted and indisputable facts of this case establish a likelihood of confusion between Pioneer's TROPICAL SNO trademark and Applicant's TROPICAL SNOWBALL trademark. Pioneer is the senior user and prior registrant. Pioneer is entitled to the benefit of any doubt as to a likelihood of confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 U.S.P.Q.2d 1687, 1691 (Fed. Cir. 1993); *J & J Snack Foods Corp.*, 18 U.S.P.Q.2d at 1892.

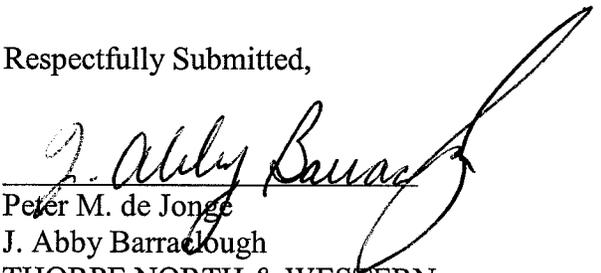
The material facts of this case require a holding that Pioneer is entitled to summary judgment based on likelihood of confusion. There are no genuine issues of material fact to be tried, and this matter should be decided as a matter of law in Pioneer's favor. For all these reasons, Pioneer respectfully urges the Board to grant this motion.

IV. REQUEST FOR SUSPENSION OF PROCEEDINGS

Pioneer hereby requests that this opposition proceeding be suspended with respect to all matters not germane to this motion pending resolution of this motion.

DATED: October 7, 2009.

Respectfully Submitted,



Peter M. de Jonge
J. Abby Barraclough
THORPE NORTH & WESTERN

Attorneys for Opposer
Pioneer Family Brands, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING OPPOSER'S MOTION FOR SUMMARY JUDGMENT was served upon Applicant by depositing a copy of the same with the United States Post Office as first class mail, postage prepaid, in an envelope addressed to:

William Hackett
Tropical Snowball
8633 West Knoll Drive, Suite 205
West Hollywood, CA 90069

Hand Delivery
 United States Mail
First Class, Postage Pre-Paid
 Overnight Delivery
 Fax Transmission

on this 8th day of October, 2009.

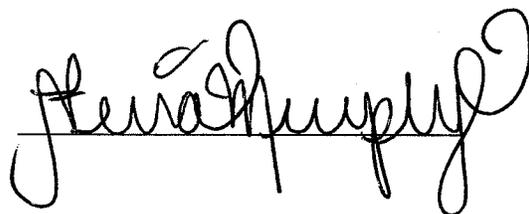
A handwritten signature in black ink, appearing to read "Steven Murphy", written over a horizontal line.

EXHIBIT A

Peter M. de Jonge
J. Abby Barraclough
THORPE NORTH & WESTERN, LLP
8180 South 700 East, Suite 350
Sandy, Utah 84070
Telephone: (801) 566-6633
Facsimile: (801) 566-0750

Attorneys for Petitioner
Mark petitioned for cancellation: TROPICAL ICE
U.S. Trademark Registration No.: 3,474,318

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

PIONEER FAMILY BRANDS, INC.,

Petitioner,

v.

EASTLAND FOOD CORPORATION

Registrant.

Cancellation No. 92050157

DECLARATION OF DONALD GRIFFITHS
SUPPORTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I, Donald Griffiths, having been warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of any application or any registration resulting there from, hereby declare as follows:

1. I am the President of Pioneer Family Brands, Inc. (hereinafter "Pioneer"). I am very familiar with Pioneer's operations, especially the trademarks and marketing activities associated with Pioneer's shaved ice, complete line of flavorings for

shaved ice, and related products such as toppings for shaved ice. All information provided within this declaration is personally known to me or is information provided to me which I believe to be true.

2. Pioneer is a corporation existing under the laws of the State of Utah and has a principal place of business at 12674 So. Pony Express Rd., #1, Draper, Utah 84020.
3. Pioneer is a market leader in the shaved ice market in the United States. Pioneer offers shaved ice and an extensive line of authentic-tasting flavorings for its shaved ice.
4. The market leadership enjoyed by Pioneer is founded on the fact that since 1983, Pioneer, partly through its predecessor in interest, has offered and continues to offer high quality, innovative and great tasting shaved ice products.
5. Pioneer is the owner of U.S. Trademark Registration No. 1,359,508, for the mark TROPICAL SNO, for use in connection with "flavored shaved ice and flavorings for shaved ice" in International Class 30. Pioneer is currently using and has continuously used, through its predecessor in interest, the mark TROPICAL SNO in Registration No. 1,359,508 in interstate commerce since at least as early as June 1983.
6. Pioneer has expended hundreds of thousands of dollars and considerable time in the promotion and advertising of its TROPICAL SNO products. Pioneer's marketing efforts have and are continuing to successfully develop a loyal customer following and valuable brand identity for the TROPICAL SNO products.

7. Pioneer's TROPICAL SNO products are sold nationwide through brick and mortar retail outlets, and also through mobile retail outlets, including, without limitation, kiosks, trailers, carts, huts and the like.
8. Pioneer's mobile retail outlets are typically located in high foot traffic areas, including but not limited to, stadiums featuring sporting and/or cultural events, city streets, parks, shopping centers, malls, schools, fairs, festivals, amusement parks, fundraising events and the like.
9. Pioneer, together with its dealers, operates various websites, for example, at the URLs www.tropical.sno.com, www.pioneerfamilybrands.com, and tropicalsnotx.com where product and sales information is provided to potential customers.
10. Pioneer markets its TROPICAL SNO products through a network of dealers and distributors. Currently, Pioneer's network consists of about 1,000 dealers and distributors throughout the United States. Pioneer currently has or has had dealers and/or distributors in every state in the United States.
11. Through its dealers and distributors, Pioneer markets and sells the TROPICAL SNO product directly to the general consuming public.
12. Pioneer, at times during the past about 20 years, has marketed and sold products other than flavored shaved ice and flavorings for shaved ice, including without limitation, powdered water ice desserts, fruit drinks and syrups for making fruit drinks, and frozen yogurt.
13. At times, Pioneer's TROPICAL SNO shaved ice products are offered alongside or in the same vicinity as a variety of frozen confections including but not limited to, ice cream, frozen yogurt, popsicles, and/or sherbet.

14. All statements herein made of my own knowledge are true and all statements made on information and belief are believed to be true.

DATED: September 9TH, 2009.

Pioneer Family Brands, Inc.



Donald Griffiths
President

EXHIBIT B

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2009-09-28 11:01:29 ET

Serial Number: 77329997 Assignment Information Trademark Document Retrieval

Registration Number: (NOT AVAILABLE)

Mark

Tropical Snowball

(words only): TROPICAL SNOWBALL

Standard Character claim: Yes

Current Status: An opposition is now pending at the Trademark Trial and Appeal Board.

Date of Status: 2008-12-04

Filing Date: 2007-11-15

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 112

Attorney Assigned:
AIKENS RONALD E

Current Location: 650 -Publication And Issue Section

Date In Location: 2008-10-08

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. Tropical Snowball, Incorporated

Address:
Tropical Snowball, Incorporated
#205 8633 West Knoll Drive

West Hollywood, CA 90069

United States

Legal Entity Type: Corporation

State or Country of Incorporation: California

Phone Number: 626.705.2180

GOODS AND/OR SERVICES

International Class: 030

Class Status: Active

Shaved ice and shaved ice based desserts combined with fruit, nuts, cereal, candy, cookies, ice cream, and soy based products; frozen yogurt and frozen yogurt desserts combined with nuts, cereal, fruit, candy and shaved ice; ice cream; beverages made of coffee; beverages made of tea; chocolate food beverages not being dairy-based or vegetable based; cocoa beverages with milk; coffee flavored syrup used in making food beverages; coffee-based beverage containing milk; flavorings for beverages; grain-based beverages; grain-based food beverages; herbal food beverages; mixes in the nature of concentrates, syrups or powders used in the preparation of tea based beverages; prepared cocoa and cocoa-based beverages; prepared coffee and coffee-based beverages; tea-based beverages with fruit flavoring; and candy

Basis: 1(b)

First Use Date: (DATE NOT AVAILABLE)

First Use in Commerce Date: (DATE NOT AVAILABLE)

ADDITIONAL INFORMATION

Disclaimer: "SNOWBALL"

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

NOTE: To view any document referenced below, click on the link to "Trademark Document Retrieval" shown near the top of this page.

2008-12-04 - Opposition instituted for Proceeding

2008-12-04 - Opposition papers filed

2008-11-11 - Published for opposition

2008-10-22 - Notice of publication

2008-10-08 - Law Office Publication Review Completed

2008-10-08 - Assigned To LIE

2008-09-27 - Approved for Pub - Principal Register (Initial exam)

2008-09-09 - Teas/Email Correspondence Entered

2008-09-08 - Communication received from applicant

2008-09-08 - TEAS Response to Office Action Received

2008-03-11 - Notification Of Non-Final Action E-Mailed

2008-03-11 - Non-final action e-mailed

2008-03-11 - Non-Final Action Written

2008-02-29 - Assigned To Examiner

2007-11-19 - New Application Entered In Tram

ATTORNEY/CORRESPONDENT INFORMATION

Correspondent

William Hackett

Tropical Snowball, Inc.

8633 West Knoll Drive Apt. 205

West Hollywood, CA 90069-4165

Phone Number: 626.705.2180

EXHIBIT C

INTERROGATORY NO. 1:

The product has been made since late summer or Fall of 2007, but has not been marketed or sold. The product is a high end shave ice dessert with delicious fruit and other toppings.

INTERROGATORY NO. 2:

Thom Uber and William Hacket. Both have created and developed the mark and came up with ideas surrounding its use.

INTERROGATORY NO. 3:

We intend to market the product through word of mouth and foot traffic and the internet along with potential public relations blitz.

INTERROGATORY NO. 4:

tropicalsnowball.com and tropicalsnowball.net

INTERROGATORY NO. 5:

High end up scale consumers with lots of disposable income. Abercrombie and Fitch as opposed to K-Mart.

INTERROGATORY NO. 6:

When notice was received from U.S.P.T.O that our application for trademark was denied.

INTERROGATORY NO. 7:

None other than this current opposition filed by Opposer.

INTERROGATORY NO. 8:

None.

EXHIBIT D

**Received Your Response To Office Action for serial number 77329997**

Monday, September 8, 2008 4:44 PM

From: "teas@uspto.gov" <teas@uspto.gov>**To:** billhacket2002@yahoo.com

We have received your Response to Office Action Form form below.

To the Commissioner for Trademarks:
Application serial no. **77329997** has been amended as follows:

ARGUMENT(S) In response to the substantive refusal(s), please note the following:

The applicant's mark, when used on or in connection with the identified goods, does not resemble the marks in U.S. Registration Nos. 1359508, 1457661, 1564938, 1564910 as to be likely to cause confusion, mistake, or to deceive. TMEP section 1207.

According to Wikipedia a **snowball** is a spherical object made from frozen water or snow, usually created by scooping snow with the hands, and compacting it into a roughly fist-sized ball. The snowball is often used to engage in games, such as snowball fights. The pressure exerted by the hands on the snow is determinant for the final result. Reduced pressure leads to a light and soft snowball. A higher pressure causes the snow to melt, turning into liquid water. Once the pressure is removed, the water turns again into ice, leading to a more compact and hard snowball called an **iceball**, which eventually can be considered harmful during a snowball fight. The process of melting and refreezing is called regelation.

A snowball may also be a large ball of snow formed by rolling a smaller snowball on a snow-covered surface. The smaller snowball grows by picking up additional snow as it rolls. The terms "snowball effect" and "snowballing" are named after this process. This technique is often used to create snowmen. **Snow** on the other hand is a type of precipitation in the form of crystalline water ice, consisting of a multitude of snowflakes that fall from clouds. The process of precipitation is called **snowfall**. (Wikipedia)
The words in question Sno and Snowball have two entirely different meanings and the words themselves would not in any way lead to confusion. The test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. These marks clearly do not create the same overall impression. A snowball is a distinct spherical object that kids throw at each other during a snowball fight. "Sno" if we take it to me snow is simply precipitation that falls from the sky. Side by side Tropical Snowball and Tropical Sno in no way create the same overall impression.

It should further be noted that there is no definition of SNO in Wikipedia because the word does not exist. According to Wikipedia the definition of SNO is The **Sudbury Neutrino Observatory (SNO)** which is a neutrino observatory located 6800 feet high.

If the goods or services of the respective parties are closely related, the degree of similarity between marks required to support a finding of likelihood of confusion is not as great as would apply with diverse goods or services. However in the instant case the products are very different in the sense that Tropical Sno is basically offering garden variety snow cones that can be found at any school fair or carnival.

The dessert offered by Tropical Snowball is a true Hawaiian Shaved ice product using distinct plastic containers and targeted to the high end customer with a lot of disposable income. It is Matsumoto's in Hawaii on steroids. The product will have a base of vanilla ice cream with finely shaved ice in the form of sphere on top of the ice cream with fruit and other delectable toppings on top of and on the side of the dessert.

The examining attorney states "Furthermore, when products are inexpensive and subject to impulse purchase, purchasers are held to a lesser standard of purchasing care and thus are considered more likely to be confused as to the source of the goods." The product being offered by Tropical Snowball is a

Hawaiian Shaved Ice treat on the model of Starbucks. The average price with toppings will be in the order of \$5.00 not the 99 cent snow cone being sold by the girl scouts or Tropical Sno at the local carnival. We intend to satisfy the discerning palate of consumers who are accustomed to Starbucks and Pinkberry not the messy snow cone thrown to a consumer on a hot summer day in a paper cup in the park.

A consumer may impulsively purchase a 25 cents cookie or ninety nine cent ice cream cone at Rite Aid, but they are not going to impulsively purchase at \$5.00 or even \$6.00 or \$7.00 shaved ice on impulse. It just is not going to happen. Consumers would in no way be confused by the upscale Tropical Snowball product that be had only at a specialty location that offers a pleasant tropical/Hawaiian environment with hip island music and scenes of surfers plastered on the walls and on videos. Think Abercrombie and Fitch.

Tropical Sno has an operation of supplying powders and products as well as rolling/stationary carts that can be set up at carnivals. It is a whole other demographic and target consumer and even if it were not there is no possibility of confusion between the authentically Hawaiian dessert we are offering and a sno cone.

Consumers are not likely to believe that the applicant's frozen desserts are produced in connection with the frozen desserts noted in the cited registration.

Disclaimer

No Claim is made to the exclusive right to use "SNOWBALL" apart from the mark as shown.

ADDITIONAL STATEMENTS

Disclaimer

No claim is made to the exclusive right to use SNOWBALL apart from the mark as shown.

Declaration Signature

If the applicant is seeking registration under Section 1(b) and/or Section 44 of the Trademark Act, the applicant had a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services as of the filing date of the application. 37 C.F.R. Secs. 2.34(a)(2)(i); 2.34 (a)(3)(i); and 2.34(a)(4)(ii). If the applicant is seeking registration under Section 1(a) of the Trademark Act, the mark was in use in commerce on or in connection with the goods or services listed in the application as of the application filing date. 37 C.F.R. Secs. 2.34(a)(1)(i). The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. §1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; that if the original application was submitted unsigned, that all statements in the original application and this submission made of the declaration signer's knowledge are true; and all statements in the original application and this submission made on information and belief are believed to be true.

Signature: /hacket/ Date: 09/08/2008

Signatory's Name: William Hacket

Signatory's Position: Vice President

Response Signature

Signature: /hacket/ Date: 09/08/2008

Signatory's Name: William Hacket

Signatory's Position: Vice President

The signatory has confirmed that he/she is not represented by either an authorized attorney or Canadian attorney/agent, and that he/she is either (1) the applicant or (2) a person(s) with legal authority to bind the applicant; and if an authorized U.S. attorney or Canadian attorney/agent previously represented him/her in this matter, either he/she has filed a signed revocation of power of attorney with the USPTO or the USPTO has granted the request of his/her prior representative to withdraw.

Thank you,
The TEAS support team
Mon Sep 08 19:44:03 EDT 2008
STAMP: USPTO/ROA-198.135.224.110-20080908194403884050-77329997-
4303e74ac6129ccd3a68a3fc0e38ec246fd-N/A-N/A-20080908193228024798

EXHIBIT E

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ball

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On Off

- 1 ball (noun)
- 2 ball (verb)
- 3 ball (noun)
- Ball (biographical name)

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ball **Go**

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Main Entry: **'ball**

Pronunciation: \ˈbɔl\

Function: *noun*

Usage: *often attributive*

Etymology: Middle English *bal*, prob from Old English **beall*; akin to Old English *bealluc testis*, Old High German *balla* ball, Old Norse *boltr*, Old English *blāwan* to blow — more at **BLOW**

Date: 13th century

1 : a round or roundish **body** or mass: as **a** : a spherical or ovoid body used in a game or sport <a tennis ball> —used figuratively in phrases like *the ball is in your court* to indicate who has the responsibility or opportunity for further action **b** : **EARTH**, **GLOBE** **c** : a spherical or conical projectile; *also* : projectiles used in firearms **d** : a roundish protuberant anatomical structure (as near the tip of a human finger or toe or at the base of a thumb); *especially* : the part of the sole of the human foot between the toes and arch on which the main weight of the body rests in normal walking

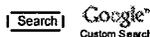
2 *a often vulgar* : **TESTIS** **b plural** (1) *often vulgar* : **NONSENSE** —often used interjectionally (2) *often vulgar* : **NERVE** **3** : a **game** in which a ball is thrown, kicked, or struck; *also* : quality of play in such a game

4 **a** : a pitch not swung at by the batter that fails to pass through the strike zone **b** : a hit or thrown ball in various games <foul ball>

— **on the ball** **1** : **COMPETENT**, **KNOWLEDGEABLE**, **ALERT** <the other introductory essay...is much more *on the ball* — *Times Literary Supplement*> <keep *on the ball*>

2 : of ability or competence <if the teacher has something *on the ball*, the pupils won't squirm much — *New Yorker*>

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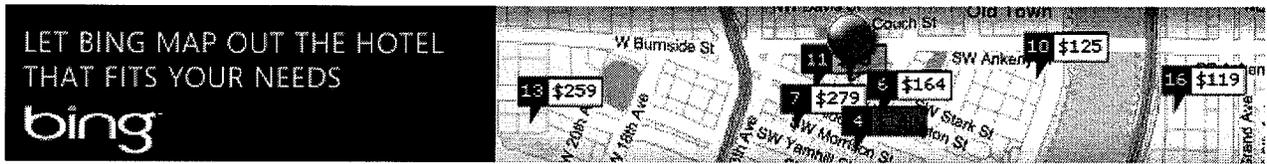
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Dictionary

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- ↑
- Balkan
- Balkan Mountains
- Balkan Peninsula
- Balkan States
- Balkanization
- balkline
- balkline billiards
- balky
- ▶ **ball (1)**
- ball (2)
- ball and chain
- ball-and-claw
- ball and socket joint
- ball bearing
- ball boy
- ball carrier
- ball clay
- ↓

ball (1)

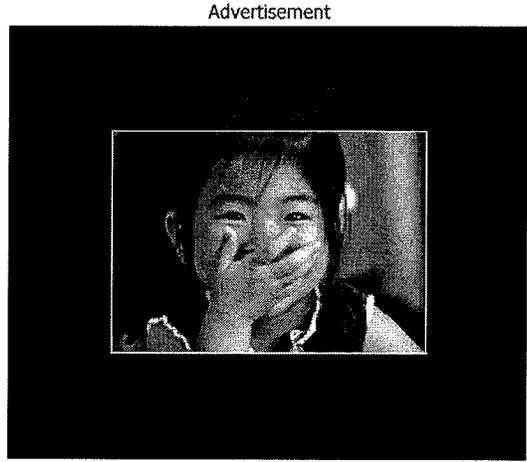
ball (1)

ball [bawl]

noun (plural balls)

Definition:

1. **round object played with:** an object, usually round in shape and often hollow and flexible, used in many games and sports in which it is thrown, struck, or kicked
2. **rounded thing:** something spherical or almost spherical, especially a spherical mass or arrangement of material
 - a ball of wool
3. **game with ball:** a game, especially one played by children, in which a ball may be thrown from one player to another in various ways
 - *Who's coming out to play ball?*
4. **ball played in particular way:** a particular use, movement, or way of transferring the ball to another player in the course of a game
 - a long ball into the end zone
5. **BASEBALL pitch that is not strike:** in



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----------------------	-----------------------------	---	---------------------------------------	---------------------------	-------------------------------

Yahoo! Education > Reference > Dictionary > ball

Definition of ball

Reference

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< balky

ball >

ball ¹ (bôl) KEY

NOUN:

1.
 - a. A spherical object or entity: *a steel ball.*
 - b. A spherical or almost spherical body: *a ball of flame.*
2. *Sports*
 - a. Any of various rounded, movable objects used in various athletic activities and games.
 - b. Such an object moving, thrown, hit, or kicked in a particular manner: *a low ball; a fair ball.*
 - c. A game, especially baseball or basketball, played with such an object.
 - d. A pitched baseball that does not pass through the strike zone and is not swung at by the batter.
3.
 - a. A solid spherical or pointed projectile, such as one shot from a cannon.
 - b. Projectiles of this kind considered as a group.
4. A rounded part or protuberance, especially of the body: *the ball of the foot.*
5. **balls** *Vulgar Slang*
 - a. The testicles.
 - b. Courage, especially when reckless.
 - c. Great presumptuousness.

VERB:

balled , ball-ing , balls

VERB:

ADVERTISEMENT




BUSINESS TRAVEL?



Word of the Day

malingering

Definition: (verb) to pretend incapacity or illness to avoid a duty or work.

Petersons.com

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EXHIBIT F

RESPONSE TO REQUEST FOR ADMISSION NO. 12: Applicant objects on the ground that this Request for Admission lacks foundation and calls for a legal conclusion as well as speculation. However, in the interest of discovery and without waiving the foregoing objections applicant responds as follows: Deny.

RESPONSE TO REQUEST FOR ADMISSION NO. 13: Applicant objects on the ground that this Request for Admission lacks foundation and calls for a legal conclusion as well as speculation. However, in the interest of discovery and without waiving the foregoing objections applicant responds as follows: Deny.

RESPONSE TO REQUEST FOR ADMISSION NO. 14: Applicant objects on the ground that this Request for Admission lacks foundation and calls for a legal conclusion as well as speculation. However, in the interest of discovery and without waiving the foregoing objections applicant responds as follows: Deny.

RESPONSE TO REQUEST FOR ADMISSION NO. 15: Applicant objects on the ground that this Request for Admission lacks foundation and calls for a legal conclusion as well as speculation. However, in the interest of discovery and without waiving the foregoing objections applicant responds as follows: Deny, but with the caveat that some of the same types of ingredients may be used in the making of the product.

RESPONSE TO REQUEST FOR ADMISSION NO. 16: Applicant objects on the ground that this Request for Admission lacks foundation and calls for a legal conclusion as well as speculation. However, in the interest of discovery and without waiving the foregoing objections applicant responds as follows: Deny, but with the caveat that some of the same types of ingredients may be used in the making of the product.

EXHIBIT G

tropicalsno.



Tropical Sno is the most widely recognized Brand Name in the shave ice industry!

Dealer Login:

Username coming soon

Password



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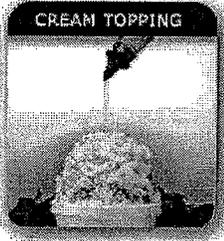
The Menu

Cream Topping

BECOME A DEALER

RELATED TOPICS

- Nutritional Information
- Healthy Perspectives
- Flavors
- Lite Flavors
- Nutritional FAQs
- Nutritional Index & Ingredients



Tropical Sno Cream Topping is an excellent addition to any Tropical Sno Hawaiian Shave Ice. Our Cream Topping has a real vanilla flavor and is used to create a wide variety of flavor combinations. Add Cream Topping to a strawberry shaved ice to create "Strawberries & Cream" or to a peach shaved ice to make "Peaches & Cream". If your local dealer isn't offering Tropical Sno Cream Topping ask them to do so. You'll be glad you did!

Tropical Sno Cream Topping is a blend of quality non-dairy ingredients that are low in fat and cholesterol. For more information see Nutritional Index & Ingredients.



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EXHIBIT H



Flower Cup
\$4.50

Large
\$3.50

Medium
\$2.50

Small
\$1.50

Add Cream Topping 50¢

Add Pucker Packs 25¢

FLAVORS

[Create your own concoction. Choose up to 3 flavors]

Apple
Banana
Birthday Cake
Black Cherry
Blue Raspberry
Blueberry
Bubblegum
Cantaloupe
Cheesecake
Cherry

Chocolate
Cinnamon
Coconut
Cola
Cotton Candy
Fresh Lime
Grape
Green Apple
Guava
Honeydew Melon

Kiwi
Lemon
Lime
Mango
Margarita
Orange
Papaya
Passion Fruit
Peach
Pineapple

Pink Grapefruit
Pink Lemonade
Red Raspberry
Rootbeer
Strawberry
Tamarind
Tangerine
Tutti Frutti
Vanilla
Watermelon

POPULAR CONCOCTIONS

Bananaberry
Banana + Strawberry

Creamsicle
Orange + Cream + 50¢

Mango Madness
Mango + Lime

Pineapple Orange
Pineapple + Orange

Berries N' Cream
Strawberry + Cream + 50¢

Daiquiris
Any Flavor + Pineapple

Melonberry
Watermelon + Strawberry

Rock N' Roll
Grape + Blueberry +
Blue Raspberry

Candy Apple
Apple + Cinnamon

Fuzzy Navel
Peach + Orange

Peach Razzmatazz
Peach + Red Raspberry

Rootbeer Float
Rootbeer + Cream + 50¢

Cherry Blaster
Cherry + Cola

Georgia Peach
Peach + Strawberry

Peaches N' Cream
Peach + Cream + 50¢

Sunrise
Cherry + Lemon + Orange

Coladas
Any Flavor + Coconut

Lover's Delight
Guava + Passion Fruit

Pina Colada
Pineapple + Coconut

Tangerango
Tangerine + Mango

Citrus Cooler
Orange + Margarita

Mai Tai
Pineapple + Lemon + Orange

Pineango
Pineapple + Mango

Tiger's Blood
Strawberry + Coconut

tropical sno



Large
\$3.50



Medium
\$2.50



Small
\$1.50

Add Cream Topping 50¢ Add Pucker Packs 25¢

FLAVORS

[Create your own concoction. Choose up to 3 flavors]

Banana
Black Cherry
Blue Raspberry
Blueberry
Bubblegum
Cherry
Coconut
Cola

Cotton Candy
Grape
Green Apple
Lemon
Lime
Mango
Orange
Passion Fruit

Peach
Pineapple
Pink Lemonade
Red Raspberry
Rootbeer
Strawberry
Vanilla
Watermelon

POPULAR CONCOCTIONS

Bananaberry
Banana + Strawberry

Berries N' Cream
Strawberry + Cream +50¢

Coladas
Any Flavor + Coconut

Creamsicle
Orange + Cream +50¢

Daiquiris
Any Flavor + Pineapple

Fuzzy Navel
Peach + Orange

Georgia Peach
Peach + Strawberry

Mango Madness
Mango + Lime

Melonberry
Watermelon + Strawberry

Peach Razzmatazz
Peach + Red Raspberry

Peaches N' Cream
Peach + Cream +50¢

Pina Colada
Pineapple + Coconut

Rock N' Roll
Grape + Blueberry + Blue Raspberry

Rootbeer Float
Rootbeer + Cream +50¢

Tiger's Blood
Strawberry + Coconut

tropical sno

PF 0150



Large
\$3.50



Medium
\$2.50

Add Cream Topping 50¢ Add Pucker Packs 25¢

FLAVORS

(Create your own concoction. Choose up to 3 flavors)

Banana
Blue Raspberry
Bubblegum
Cherry

Coconut
Grape
Lime
Peach

Pineapple
Red Raspberry
Strawberry
Watermelon

POPULAR CONCOCTIONS

Bananaberry
Banana + Strawberry

Daiquiris
Any Flavor + Pineapple

Peach Razzmatazz
Peach + Red Raspberry

Berries N' Cream
Strawberry + Cream +50¢

Georgia Peach
Peach + Strawberry

Pina Colada
Pineapple + Coconut

Coladas
Any Flavor + Coconut

Melonberry
Watermelon + Strawberry

Tiger's Blood
Strawberry + Coconut

tropical sno

Peter M. de Jonge
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Attorneys for Pioneer Family Brands, Inc.

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

PIONEER FAMILY BRANDS, INC.,

Opposer,

v.

TROPICAL SNOWBALL,

Applicant.

Opposition No. 91187879

DECLARATION OF J. ABBY BARRACLOUGH

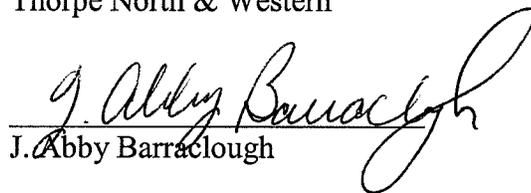
I, J. Abby Barraclough, declare as follows:

1. I am an Associate attorney at the law firm of Thorpe North & Western representing Opposer, Pioneer Family Brands, Inc. (hereinafter "Pioneer") in the above-captioned opposition proceeding. All information provided within this declaration is personally known to me or is information provided to me which I believe to be true. I am competent to testify to the matters stated herein if required.

2. On about September 25, 2009, I performed a search on the Internet to find dictionary definitions of the word "ball". The purpose of this search was to prepare Opposer's Memorandum of Points and Authorities Supporting Opposer's Motion for Summary Judgment.
3. The excerpts obtained in the search are attached as Exhibit E to Opposer's Memorandum of Points and Authorities Supporting Opposer's Motion for Summary Judgment. These excerpts are true and correct copies of the relevant web pages obtained in my search.
4. I further declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or document or any registrations resulting therefrom.

DATED: October 7, 2009.

Thorpe North & Western


J. Abby Barraclough