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

Proceeding	91187879
Party	Plaintiff Pioneer Family Brands, Inc.
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TRADEMARK
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Opposed Mark: TROPICAL SNOWBALL
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

OPPOSER'S REPLY BRIEF

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES. 3

Table of Cases 3

I. INTRODUCTION 4

II. ARGUMENT 4

A. Summary Judgment is Appropriate in the Present Case 4

B. Pioneer's Mark and Applicant's Mark Are Confusingly Similar 5

C. Evidence Shows That Applicant's Goods and Pioneer's Goods Are Closely Related 6

D. The Parties' Goods Travel Through Similar Channels of Trade 7

II. CONCLUSION 10

TABLE OF AUTHORITIES

CASES

First Nat'l Bank v. Cities Service Co.,
391 U.S. 253, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968) 4
In re E.I. Du Pont de Nemours & Co.,
476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973) 8
In re Thor Tech, Inc.,
90 USPQ2d 1634, 1638 (TTAB 2009). 8
Pure Gold, Inc. v. Syntex (U.S.A.), Inc.,
221 USPQ 151 (TTAB 1983),
aff'd, 739 F.2d 624, 222 USPQ 741, 743 (Fed. Cir. 1984) 4
Sweats Fashions Inc. v. Pannill Knitting Co.,
833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987) 4

I. INTRODUCTION

Pursuant to TBMP §528.02; 37 CFR § 2.127(e)(1); and Fed. R. Civ. P. 56, Petitioner, Pioneer Family Brands, Inc. (hereinafter "Pioneer") submits this Reply Brief in response to Applicant's Opposition to Opposer's Motion for Summary Judgment and Memorandum in Support Thereof (hereinafter "Applicant's Opp.") filed by Tropical Snowball, Inc. (hereinafter "Applicant"). Opposer respectfully submits that the Trademark Trial and Appeal Board (hereinafter "Board") should readily grant Pioneer's Motion for Summary Judgment and thus, deny registration of Applicant's TROPICAL SNOWBALL mark.

II. ARGUMENT

A. Summary Judgment is Appropriate in the Present Case.

Even in trademark cases before the Board, the purpose of a motion for summary judgment is judicial economy. More specifically, the purpose of a motion is "to avoid an unnecessary trial where there is no genuine issue of material fact and more evidence than is already available in connection with the summary judgment motion could not reasonably be expected to change the result in the case." *See, e.g., Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 221 USPQ 151 (TTAB 1983), aff'd, 739 F.2d 624, 222 USPQ 741, 743 (Fed. Cir. 1984). The summary judgment procedure is regarded as "a salutary method of disposition," and the Board does not hesitate to dispose of cases on summary judgment when appropriate. TBMP § 528.01; *Citing, Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987).

Pioneer submits that there is no genuine issue of material fact in the present case, and no reasonable trier of fact could find other than for Pioneer. *See, First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968). Accordingly, the Board should readily grant Opposer's Motion for Summary Judgment and deny registration to Applicant for the mark TROPICAL SNOWBALL.

B. Pioneer's Mark and Applicant's Mark Are Confusingly Similar.

Applicant's TROPICAL SNOWBALL mark is confusingly similar to Pioneer's TROPICAL SNO mark. Opposer submits that not only are the conflicting marks similar in appearance and sound, but they also create very similar, even nearly identical, commercial impressions. Opposer has provided arguments and evidence in its Motion for Summary Judgment in support of this position, which need not be repeated herein.

In Applicant's Opp., Applicant has introduced facts, which Applicant purports to be in dispute. These allegedly disputed facts, however, are either absurd or completely irrelevant to the issues at bar. Each allegedly disputed fact presented by Applicant is discussed below.

First, Applicant alleges that its use of "snowball" and Opposer's use of "sno" do not create similar impressions. Specifically, Applicant argues that a reasonable person would not understand "sno" to be a misspelling of "snow." Applicant's rationale for this argument is that SNO is the acronym for The Sudbury Neutrino Observatory. This argument is outlandish since few, if any, relevant consumers have likely heard of The Sudbury Neutrino Observatory, let alone, would believe that the term "sno" in the mark TROPICAL SNO, used in used in connection with shaved ice, actually stands for The Sudbury Neutrino Observatory. No reasonable trier of fact could find for Applicant on this point.

Second, Applicant alleges that even if the word "sno" is taken to mean precipitation that falls from the sky, e.g., "snow," is still does not create a commercial impression similar to "snowball." Despite asserting this notion, Applicant repeatedly defines "snowball" as being a ball or spherical object of "snow." *See* Applicant's Opp., p. 13. Thus, by Applicant's own admissions, "snowball" and "snow" are essentially the same substance, just shaped differently. Thus, Opposer submits that the issue of whether "snow" and "snowball" are similar in meaning

is not legitimately in dispute.

Third, and finally, Applicant asks the question, "if Opposer felt that sno and snowball mean the same thing and create the same impression and if they own the site tropicalsno.com why didn't they secure the domain name tropicalsnowball in all forms?" *See* Applicant's Opp., p. 15. In response, Opposer submits that its selection of domain names has no bearing on the issue of whether the conflicting marks in the present case are confusingly similar. Accordingly, Applicant's comments on this issue are void and should be disregarded in their entirety.

In view of the foregoing, Opposer submits that there are no genuine issues of material fact regarding the similarity between marks TROPICAL SNO and TROPICAL SNOWBALL. When compared in their entireties, the conflicting marks in this case are highly similar in appearance, sound and commercial impression. Accordingly, the Board should find for Opposer on this issue.

C. Evidence Shows That Applicant's Goods and Pioneer's Goods Are Closely Related.

Pioneer submits that Applicant's goods, namely, *shaved ice and shaved ice based desserts*, frozen yogurt and frozen yogurt desserts, and ice cream are closely related to Opposer's *shaved ice* and flavorings for shaved ice. "The goods or services do not have to be identical or even competitive in order to determine that there is a likelihood of confusion. The inquiry is whether the goods are related, not identical." TMEP §1207.01(a)(1). Pioneer submits that Applicant's goods are related, even highly related, to Pioneer's goods, and no reasonable trier of fact could find otherwise.

A discussion of the relatedness of Pioneer's goods and Applicant's goods is included in Pioneer's Brief accompanying its Motion for Summary Judgment. Notwithstanding

Opposer's previous arguments, Opposer provides the following discussion in response to assertions raised in Applicant's Opp.

Importantly, in Applicant's Response to Opposer's Request for Admissions, Applicant acknowledges that some of the same types of ingredients may be used in the making of the respective products. *See,* Exhibit A, relevant pages from Opposer's Request for Admissions and Applicant's Response to Requests for Admissions, Req. No 15. Despite this acknowledgement, in an effort to articulate and embellish the negligible differences between the goods at issue, Applicant asserts that its product is a "shaved ice product combined with a full array of fresh fruit and candy toppings," while Opposer's shaved ice does not include fresh fruit. *See,* Applicant's Opp., p. 8. Whether or not the shaved ice is topped or mixed with fresh fruit is a miniscule difference that does not negate the relatedness of the respective goods. The respective goods are still so closely related that consumers would likely expect that the goods originate from the same source. With respect to Applicant's suggestion that Opposer's shaved ice is not topped with candy, Opposer asserts the contrary and points out that it has provided evidence that its shaved ice is often topped with candy. Specifically, Opposer's shaved ice can be topped with a "pucker pack," which is a sour candy topping. *See,* Exhibit B, documents Bates numbered PF 0149- PF 0151. Thus, both Applicant and Pioneer offer shaved ice with candy topping. Thus, this purported difference is non-existent.

In view of the foregoing, Opposer submits that there is no question that the respective goods are closely related, even virtually identical as described in the relevant application and registration. Such relatedness of the goods, together with the similarities between the conflicting marks, can only lead to the conclusion that a likelihood of confusion exists.

D. The Parties' Goods Travel Through Similar Channels of Trade.

It is well-established that overlapping or complimentary marketing channels increase the likelihood of confusion. *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) (stating "The mere fact of diverse marketing emphasis alone may not in every case preclude confusion.") Further, if the subject registration describes goods broadly, and there is no limitation as to the channels of trade, or class of purchasers, it is presumed that the registration encompasses all goods of the type described, that they move in all normal channels of trade, and that they are available to all classes of purchasers. *See, e.g., In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) ("We have no authority to read any restrictions or limitations into the registrant's description of goods.")

Similarly, in the present case, the Board cannot read absent restrictions or limitations into either Pioneer's or Applicant's description of goods. In Applicant's Opp., Applicant presents arguments regarding the channels of trade through which the respective goods travel, price of the respective goods, and the palate of the respective consumers. None of these purported limitations and distinctions, however, is included in either Applicant's or Pioneer's descriptions of goods, and thus, such distinctions should not be considered.

Nevertheless, assuming *arguendo* that the Board takes some of these alleged distinctions into consideration, Opposer submits that such purported distinctions either don't exist or are not sufficient to eliminate a likelihood of confusion between the marks. Applicant's purported distinctions are addressed individually below.

First, Applicant asserts that its TROPICAL SNOWBALL product is targeted to the "high end customer with a lot of disposable income." *See* Applicant's Opp., p. 8. In response, Opposer submits that there is nothing in the description of goods in its registration for

TROPICAL SNO to indicate that its goods are not also offered to high end customers with a lot of disposable income. On the contrary, it is highly likely that customers with a lot of disposable income have purchased and will continue to purchase Opposer's TROPICAL SNO shaved ice product. In support of this assertion, Opposer points to the fact that in some instances its product is offered to consumers at stadiums featuring sporting events. *See* Exhibit C, Declaration of Donald Griffiths ¶ 8. These consumers typically have a lot of disposable income. Accordingly, both consumers of Applicant's and Pioneer's product can have a lot of disposable income. Thus, the parties' goods are offered to the same class of purchasers.

Second, Applicant argues that the price levels of the respective product are different. The available evidence, however, demonstrates otherwise. Specifically, Applicant asserts that the average price of its TROPICAL SNOWBALL product (with toppings) "will be in the order of $5.00 to $7.00 [per serving]." *See* Applicant's Opp., p. 9. Similarly, Opposer has provided evidence that its TROPICAL SNO shaved ice product (with toppings) can cost as much $5.25 per serving. *See*, Exhibit B, document Bates numbered PF 0149, sample menu for TROPICAL SNO product. Based on this evidence, the price range of Applicant's and Opposer's product is virtually identical for at least some products.

Third, Applicant argues that Opposer is not in the direct retail business of supplying a high end shaved ice dessert because it uses a network of dealers to distribute the TROPICAL SNO product to the end consumer. Opposer does not contest the fact that dealers distribute Opposer's TROPICAL SNO product to end consumers. This factor, however, has no bearing on the issue at bar. The end consumers of both Applicant's and Pioneer's product are the same. Importantly, the end consumers of both products are highly likely to associate the respective marks with the products. Contrary to Applicant's allegations, Opposer's shaved ice is typically

served to the end consumer for immediate consumption in packaging and containers bearing the TROPICAL SNO mark. *See,* Exhibit D, documents Bates numbered PF 0021. Likewise, Applicant's mark is also likely to appear on the containers for its shaved ice and shaved ice desserts, which will be sold to the end consumer for immediate consumption. *See,* Exhibit E, relevant pages from Opposer's Req. for Admissions and Applicant's Responses, Req. No. 27.

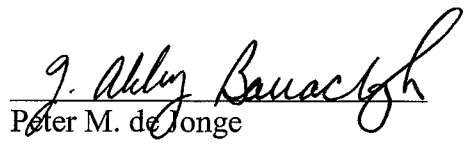
In view of the foregoing, Opposer submits that Board should avoid giving undue weight to Applicant's arguments regarding the channels of trade of the respective parties products since none of Applicant's purported distinctions in the channels of trade are set forth in the descriptions of goods in the respective application and registration. If, however, the Board does take the channels of trade into consideration, Opposer submits that the channels of trade through which the respective goods travel are closely related.

III. CONCLUSION

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.

DATED: November 20, 2009.

Respectfully Submitted,



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

Attorneys for Opposer
Pioneer Family Brands, Inc.

EXHIBIT A

REQUEST FOR ADMISSION NO. 12

A reasonable person would perceive Applicant's mark "TROPICAL SNOWBALL" to be similar in sound to Opposer's mark "TROPICAL SNO" that is the subject of U.S. registration 1,359,508.

REQUEST FOR ADMISSION NO. 13

A reasonable person would understand Applicant's mark "TROPICAL SNOWBALL" as having a connotation similar to that of Opposer's mark "TROPICAL SNO" that is the subject of U.S. registration 1,359,508.

REQUEST FOR ADMISSION NO. 14

Applicant's goods as recited in U.S. Trademark Application No. 77/329,997 for the mark TROPICAL SNOWBALL are related to Opposer's goods listed in U.S. Trademark Registration No. 1,359,508.

REQUEST FOR ADMISSION NO. 15

Applicant's goods as recited in U.S. Trademark Application No. 77/329997 for the mark TROPICAL SNOWBALL, namely shaved ice, are virtually identical to Opposer's goods, namely flavored shaved ice and flavorings for shaved ice.

REQUEST FOR ADMISSION NO. 16

Applicant's goods as recited in U.S. Trademark Application No. 77/329,997 for the mark TROPICAL SNOWBALL, namely shaved ice, are similar to the Opposer's goods, namely flavored shaved ice and flavorings for shaved ice.

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 B

Flower Cup	Large	Medium	Small
$4.50	$3.50	$2.50	$1.50

Add Cream Topping 50¢ • Add Pucker Packs 25¢

FLAVORS

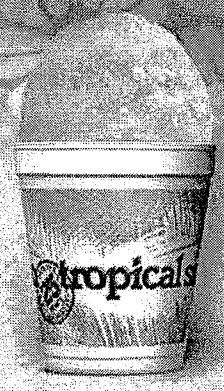
(Create your own concoction. Choose up to 3 flavors)

Apple	Chocolate	Kiwi	Pink Grapefruit
Banana	Cinnamon	Lemon	Pink Lemonade
Birthday Cake	Coconut	Lime	Red Raspberry
Black Cherry	Cola	Mango	Rootbeer
Blue Raspberry	Cotton Candy	Margarita	Strawberry
Blueberry	Fresh Lime	Orange	Tamarind
Bubblegum	Grape	Papaya	Tangerine
Cantaloupe	Green Apple	Passion Fruit	Tutti Frutti
Cheesecake	Guava	Peach	Vanilla
Cherry	Honeydew Melon	Pineapple	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	Medium	Small
$3.50	$2.50	$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

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	Coconut	Pineapple
Blue Raspberry	Grape	Red Raspberry
Bubblegum	Lime	Strawberry
Cherry	Peach	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

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EXHIBIT C

TRADEMARK
DOCKET NO. 00635-32704

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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 D

tropical sno.

Food Containers & Cups

12 oz Food Container | 4 oz Food Container | 16 oz Food Container | 8 oz Food Container

Food Containers & Cups

Our styrofoam food containers and cups have the Tropical Sno logo printed on two sides and are great advertisement for your shave ice business. The Food Container is shorter and has a wider mouth than the Cups. Food Containers look better to the eye and give the customer the feeling that they are getting more for their money. Both Food Containers and Cups come in a variety of sizes.

Food Container, 4 oz. (1,000/Case)	Item D04FC1M	Cups, 8 oz. (1,000/Case)	Item D08CP1M
Food Container, 8 oz. (1,000/Case)	Item D08FC1M	Cups, 12 oz. (1,000/Case)	Item D12CP1M
Food Container, 12 oz. (500/Case)	Item D12FC5C	Cups, 16 oz. (1,000/Case)	Item D16CP1M
Food Container, 16 oz. (500/Case)	Item D16FC5C	Cups, 20 oz. (500/Case)	Item D20CP5C

Spill Stopper

The spill stopper is made of clear PET plastic and is designed to fit the Tropical Sno 8 oz. Food Container (Item D08FC1M). The Spill Stopper is ideal for indoor locations where spills are a concern, but can also be used at outdoor locations and special events. The Spill Stopper not only helps to eliminate spills but it also gives the product a higher perceived value which justifies a higher retail price. The Spill Stoppers are packaged 500 per

PF 0021

EXHIBIT E

RESPONSE TO REQUEST FOR ADMISSION NO. 25 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: Applicant cannot admit or deny this request for admission as it lacks sufficient information to respond this request. If individuals ordered a dessert with numerous toppings it could conceivably cost more than the amount stated.

RESPONSE TO REQUEST FOR ADMISSION NO. 26 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. Goods will be sold to discerning members of the public.

RESPONSE TO REQUEST FOR ADMISSION NO. 27 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: Admit.

REQEUST FOR ADMISSION NO. 24

Applicant's shaved ice and shaved ice based desserts, as identified in Application Serial No. 77/329,997, are or will be priced under $6.00 per dessert.

REQEUST FOR ADMISSION NO. 25

Applicant's shaved ice and shaved ice based desserts, as identified in Application Serial No. 77/329,997, are or will be priced under $5.00 per dessert.

REQUEST FOR ADMISSION NO. 26

Applicant's goods, as identified in Application Serial No. 77/329,997 are or will be marketed and sold to the general consuming public.

REQUEST FOR ADMISSION NO. 27

Applicant's goods, as identified in Application Serial No. 77/329,997 are or will be sold to consumers for immediate consumption.

DATED this 8th day of April, 2009.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing OPPOSER'S REPLY BRIEF 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 Hacket
Tropical Snowball, Inc.
8633 West Knoll Drive, Apt. 205
West Hollywood, CA 90069-4165
UNITED STATES

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