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

Proceeding	92044522
Party	Plaintiff Southern Snow Manufacturing, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Cancellation No. 92044522

Registration No. 2901592

Mark: ORCHID CREAM VANILLA

SOUTHERN SNOW MANUFACTURING, INC.
v.
SNOWIZARD HOLDINGS, INC.

MOTION TO CONSIDER REPLY BRIEF

Petitioner Southern Snow Manufacturing Co., Inc., moves that this Reply Brief in support of its Motion To Join Party And Amend (Second) Petition For Cancellation be given consideration. This short Brief addresses issues raised in Respondent's Response Brief and identifies issues Respondent fails to address.

REPLY BRIEF

Petitioner Southern Snow Manufacturing, Inc., has moved to amend the once-amended Petition for Cancellation in this proceeding to join a new party, Williams Plum Street Snowballs, as joint-petitioner, to add specific allegations of fraud upon the USPTO, and to refine the grounds for cancellation in accord with information developed in the course of a motion for summary judgment, and to clarify, amplify, or eliminate some grounds presently part of the Petition.

Respondent has objected to Petitioner's Motion, but has failed to address a number of points, and has inadequately addressed others.

Respondent makes much of the three-year pendency of this cancellation proceeding, but does not show where and how any significant delay has been caused by Petitioner. Respondent faults Petitioner for not amending during the long pendency of a Motion for Summary Judgment filed 26 December 2006 and decided 13 May 2008, but such an amendment would not have been proper. The

instant Motion to Join and Amend was filed forty-nine (49) days after the Motion for Summary Judgment was decided. The record in this case shows that consideration of the Motion for Summary Judgment was suspended for five months, from May to October 2007 while Respondent made untimely and formally deficient requests for extension of time to retain counsel. Respondent's new counsel seems unfamiliar with Respondent's five-month delay from 29 August 2005 to 23 January 2006 in producing its discovery, which Respondent claimed was attributable to the hurricanes.

Respondent alludes to the long pendency of this cancellation action and posits an extraordinarily long and unexplained delay on the part of Petitioner, but fails to show how Petitioner is responsible for any delay.

Respondent does not even suggest that it will be prejudiced by the joined co-petitioner or by the second-amended pleadings, and could not responsibly urge that suggestion where Respondent points out several times that the operative facts alleged in the proposed amendment have been a part of the instant case since either the original petition or the first-amended petition. Respondent helpfully points out on its page 2, "[i]n fact, petitioner attached to its original petition for cancellation an affidavit of a representative of Williams Plum Street Snowballs that includes the same prior use allegation that is the nexus of the claims found in the proposed amended petition".

Proposed Joint Petitioner Williams Plum Street Snowballs could, as of right, bring its own separate cancellation action against this registration. The new Petitioner would not see any difference in fees either way. Respondent could, in turn, urge consolidation of the two cancellations. Petitioners suggest, therefore, that the proper analysis of whether Respondent will be prejudiced by the supposed delay in joining of Williams Plum Street Snowballs is whether the joining creates any prejudice that would be absent from a separate cancellation action, keeping in mind that the grounds and the facts urged by the new party have been a part of the

instant action since the original filing, and that this TTAB has already reviewed these grounds and facts and suggested that the right to a claim of confusion with an existing mark properly belongs to Williams Plum Street Snowballs.

Regarding the proposed amended grounds, Respondent points out, for example on its page 2, that "[o]n page 2, paragraphs 8-15 of the original petition for cancellation filed on May 18, 2005, petitioner clearly sets forth the purported facts upon which the new claims are based, and which are not based 'upon evidence developed after the filing of this cancellation action.'". Respondent confirms Petitioner's assertions that Respondent has been on notice of the unchanging underlying fact scenario of this cancellation since it was filed, and is therefore in no way prejudiced by any perceived "delay" in clarifying the grounds for cancellation.

Respondent writes nothing at all about the most significant proposed amendments—the three new claims of fraud based upon the unchanging underlying fact scenario. Petitioner suggests here that it exercised restraint in not making claims of fraud earlier in this cancellation proceeding while Petitioner was still gathering and analyzing evidence and while a motion for summary judgment was pending. Petitioner points out that each and every fact underlying each new averment of fraud has already been averred in the original or first-amended Petitions, and that Respondent is not prejudiced (and does not even aver prejudice) by an amendment adding a fraud analysis to the existing fact scenario.

CONCLUSION

For the reasons set forth above and in its main Brief, and where Respondent does not contend that it will suffer any prejudice, and where Respondent fails to identify any delay in these proceedings fairly attributable to Petitioner, Petitioner Southern Snow Manufacturing Co., Inc., moves that Joint Petitioner Williams Plum Street Snowballs be joined and that the grounds for cancellation in this proceeding be amended as moved.

Respectfully submitted,

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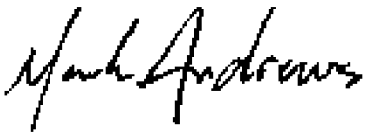
CERTIFICATE OF SERVICE

I, Mark Edw. Andrews, certify that I have served a copy of this document on counsel for Respondent in this proceeding by email on this 16th day of July, 2008.