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

Proceeding	92060914
Party	Plaintiff Snow Ball's Chance, Ltd.
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UNITED STATES PATENT & TRADEMARK OFFICE
TRADEMARK TRIAL & APPEAL BOARD

CANCELLATION NO. 92060914
WHITE CHOCOLATE & CHIPS

CANCELLATION NO. 92060915
CAJUN RED HOT

SNOW BALL'S CHANCE, LTD.
v.
SNOWIZARD, INC.

DECLARATION OF GEORGE MILLER

I HEREBY DECLARE:

1. I am George Miller, a person of majority and a resident of New Orleans, Louisiana.

2. I have personal knowledge of the matters stated and I am competent to testify.

3. I am the President and principal of Snow Ball's Chance, Ltd., a Louisiana corporation, which operates Rodney's Snowball Stand at 9231 Lake Forest Blvd in New Orleans, which sells snowballs, soft-serve ice cream, and nachos to the public.

4. I verify the truthfulness of the information provided here.

5. Snow Ball's Chance, Ltd. filed petitions to cancel some of SnoWizard's trademark registrations because the existence of those registrations on flavor names prevents my snowball stand from offering those flavor names to the public, and prevents me from efficiently managing my back-of-shop commissary operations of mixing ready-to-use snowball syrups from flavoring concentrates.

6. The decision to file the cancellation proceedings was mine. At the beginning of the season, I called Southern Snow to order my flavors. Every year I may add 2 or 3 new flavors and stop using some of the flavors that were not as popular the year before. When I placed my order, the representative told me that "this was fine – all of the flavors are available, but two of them you will need to call something else. You cannot call White Chocolate and Chips or Cajun Red Hot those names." I asked the representative why I could not and was transferred to Bubby Wendling. Bubby requested that I call Mark Andrews for a full explanation. Mark said he could fix this for me. I had seen in the newspapers a few years back that Southern Snow, along with two snowball-stands, Plum Street and Van's, had sued SnoWizard to get about twenty trademarks on flavor names canceled, and that they got fifteen of those trademarks canceled. I knew that Mark Andrews was Southern Snow's attorney because his name was in the newspapers several times, and I had seen and spoken to him briefly and occasionally at Bubby's parties over the years. Bubby gave me Mark's phone number. I called Mark, and he was able to explain trademarks and cancellations to me, since I did not know much about them at the time. I decided to hire Mark Andrews as my attorney because he gave me a good explanation of the process and because he had already been successful in eliminating fifteen of SnoWizard's trademarks on snowball flavor names. He agreed to represent me for a very reasonable flat fee, which I paid him in cash. I pay for everything in cash, just like every other snowball stand does. Mark paid the $300-each filing fees through his Internet connection to the Trademark Office, and I reimbursed him in cash. At first I only filed two cancellations, against White Chocolate and Chips and Cajun Red Hot. Later I decided to file a third cancellation against Mountain Maple.

7. I buy a couple of thousand dollars worth of snowball flavor concentrates per year from Southern Snow. I buy most of my flavor concentrates from Southern Snow. Southern Snow gives me good prices and good service. I prefer to buy my flavor concentrates from Southern Snow. SnoWizard flavor concentrates cost more per gallon than Southern Snow's. In my own experience and from what I have heard from other snowball stands, SnoWizard's service is not as good as Southern Snow's service. SnoWizard's owner has offended many snowball stand owners since the early 1980s. I am not the only snowball stand owner in the New Orleans area who does not want to do business with SnoWizard. I do not want to be forced to purchase any flavor concentrate for any flavor name from SnoWizard just because SnoWizard obtained a trademark registration on the flavor name.

8. To customers, one of the most appealing aspects of getting a snowball is choosing the flavor name of the snowball. Especially for children, it is a big deal to be able to make a completely personal choice about anything, and the visit to the snowball stand is an event and an experience that is bigger than just the resulting cup of shaved ice with sweet, colored syrup poured over it. Many adults bring children to the snowball stand out of a feeling of nostalgia for when their parents or grandparents brought them, and a desire to provide the same experience to their children or grandchildren. The young person's experience at a snowball stand is a lot like an older person's experience at a cocktail bar. One of the main aspects of both is that the customer gets to state his or her personal preference, by name, from a range of choices. The choices are identified by cocktail names or flavor names. Although some bars and some snowball stands might have a few unique offerings, the majority of cocktail and flavor names are part of a common tradition and common knowledge. The unique offerings have to be explained to customers, but the traditional and common cocktail and flavor names do not have to be explained. Everybody, on both sides of the counter, even the child, knows what is being asked for.

9. Through Snow Ball's Chance, Ltd. I have a plan and I am developing a franchise. This plan to franchise makes my concerns about the effect of trademarked flavor names for snowballs even larger than my concerns about the problems that trademarks already cause for my single Rodney's Snowball Stand.

10. The snowball part of my Rodney's Snowball Stand business operates essentially the same as every other snowball stand that I know of. There is a counter or a window where customers place their orders. Rodney's has a window. Visible to the customers is a large sign having a menu of the flavor names available. Many years ago there were fewer flavor choices. Thirty flavors would have been a huge offering. But now, thirty flavors is a small, minimal list. Sometimes, such as when serving a special event like a party or a festival from a mobile unit, the choice of flavors will be cut down to closer to ten. But at the permanent snowball stand, a large variety of flavor choices is expected. While waiting in line to approach the window, the customer reads the menu of flavor names. Even if the customer already knew what flavor he or she wanted, the customer still reads the menu of flavor names. When adults bring children, discussions based on the menu board are common, such as "I know you want Cajun Red Hot, but this snowball stand does not offer Cajun Red Hot, it isn't on the menu board".

11. At the window, the customer places an order by stating what size of a cup of shaved ice, such as small, medium, or large, is desired, and then by stating the flavor name of the desired snowball. Behind the window, one or more employees shave the desired-sized cup of ice and then pour a sweet, colored, flavored syrup over the shaved ice. This syrup can be called ready-to-use syrup. After the customer states the desired flavor name, an employee behind the window

reaches for a bottle of ready-to-use syrup which has a label which has the flavor name printed or written on it. There are many such bottles— at least one for each flavor name offered. Most snowball stands use clear glass or plastic bottles of the 750ml or "fifth" size, in order to show off the various colors of the syrups, which are an important factor in the customers' choice of flavor. The only way for the employee to pick the correct bottle is to read the flavor name. This happens quickly at busy times, and it is essential that the flavor names on the labels on the bottles of ready-to-use syrup match the flavor names offered on the menu board and the names by which the customers place their orders. There is not time for the employee to assemble any recipes or make any substitutions.

12. The employees of snowball stands are usually teenagers, and it is usually the teenager's first job, so having uniform, unchanging, easy-to-follow work processes are necessary. Also, the newest and least experienced employees often start out by mixing syrups in the back or in the separate commissary, away from contact with the customers, away from the ice-shaving machine, and away from the cash register.

13. The bottles of ready-to-use syrups having labels with flavor names are made up in the back or in a separate commissary. Usually, for each flavor name, a number of bottles sufficient for one day or a few days are made up in batches. The ready-to-use syrup contains a large amount of sugar, and is subject to spoilage if made up too far in advance of use. The employee or employees in the back or in the commissary receive empty labeled bottles from the front as they are used up. These empty labeled bottles are then cleaned. Usually, the flavor-name label is permanent enough to withstand the cleaning, and the bottle can be refilled with the same flavor. Otherwise, the cleaned bottle becomes available for re-labeling after refilling. The ready-to-use syrups are made by adding a small amount of flavor concentrate to a much larger amount of simple syrup, which is sugar water. Usually, a large thirty to fifty gallon container of simple syrup is made up by dissolving about five pounds of sugar per gallon of water, which requires some warming and some stirring. This common supply of simple syrup is then used to make smaller amounts of several different ready-to-use syrups. The flavor concentrates are formulated so that a uniform 4 ounces of concentrate is added to each gallon of simple syrup. Mixing different flavors does not require measuring different amounts of flavor concentrate. The flavor concentrates are all the same strength.

14. The flavor concentrates used to make all of the various flavors of ready-to-use syrups are purchased in either quart-sized or gallon-sized bottles, depending upon how much ready-to-use syrup of any given flavor is expected to be used, or in other words the expected popularity of a given flavor. The area used for mixing the ready-to-use syrups, which is required to meet food-safety standards, and which is usually an area not seen by customers, has shelves of bottles of flavor concentrates. There is at least one bottle of flavor concentrate for every flavor name listed on the menu board, and for popular and fast-moving flavors there are probably several bottles of flavor concentrate, which might be stored in a separate area and brought into the mixing area as needed.

15. When the time comes to mix and fill up five bottles of "strawberry" ready-to-use syrup, the employee will gather five cleaned and sanitized bottles which are each labeled "strawberry". The employee will then go to the shelf and pick up the bottle of flavor concentrate labeled "strawberry", and pour off 4 ounces into a cleaned and sanitized measuring cup. The employee will then pour off one gallon of simple syrup from the large container into a smaller mixing container, and will add the 4 ounces of "strawberry" flavor concentrate to the gallon of simple

syrup and will stir or mix the two together to make "strawberry" ready-to-use syrup. Then the employee will pour the ready-to-use syrup into the cleaned and sanitized bottles which are each labeled "strawberry". After that, the bottles of "strawberry" ready-to-use syrup are delivered either to the snowball-making area or to a nearby reserve storage area.

16. In a busy snowball operation different employees will be performing different tasks in different locations. Therefore it is critical that the employees are able to very clearly understand what flavor name is being worked on at that moment. During the operation of a snowball stand, including the preparations and cleaning done before and after opening and closing time, newer or junior employees are often sent to retrieve bottles of ready-to-use syrups and bottles of flavor concentrates from a separate storeroom. The employee is told to retrieve a specific flavor name or names. Therefore it is necessary to have the flavor names clearly and prominently visible on all of the bottles' labels. It is also necessary that the flavor name on the label of the ready-to-use syrup is the same flavor name on the label of flavor concentrate. Otherwise, the extra complication of having to learn the proper associations among the flavor names listed on the menu board, the flavor names on the labels of ready-to-use syrup bottles, and the flavor names on the labels of flavor concentrates leads to errors such as mislabeling and ultimately giving the customer the wrong flavor.

17. My Rodney's Snowball Stand offers a large variety of flavors of snowballs. The customers use the flavor names to convey their chosen flavors. The front-of-house employees use the flavor names on the bottles of ready-to-use syrups to prepare the right flavor of snowball. The back-of-house employees use the flavor names on the bottles of flavor concentrates to prepare the right and properly labeled flavor of ready-to-use syrup. Employees sent to the storeroom to fetch either a bottle of ready-to-use syrup or a bottle of flavor concentrate use the flavor names on the bottles to identify the correct one. With so many different flavors, with so many inexperienced employees, with such a large volume of production at busy times, where the flavor of the snowball is very important to the customer, each flavor name has to be uniform and consistent from the menu board to the ready-to-use syrup to the flavor concentrate. Otherwise the wrong flavors will be mixed and the wrong flavors will be poured over shaved ice and given to the customers.

IN ACCORD WITH 28 USC §1746, I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON 2nd MARCH 2017 AT NEW ORLEANS, LOUISIANA.

GEORGE MILLER
President, Snow Ball's Chance Ltd.